

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1427

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 72732). Claimant filed a timely request for hearing. On December 12, 2016, ALJ Seideman conducted a hearing, and on December 15, 2016, issued Hearing Decision 16-UI-73019, affirming the administrative decision. On December 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent that it was relevant and based on evidence in the record.

FINDINGS OF FACT: (1) From June 7, 2015 until October 10, 2016, Toro Bravo employed claimant, last as bar manager at its restaurants.

(2) On July 25, 2015, claimant watched a coworker stocking the bar and noticed that she was wearing a short skirt. Claimant became concerned that given the type of work the coworker was performing, her outfit was excessively revealing to customers and to other employees. Claimant told the coworker that he hoped she was wearing shorts underneath her skirt. The coworker was initially offended by claimant's comment and complained to management that claimant had made a sexually suggestive remark to her. Claimant, the coworker and the employer's managers discussed the situation, and claimant explained that his remark was intended to make sure the coworker understood and complied with the employer's dress code. The coworker then realized she had misunderstood claimant; she was no longer offended and considered the situation resolved.

(3) In September 2016, claimant met with the employer's owners to discuss management of the restaurant and staff morale. During that meeting, one of the owners told claimant that manager T complained that claimant had encouraged some type of violent behavior toward manager M.¹ Claimant

¹ M and T are pseudonyms.

told the owners that he had never made a statement that would suggest that violence toward M. Transcript at 28.

(4) On October 10, 2016, the employer discharged claimant because it believed that he had offended two employees by describing a sexual encounter in which claimant attempted to choke a woman.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-73019, the ALJ found that the “employer received complaints from various employees” regarding claimant’s conduct, and that claimant continued making “remarks or comments which upset co-workers,” even after the employer warned him not to do so. Based on these findings, the ALJ concluded that claimant engaged in misconduct. Hearing Decision 16-UI-73019 at 3. We disagree.

The employer discharged claimant only after two employees complained that in October 2016, claimant offended them by describing a sexual encounter in which claimant supposedly attempted to choke a woman. We therefore focus on this conduct as the proximate cause of claimant’s discharge. The employer’s evidence regarding what claimant told the other employees consisted of testimony from a manager and one of the employer’s owner’s regarding complaints employees made to them. Claimant, however, denied making the comments attributed to him. Claimant’s first-hand denials outweigh the employer’s hearsay evidence. The employer therefore failed to meet its burden to establish that claimant engaged in misconduct by a preponderance of evidence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-73019 is set aside, as outlined above.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: January 17, 2017

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.