

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0183

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93242). Claimant filed a timely request for hearing. On January 25, 2017, ALJ M. Davis conducted a hearing, and issued Hearing Decision 17-UI-75439, concluding the employer discharged claimant, but not for misconduct. On February 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not offered into evidence during the hearing. The employer did not explain why it did not present this information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 461-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to offer in its written argument.

FINDINGS OF FACT: (1) Umpqua Hospitality Services Corporation employed claimant from May 4, 2014 until September 22, 2016, last as a guest services attendant.

(2) The employer expected claimant not to treat guests and coworkers rudely or discourteously. Claimant understood the employer's expectation.

(3) On June 3, 2016, the employer issued a written warning to claimant for using foul language when speaking to a coworker. On June 24, 2016, the employer issued a written warning to claimant after receiving a complaint from a guest that claimant had treated that guest rudely and disrespectfully. Transcript at 17.

(4) On September 15, 2016, a guest contacted claimant's manager and told the manager that after he had made a telephone request of claimant, claimant had responded with a "tone" and "mannerisms" that the guest construed as "rude." Transcript at 16.

(5) On September 22, 2016, the employer discharged claimant for the way he treated the guest on September 15, 2016.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness testified that the employer discharged claimant based on a guest's complaint that claimant was rude to him on September 15, 2016. Transcript at 15. The employer's witness had no information about what specifically claimant had done or said that caused the guest's complaint. Transcript at 16. Claimant vigorously denied that he dealt rudely with the guest on September 15, 2016. Transcript at 21, 22. Given claimant's rebuttal coupled with the employer's failure to provide concrete and specific evidence about how, if at all, claimant's behavior violated the employer's standards on September 15, 2016, the employer did not meet its burden to show that on that day, claimant willfully or with wanton negligent violated the employer's standards. The fact that a guest might have concluded claimant behaved rudely is not, in and of itself, sufficient evidence to establish that claimant did so, or that claimant's behavior violated the employer's standards as opposed to the guest's sensibilities. Accordingly, the employer failed to show that claimant engaged in misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-75434 is affirmed.

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

DATE of Service: March 15, 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.