

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0366

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #91255). Claimant filed a timely request for hearing. On March 9, 2017, ALJ S. Lee conducted a hearing, and on March 13, 2017 issued Hearing Decision 17-UI-78809, concluding the employer discharged claimant, but not for misconduct. On March 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument and the entire hearing record.

FINDINGS OF FACT: (1) WMK Management, LLC employed claimant from July 29, 2015 to December 29, 2016 as a senior convention services manager.

(2) The employer had a key control policy that required employees to be responsible for the security of their hotel keys. Exhibit 1 at 3. The employer expected employees to notify the employer immediately if they misplaced or lost a key. Claimant understood the employer's expectations about its keys. The employer gave claimant a copy of its master key allowing her access to areas necessary to perform her job.

(3) On March 30, 2016, the employer gave claimant a written warning and verbal coaching because she erroneously coordinated a breakfast function on March 13 when it was not needed, resulting in wasted food products. Claimant had relied solely on the event contract and failed to verify the arrival time of the guests on March 13, and the necessity for their breakfast, with the client. During the verbal coaching, the director of convention services discussed with claimant the importance of communication and attention to detail.

(4) On May 30, 2016, the employer met with claimant to discuss billing and banquet event order errors that claimant had made, and the requirement that claimant to take responsibility for client issues, rather

than passing the issues on to other staff. The employer provided claimant with additional one-on-one training from the accounts receivable person in the employer's accounting department.

(5) Although claimant's performance improved somewhat during June, July and August 2016, on November 7, 2016, the employer implemented a performance improvement plan for claimant, addressing claimant's alleged lack of attention to detail, insufficient communication with other departments, and failure to take ownership of her job. The plan stated that the employer might discharge claimant if she did not immediately improve the performance issues addressed in the plan.

(6) In late November 2016, the employer requested claimant's copy of the master key because it was replacing the employer's locks. Claimant told the employer that she was unable to find the key.

(7) Beginning at the end of November 2016, a convention was held at the employer's hotel. Meals were to be served at the convention beginning on December 1, 2016. On December 1, the head count for the meals increased. Neither claimant nor the convention client knew before the first day of meals that the head count for the meals would increase substantially. The hotel experienced food and serving staff shortages during the meals due to the increased attendance. The employer attributed the problems during the event to claimant's alleged failure to notify the kitchen and banquet staff when she learned the meal attendance was increasing.

(8) On December 29, 2016, the employer discharged claimant for her alleged failure to notify the employer immediately when she lost her master key, and her alleged failure to notify the kitchen and banquet staff when she learned the meal attendance for December 1, 2016 could increase and that it had increased.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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).

The employer discharged claimant following claimant's alleged failure to notify the employer that she lost her key, and to communicate an increase in meal attendance for the December 1, 2016 convention. Exhibit 1 at 7-8. Although the employer argued that EAB should consider all of the incidents showing a lack of attention to detail by claimant during 2016, because the key and December 1, 2016 incidents triggered the employer's decision to discharge claimant, they were the proximate cause of the discharge and are the proper focus of the misconduct analysis. Employer's Argument at 2, 3.

Claimant understood the employer expected her to safeguard the hotel keys and to inform the employer immediately if she lost a key. To the extent that the employer discharged claimant because she lost and allegedly failed to report losing her key, the employer failed to show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would probably violate the employer's expectations. The record does not contain evidence showing that claimant lost the key because she consciously failed to follow any employer's expectations for safeguarding the key. Although claimant may have been careless, or even negligent in losing the key, her conduct did not rise to the level of *wanton* negligence, as defined under OAR 471-030-0038(1)(c), and thus was not misconduct. The employer's director of convention services testified that claimant did not report the missing key until a coworker asked her for the key when he was going to change the locks. Transcript at 65. However, claimant testified that she looked for the key and told her supervisor it was missing when she first discovered it was missing. Transcript at 48-50. Because the preponderance of the evidence is no more than equally balanced between the parties, the employer did not show by a preponderance of the evidence that claimant's conduct regarding the key was misconduct.

The employer also discharged claimant for allegedly failing to inform the kitchen and banquet staff as soon as she learned that the number of meal attendees could increase, so that they could be prepared for the event. Claimant understood from her prior warnings and experience that the employer expected her to maintain excellent communication with her coworkers to avoid mishaps at its events. At hearing, claimant testified that she told the two chefs in the kitchen and the banquet captain, plus additional banquet staff, as soon as she learned about the increasing number of registrants, which neither she nor the client anticipated before the day of the event. Transcript at 42-45. The employer's director of convention services provided hearsay testimony that claimant never told the chefs and director of banquets about the increased count for the meals. Transcript at 59-62. The human resources director provided hearsay testimony that claimant did not inform the director of banquets. Transcript at 66. Absent a basis for concluding that claimant was not a credible witness, claimant's first-hand testimony that she informed the banquet and kitchen staff about the changes outweighs the employer's hearsay information, and we therefore found facts in accordance with claimant's testimony on that issue. Claimant did not dispute that she did not tell the director of banquets about the changes. However, there is no evidence showing claimant should have informed different personnel than she did. Nor does the employer's testimony outweigh claimant's testimony that claimant did not know, nor could she have known, before the event that the number of attendees would rise on the day of the event. Thus, the record does not show that claimant acted with willful or wantonly negligent disregard of the employer's expectations by failing to inform the banquet and kitchen staff about the meal changes, or failing to do so as soon as reasonably possible under the circumstances. The employer therefore failed to establish that the claimant violated its expectations in the final incidents, let alone that she did so willfully or with wanton negligence.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-78809 is affirmed.

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

DATE of Service: April 18, 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.

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