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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0432

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 73611). Claimant filed a timely request for hearing. On March 21, 2017, ALJ Wipperman conducted a hearing, and on March 24, 2017, issued Hearing Decision 17-UI-79654, concluding that the employer discharged claimant, but not for misconduct. On April 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamins employed claimant as a server at its Chapel Pub from December 8, 2015 until January 21, 2017.

(2) The employer's policies require that employees treat one another with respect and courtesy, and provide customers with excellent service. The policies also inform employees that they are allowed to "write blogs and use social networking sites on their own time, but we ask that you please be respectful of McMenamins, our employees, and our customers, as well as our relationships in and with the community." The policy prohibits employees from using social networking sites for the following purposes: "to harass, threaten, or discriminate against employees or anyone associated with or doing business with McMenamins; to post "proprietary or privileged information or trade secrets"; or to post "internal reports, policies, procedures or other internal business-related confidential communications or details about McMenamins' customers or vendors." Exhibit 1. On February 19, 2015, claimant signed an acknowledgement that she had read and understood a handbook that included these employer policies. *Id.*

(3) On August 23, 2016, a manager gave claimant an "Employee Warning Notice" for receiving an 88% rating from a "secret shopper." (A "secret shopper" is a person hired by the employer to pose as a customer to evaluate the quality of the service, food, and beverages offered in one of the employer's businesses). The notice warned claimant that the next action to be taken if "the incident should occur again" would be discipline up to and including discharge. In the space on the notice for an "Employee

Statement," claimant indicated she agreed with the employer's description of what had occurred and wrote "I will do better next time." Exhibit 1.

(4) On November 13, 2016, a customer complained that claimant had provided rude and discourteous service to the customer and his friends. A manager verbally reprimanded claimant for her behavior with the customer. Exhibit 1.

(5) On November 28, 2016, a manager gave claimant an "Employee Warning Notice" for complaining about a task the manager had directed her to perform. The warning stated that it was a "final written warning" and that any future violations of the employer's policies or customer complaints would result in claimant's discharge. Although claimant disagreed that she had been rude or discourteous to the manager, she did not indicate that she disagreed with the description of her conduct in the space on the notice provided for her to do so. Exhibit 1.

(6) On January 15, 2017, claimant was scheduled to work from 11 a.m. to 5:30 p.m. At 4:14 p.m., while she was on her lunch break, she posted the following message on her Facebook social media site:

> 16 open tables….
> one wants lemon with their water, no ice. Two ranches and Bbq please, when you have time. A couple that's going to be sitting for a long time…at a dirty table; who sits at dirty tables!!!!!?!!!!
> and somebody questioning the head on my beer ….and shit don't forget the black and tan brownie!!
>
> And y'all can wait, I gotta Facebook this shit:-)
>
> I'm feeling boozy….[1] (Exhibit 1).

(7) At the end of her shift on January 15, claimant went to the bar cash register and asked a manager to "cash her out," *i.e.*, pay her the tips she had earned during her shift. She told the manager that she was unable to wait, and if the manager could not give her the tip money she had earned, the manager could leave it in the "tip bag" and claimant would pick it up the next day. Transcript at 31. An off-duty manager, who observed this interaction, concluded that claimant had been rude to the other manager, and reported claimant's behavior to the head manager of the Chapel Pub.

(8) On January 21, 2017, the employer discharged claimant for unsatisfactory work performance.

CONCLUSION AND REASONS: We agree 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

[1] The message has been copied exactly from the screen shot in Exhibit 1 and any necessary [sic]s have been omitted.

amount to a willful or wantonly negligent disregard of an employer's interest. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness, who was the head manager of the pub where claimant worked, testified that the employer discharged claimant for inadequate performance, and that the conduct that precipitated the discharge occurred on January 15, 2017. On that date, the employer alleged that claimant posted an inappropriate Facebook message during her work hours, and behaved rudely toward a manager. Since claimant's conduct on January 15th was the proximate cause of claimant's discharge, it is the proper focus of the misconduct analysis. For that reason, we do not consider the other examples of claimant's inadequate performance about which the employer's witnesses testified, such as complaints about claimant made by a customer and a "secret shopper," and claimant's refusal to willingly comply with a manager's directive.

In regard to the events of January 15, claimant and the employer's witness provided conflicting accounts regarding what occurred. The head manager of the pub where claimant worked testified that the managers who were present during claimant's shift on January 15 reported to her that claimant was on duty at the time she posted the Facebook message, and that she behaved inappropriately by loudly and rudely demanding that a manager "cash her out." Claimant, however, testified that she was on her meal break at the time she posted the Facebook message,[2] and that her request that the manager "cash her out" was politely made. We give greater weight to claimant's first hand testimony regarding her conduct on January 15 than to the hearsay testimony of the head manager. The employer therefore failed to meet its burden to show that claimant engaged in misconduct by using a social network site during her work hours and failing to treat a coworker with courtesy and respect.

Nor do we find that the content of the January 15 message claimant posted on Facebook violated the employer's policy regarding the use of social media websites. While the content of claimant's Facebook message is somewhat puzzling, the message on its face appears to be a somewhat humorous statement about claimant's work situation, and not a criticism directed at any particular customers. The message claimant posted does not contain any of the information that the employer explicitly prohibits employees from posting, such as trade secrets. Concerning information which employees are not specifically prohibited from posting, the employer's policy "ask[s]" that employees "be respectful of [the employer], our employees, and our customers, as well as our relationships in and with the community" in their social media use. Exhibit 1. Given the lack of clear prohibition against disrespectful use of social media, and the lack of any definition of what constitutes disrespectful use of social media, the employer could not have reasonably expected that claimant was aware that the policy prohibited her from posting the message that she did on January 15. The employer therefore failed to establish that the content of claimant's January 15 Facebook message violated the employer's reasonable expectations regarding the use of social media sites.

[2] We find nothing inherently implausible in claimant's account; claimant testified that it was common practice for employees to take their meal breaks at the end of their shifts, because credits the employer gave them toward the cost of their food was based on the amount of time worked. By eating late in their shifts or after they had completed their shifts, employees were able to reduce the cost of their meals. Transcript at 28.

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 17-UI-79654 is affirmed.

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

DATE of Service: May 5, 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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