

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0777

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 145543). The employer filed a timely request for hearing. On May 3, 2016, ALJ Frank convened a hearing at which the employer did not appear and issued Hearing Decision 17-UI-82401, dismissing the employer's request for hearing. On May 11, 2017, the Office of Administrative Hearings (OAH) issued a letter order vacating Hearing Decision 17-UI-82401 and placing this matter on the docket for the scheduling of a hearing. On June 8, 2015, ALJ Frank conducted a hearing, and on June 9, 2017 issued Hearing Decision 17-UI-85364, affirming decision # 145543. On June 28, 2017, the employer filed an application for review.

FINDINGS OF FACT: (1) Buffalo Wild Wings employed claimant beginning sometime in February 2015 until February 24, 2017, last as an assistant manager.

(2) The employer had a policy that prohibited managers from becoming "romantically" or "personally" involved with subordinates employees. Exhibit 1 at 7. Claimant understood "romantic involvement" to mean a dating relationship. Claimant understood "personal involvement" to mean "hanging out [together] outside the four walls of the restaurant." Audio at ~22:07. The policy was intended to avoid, among other things, conflicts of interest, supervisory problems, morale problems and favoritism.

(3) Despite the employer's policy, the employer's managers often drove subordinate employees to work if the subordinates did not have transportation for a shift. The general manager had given subordinates rides to work "multiple times." Audio at ~23:19. Claimant and other managers had given rides to work to "multiple" subordinates during her tenure as an assistant manager. Audio at ~33:05.

(4) Sometime before February 12, 2017, claimant, a female, began driving a male employee to and from work shifts because he no longer had a valid driver's license. The male employee was claimant's subordinate. Although claimant was friendly with the subordinate, she was not romantically involved with him and did not socialize with him outside of the restaurant. Claimant and the subordinate spent no

personal time together other than during the rides to work. However, other employees noticed that claimant and the subordinate often commuted to work together and began speculating about the nature of their relationship.

(5) On February 12, 2017, the general manager observed claimant and the subordinate arrive together to work and later discussed it with claimant. The general manager told claimant there were rumors that she was having an inappropriate relationship with the subordinate. Claimant denied that she had such a relationship with the subordinate and told the general manager that she was merely providing transportation to the subordinate. Claimant also told the general manager that she understood how other staff could have misperceived her relationship with the subordinate. The general manager then told claimant it was in her “best interest” to stop giving the subordinate rides to work. Audio at ~28:23; Exhibit 2 at 7. Claimant interpreted the general manager’s statement to mean that whether she decided to cease providing transportation to the subordinate was up to her. Audio at ~28:23. Later, claimant and the subordinate discussed the situation and how it might appear to others. Claimant and the subordinate decided that their relationship could be misconstrued and that the “correct thing” would be to take steps to quell the rumors. Audio at ~27:18. Since the subordinate was more recently hired than claimant, the subordinate decided to resign.

(6) On Monday, February 13, 2017, claimant drove the subordinate to work. Sometime after they arrived at work, the subordinate notified the employer that he was resigning. Although the subordinate stated that the effective date of the resignation would be in two weeks, or on February 27, 2017, claimant and the subordinate were aware that based on the employer’s usual practices, the subordinate would not be scheduled to work any shifts after the employer’s new work schedule was posted on Thursday, February 16, 2017. The subordinate was not scheduled to work, and did not work any shifts on or after February 16, 2017. On February 17, 2017, the subordinate visited claimant at her apartment, they took some photographs of themselves in the apartment and posted them on a social media website. Both claimant and the subordinate thought it was permissible for them to socialize outside of work since the subordinate had resigned and was not going to work any shifts before the effective date of his resignation.

(7) On Saturday, February 18, 2017, the employer’s general manager sent copies of the photographs of claimant and the subordinate that were taken on February 17, 2017 to the employer’s district manager. On February 20, 2017, the district manager met with claimant. In response to the district manager’s questions, claimant stated she had been giving rides to work to the subordinate and that a non-romantic friendship between them had developed, which could be misperceived as potentially giving rise to favoritism. Claimant told the district manager that that was the reason for the subordinate’s resignation the week before.

(8) On February 24, 2017, the employer discharged claimant for violating its policy against romantic or personal relationships between managers and subordinates.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant, 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to claimant's alleged violation of the employer's policy against particular relationships between managers and subordinates, the employer's witness generally contended that he thought claimant and the subordinate had actively entered into a romantic relationship sometime before claimant was discharged. Audio at ~13:15. Claimant denied this allegation. The employer did not appear to have any direct evidence in support of this allegation, such as, for example, claimant's or the subordinate's unambiguous admissions of a romantic relationship or first-hand observations by anyone of conduct that was unmistakably characteristic only of a romantic entanglement. Although the employer surmised that claimant and the subordinate had become romantically involved during their employment, the weight of the employer's evidence is insufficient to overcome claimant's denial.

With respect to the employer's policy prohibiting "personal relationships" between managers and subordinates outside of work, the employer did not show more likely than not, that claimant violated that aspect of the policy. The employer's witness did not dispute that managers often gave rides to subordinates who lacked transportation, which strongly suggested that the fact that claimant often gave rides to the subordinate was not, in and of itself, emblematic of an ongoing "personal" relationship of the type that the employer prohibited.

As well, claimant testified that she and the subordinate did not spend any time together outside of work until February 17, 2017, when the subordinate had already submitted his notice of resignation four days earlier and after which he was not scheduled for any further work shifts. While the employer contended that, as of February 17, 2017, the subordinate was still technically employed and claimant was still technically his superior and would be until February 27, 2017, claimant's belief that she would not violate the employer's policy by socializing outside of work with the subordinate, was at least a reasonable interpretation of the employer's policy. Audio at ~34:13. The employer's policy was intended to avoid favoritism, or the appearance of it, in the workplace by a supervisor who supervised a subordinate with whom the supervisor had a personal relationship, and on these facts, when the subordinate would not again be present in the workplace before he permanently departed from work, it does not appear that the purpose of the policy would be undercut by claimant's interaction with the subordinate outside of the workplace on February 17, 2017. Audio at ~10:00, ~12:30. The record therefore fails to show claimant knew or should have known that socializing with the subordinate on February 17, 2017 probably violated the employer's expectations, or that she acted with indifference to the consequences of her actions. Absent such a showing, the record fails to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer therefore failed to meet its burden to show that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-85364 is affirmed.

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

DATE of Service: July 26, 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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