

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0970

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120258). Claimant filed a timely request for hearing. On July 25, 2017, ALJ Amesbury conducted a hearing, and on July 26, 2017 issued Hearing Decision 17-UI-88940, reversing the Department's decision. On August 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) The Nines employed claimant as a senior restaurant manager at Departure Restaurant from May 31, 2016 until May 19, 2017.

(2) The employer had a dress code requiring that all servers exhibit a neat and cleanly appearance while on duty and that both male and female servers dress all in black, with female servers required to wear dresses and male servers required to wear shirts and trousers. The employer expected that, as manager, claimant would enforce its policies with subordinate staff, including its dress code. The employer also had an insubordination policy that prohibited claimant from refusing to comply with the direct orders of supervisors. Claimant was aware of the employer's dress code and its expectations that he would enforce it and refrain from insubordination.

(3) On May 13, 2017, while claimant was on duty, an older male customer at the restaurant grabbed the arm of a female server who was wearing the required black dress to look more closely at tattoos on the server's exposed legs. After a short period of time, the server was able to pull away from the customer and disengage. The server was frightened and upset by the incident and began crying. The server later spoke to claimant about what had happened and she attributed the customer's behavior to the fact that she had been wearing a dress which had initially allowed the customer to observe her leg tattoos.

(4) As a result of the incident on May 13th, claimant became concerned about the propriety of the employer's gender-specific dress code, which he thought required female servers to wear dresses to create the atmosphere that the restaurant was "sexy" place, put the female servers on display and encouraged some customers to act in harassing ways, including making comments about the appearances of female servers and touching their bodies. Claimant researched the lawfulness of dress codes that had different requirements for employees based gender and consulted with a legal professional. Based on this input, claimant concluded that the employer's dress code was unlawful because its requirement that female servers wear dresses placed an "undue burden" on female servers based on their gender, since dresses were less functional for a female server than the trousers worn by male servers and contributed to generating a hostile and harassing work environment for the female servers. Audio at ~33:46.

(5) On May 15, 2017, claimant sent a lengthy email to members of the employer's management, including the human resources director and the manager of the restaurants. In the email, claimant described the incident on May 13th and the research he had located about greater sexual harassment and gender hostility in restaurants when servers were required to wear different uniforms based on gender. Exhibit 1 at 5-6. Claimant concluded the email by stating that, based on his research, he could not continue to enforce the gender specific aspects of the employer's dress code for servers and suggested that female servers, if they chose, be allowed to wear the same type of black trousers and branded shirts that male servers wore rather than being limited to black dresses. Exhibit 1 at 5.

(6) On May 16, 2017, claimant met with the members of management to whom he had sent the May 15th email at the members' request. Claimant explained to them why he had concluded that the employer's dress code was an unlawful form of gender discrimination and why he was unwilling to enforce the gender-specific aspects of the current dress code. The employer representatives did not agree with claimant's opinion. Claimant understood the representatives wanted him to express agreement with the employer's dress code and to commit to enforcing it in its current form. At the conclusion of the meeting, the employer suspended claimant from employment. As of that time, no employee had ever violated the employer's dress code, as it then existed, and claimant had never had to enforce its requirements on any subordinates.

(7) After May 16, 2017, claimant sent additional emails to the employer's management explaining the reasons for his view that the employer's dress code was unlawful form of gender discrimination and seeking to have management reconsider its commitment to the gender-specific aspects of the current dress code.

(8) On May 19, 2017, the employer discharged claimant for stating that he was not going to enforce the gender specific aspects of the employer's dress code if any female servers failed to comply with the requirement that they wear a dress while on duty.

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. 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. Good faith errors do not constitute misconduct. OAR 471-030-0038(3)(a). A conscious decision not to comply with an unreasonable employer policy also does not constitute misconduct. OAR 471-030-0038(1)(d)(C). 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 evidence showed only that claimant had stated that he would not enforce the gender-specific aspects of employer's dress code on female servers whom he supervised because he had concluded those elements of the dress code were unlawful. However, the employer did not dispute that no occasions had ever arisen when compliance with the gender-specific aspect of the dress code needed to be enforced and a female server had to be instructed to wear a dress. While the employer appeared to suggest that it was requiring claimant to express an abstract commitment to a dress code he had concluded was unlawful, that claimant held a view about the dress code that was not consistent with management's view did not, in and of itself, involve behavior that was non-compliant with the dress code or claimant's responsibility to enforce it. The employer did not offer any evidence that claimant had at any time ever failed to enforce the dress code, since there never had been a need for him to do so. The employer offered no evidence that claimant had ever disobeyed a direct instruction of management to require an errant server to comply with the dress code or that claimant had ever told the female servers subordinate to him that they were not required to comply with the dress code as it then existed. Rather, the employer offered only its speculations that claimant would if the occasion arose at some indefinite future time refuse to enforce the dress code requirement if a female server reported for work not wearing a dress. A belief that claimant would not enforce the dress code if he was called upon to do so under appropriate circumstances that might or might not come to fruition, however certain the employer might have been that he would fail to do so, does not substitute for a showing that claimant engaged in an actual willful or wantonly negligent violation of the employer's standards, as distinct from merely holding a different view from the employer about the legitimacy or lawfulness of the dress code or trying to convince the employer to change its dress code. On this record, the employer did not show that claimant willfully or with wanton negligence failed to enforce the employer's dress code or failed to comply with an actual instruction from the employer.

As well, even if claimant's statements as to his future intentions with respect to the dress might under appropriate circumstances have constituted misconduct, they would not on the facts in this record. The unpleasant experience of the female server on May 13th had caused claimant to first consider the legitimacy of the employer's dress code and he had performed his own research and consulted with a legal professional before he reached the conclusion that the gender-specific aspects of the employer's dress code were unlawful. Claimant appeared sincere in his belief, and the employer did not dispute that claimant's belief was authentic, reasoned and researched, held in good faith and was the motivation for his stated unwillingness to enforce the gender-specific aspects of the employer's dress code if the occasion arose. While the members of the employer's management with whom claimant met on May 16th 2017 disagreed with claimant's analysis of the lawfulness of the employer's dress code, the employer did not present any evidence that management did more than cursorily assert the legality of the dress

code, and did not show that management provided to claimant a reasoned basis for its disagreement with claimant's research and conclusions. On this record, the employer did not show that claimant's opinion about the unlawfulness of the gender-specific aspects of the employer's dress code was erroneous or was reached in a manner that evidenced a willful or wantonly negligent violation of the employer's standards. Assuming the gender-specific components of the employer's dress code were in fact unlawful, those components would appear to constitute an unreasonable employer policy. If so, it was not misconduct for claimant to state he would enforce an employer policy that was against the law. *See* OAR 471-030-0038(1)(d)(C). Assuming that claimant's opinion about the unlawfulness of the employer's dress code was wrong and the dress code, as written, was lawful, claimant nonetheless appeared to sincerely and in good faith believe that it was unlawful based on his independent investigation, to which the employer did not appear to have presented its own reasoned or researched response. On these facts and in the alternative, claimant's belief that the employer's dress code was unlawful was, at worst, a good faith error. On these facts, claimant's stated position that he would not enforce the dress code because it was unlawful was also excused from constituting misconduct as a good faith error. *See* OAR 471-030-0038(3)(a).

The employer did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-88940 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 8, 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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