

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1382

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 4, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141503). Claimant filed a timely request for hearing. On November 1, 2017 and November 16, 2017, ALJ Griffin conducted a hearing, and on November 17, 2017 issued Hearing Decision 17-UI-97160, concluding claimant's discharge was not for misconduct. On November 28, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath Falls Grocery Outlet employed claimant as cashier supervisor from February 25, 2015 to September 18, 2017.

(2) The employer prohibited employees from sexual harassment and inappropriate touching, which claimant understood. The employer also expected employees to report any behavior they observed that could be considered sexual harassment or inappropriate touching, which claimant also understood.

(3) On September 4, 2017, claimant and three other employees were at the same cashiers' stand. While claimant's back was turned, one employee, holding her smartphone in her hand, rubbed the smartphone screen against another employee's shoulder several times, turned away, then moments later turned back to the same employee and rubbed the smartphone screen against the other employee's upper buttocks twice before briefly sliding the smartphone down the employee's buttocks and between the employee's legs. Claimant did not see the employee's behavior. Neither she nor the other employees present reported the offending employee to the employer.

(4) On September 18, 2017, one of the employer's co-owners viewed video surveillance footage and observed the September 4, 2017 incident. The co-owner found the incident disturbing and discharged the employees involved, including claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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.

In a discharge case, the employer has the burden to prove misconduct occurred by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In order to do so in this case, the employer must prove that claimant knowingly failed to report that one employee sexually harassed or inappropriately touched the other employee. While the employer's video surveillance footage showed that claimant was in the vicinity when one employee touched the other on September 4th, the footage also clearly shows that claimant's back was turned to the two employees the entire time the employee was touching the other. The surveillance system did not record sound, and therefore failed to show that any of the employees narrated what was happening when claimant's back was turned or otherwise communicated to claimant what was happening. The record therefore fails to establish either that claimant was aware of what was happening, or a basis for imputing knowledge of what was happening to claimant such that we can infer that she knowingly failed to report the employee's behavior to the employer. Claimant's failure to report harassment or touching, under circumstances where the record fails to prove that she knew harassment or touching had occurred, is not misconduct. Claimant's discharge was, therefore, not disqualifying.

DECISION: Hearing Decision 17-UI-97160 is affirmed.

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

DATE of Service: December 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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