

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1427

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100121). Claimant filed a timely request for hearing. On November 30, 2017, ALJ Seideman conducted a hearing, and on December 8, 2017 issued Hearing Decision 17-UI-98627, concluding claimant's discharge was not for misconduct. On December 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marathon Coach, Inc. employed claimant as a cabinet builder from September 19, 2016 to July 24, 2017.

(2) The employer prohibited employees from engaging in harassment and sexual harassment, which it defined to include "[a]ctions, jokes, or comments based on an individual's sex." Exhibit 2. The policy provided that anyone engaging in sexual harassment would be subject to discipline, including discharge. The employer trained claimant about its harassment policy and gave him a copy of it.

(3) Between July 21, 2017 and July 24, 2017, an employee reported to two female employees and human resources that claimant had, on July 21, 2017, observed the females from behind without their knowledge and made offensive gestures toward them, including "feigning masturbation while making an offensive sound" that sounded like a "squirt," and making "dry humping" gestures. Exhibit 2; Audio recording at ~ 11:00-12:30.

(4) The employer spoke with the employee, the two females and others, and concluded that claimant had engaged in the activities alleged. On July 24, 2017, discharged claimant for allegedly making the gestures and noise. Prior to his discharge, claimant had not received prior warnings or engaged in other prohibited behavior.

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 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 bears the burden to establish misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer alleged that claimant made sexual gestures and an offensive noise, thereby violating its sexual harassment and harassment policy. Although the employer indicated that several individuals saw claimant's conduct, the only evidence it presented to substantiate the allegation that claimant engaged in that conduct were the hearsay statement and testimony provided by the human resources director. Claimant credibly denied having engaged in the alleged conduct. *See e.g.* Audio recording at ~ 16:30-17:30. Given that the only evidence of misconduct in this case is based upon hearsay, without substantiating evidence, and claimant credibly denied having engaged in the conduct alleged, the record is no better than equally balanced, and does not show that it is more likely than not that claimant engaged in the conduct for which he was discharged. Absent such a showing, the employer failed to establish that claimant's discharge was for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-98627 is affirmed.

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

DATE of Service: January 17, 2018

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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