

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1437

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90432). Claimant filed a timely request for hearing. On December 4, 2017, ALJ Meerdink conducted a hearing, and on December 5, 2017 issued Hearing Decision 17-UI-98144, reversing the Department's decision. On December 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Mini Pet Mart Inc. employed claimant from February 27, 2012 until October 19, 2017, last as a store manager.

(2) The employer prohibited employees from engaging in sexually harassing workplace behaviors. The employer also expected claimant, as a manager, to take reasonable steps to ensure that the employees that he supervised complied with the employer's prohibition against sexual harassment. Claimant understood the employer's expectations.

(3) On October 12, 2017, a female employee whom claimant supervised reported to claimant that a male employee had sexually harassed her. The female recounted in detail several incidents of alleged harassment. After receiving this report, claimant immediately changed the work schedule to prevent the female employee from working at the same time as the alleged harasser until he could investigate what had been reported to him.

(4) After October 12, 2017, claimant began an investigation of the female employee's reported harassment. Claimant first interviewed all female employees he supervised about interactions they had had with the alleged harasser or that they had witnessed to determine if the female employee's reported incidents of harassment could be corroborated or if the alleged harasser had been sexually harassing employees other than the female employee who made the report of sexual harassment. After inquiring into this background, claimant interviewed the male employee who had allegedly sexually harassed the female employee on October 12, 2017. The alleged harasser denied all of the allegations that the female had made.

(5) On October 18, 2017, the female who had reported the sexual harassment to claimant sent an email to claimant confirming the substance of their conversation on October 12, 2017. Ten minutes later, the female employee forwarded that email to a member of the employer's upper management.

(6) Sometime shortly after the employer's management received the forwarded email from the female employee, the employer's owner met with claimant to discuss what he had done in response to the female employee's reported harassment. Claimant told the owner he was in the process of investigating the alleged harassment. On October 19, 2017, the employer discharged claimant for not having notified the employer's upper management of the female employee's report of alleged harassment immediately after receiving it.

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. 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).

The employer's witness at hearing, the owner, contended that claimant had been informed at managers' meetings that he "always" was to report complaints of alleged sexual harassment to the employer's upper management or to its corporate office "immediately" upon his receipt of them. Audio at ~14:49. However, claimant contended that he had never received such an instruction, and the statement that came closest to the owner's contention was in the employer's written anti-harassment policy, apparently directed at all employees without distinction as to their managerial status, when it stated that "[y]ou are expected and required to bring the following matters [including incidents of harassment] to the attention of your store manager or the corporate office as soon as possible." Audio at ~30:40; Exhibit 1 at 5. Given that there is no reason to doubt the accuracy of either party's testimony, we must resolve this dispute in the evidence against the employer since it carries the burden of proof in discharge cases. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, we conclude that the preponderance of the evidence fails to show that claimant was expressly instructed that managers were required to report all complaints of sexual harassment to the employer's corporate office or its upper management upon receiving them.

The employer's written anti-harassment policy, including the section that claimant referred to at hearing, is not reasonably construed as requiring a store manager to immediately notify the corporate office of reports of sexual harassment. By referring to the "store manager or the corporate office," that section of the employer's policy reasonably implies that notice to any level of management is sufficient – not merely upper management or the corporate office – and since claimant was, in fact, the store manager, it is hard to see how, absent a more specific directive, that section could be reasonably construed as requiring him to take the further action of immediately notifying the corporate office of any sexual harassment that was reported to him. On this record, it does not appear that claimant knew or reasonably should have been aware that the employer may have required him to "immediately" notify

upper management or the corporate office of any sexual harassment reported to him before he undertook any further action to determine if the report was well-founded.

The employer's witness did not dispute that upon receiving the report of alleged harassment claimant immediately took reasonable steps to insulate the female employee from further workplace contact with the alleged harasser and immediately commenced an investigation to determine whether or not the female's report could be verified. Nor did the employer dispute that claimant intended to notify upper management or the corporate office of the reported harassment after he had obtained preliminary information supporting or undercutting the accuracy of the female employee's allegations. Audio at ~22:12. The steps that claimant took were to investigate the female employee's report of harassment were reasonable under the circumstances, including speaking with the female, interviewing several other employees and speaking at length with the alleged harasser. While other store managers might have taken a different approach, we cannot say that claimant's decision to wait for a few days to investigate the accuracy of the reported harassment before notifying the corporate office or the employer's upper management was unreasonable under the circumstances, particularly when claimant took reasonably adequate steps to shield the female employee from any additional harassment while conducting the investigation and he likely wanted to be in a position where he could inform the corporate office or the upper management at the time of his notification if there was or was not, as a preliminary matter, facts corroborating the reported sexual harassment. On this record, the employer failed to demonstrate that claimant's failure to notify the employer of the reported sexual harassment immediately upon receipt, was a willful or wantonly negligent violation of an employer expectation of which claimant was reasonably aware.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-98144 is affirmed.

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

DATE of Service: January 22, 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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