

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0233

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 100828). The employer filed a timely request for hearing. On February 21, 2018, ALJ Clink conducted a hearing and issued Hearing Decision 18-UI-103680, affirming the Department's decision. On March 6, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Salem Health employed claimant as a culinary supervisor from April 21, 2014 to December 11, 2017.

(2) The employer expected claimant to promptly notify management if he heard staff spreading rumors or making inappropriate comments about others. Claimant understood the expectation, and understood he was required to report problems at work to the employer within seven days.

(3) In October 2017, an employee made a comment about another employee. Claimant and the other employee were near the first employee, and while they thought the first employee had made a comment about the other employee being a stripper, there were loud hood vents in the area and neither was certain what the first employee actually said. Claimant confronted the first employee, who denied making the comment. Claimant felt he could not prove the first employee made the comment, so he made a note about the incident but did not report it to management.

(4) On November 23, 2017, another employee made a comment suggesting that the other employee was a stripper. Claimant asked the employee what he just said, and the employee repeated the remark. On November 24, 2017, claimant asked a line cook if he had heard any rumors. The line cook reported that he had heard the two employees saying that the other employee was a stripper. On November 25, 2017, claimant reported the November 23rd comment to management.

(5) During the course of the investigation, the employer asked claimant when he thought the situation had begun and concluded that claimant had heard the first employee state that the other employee was a stripper in October but had failed to report the incident. The employer asked claimant to disclose the names of people he associated with outside of work and to describe what he did after work. Claimant refused. On December 4, 2017, the employer suspended claimant.

(6) On December 11, 2017, the employer discharged claimant for failing to cooperate with the investigation by answering questions about his off-duty activities and associates, and for failing to report the October 2017 comment to management.

CONCLUSIONS AND REASONS: We agree with the Department and 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. 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 are not misconduct. OAR 471-030-0038(3)(b).

The employer alleged that claimant's discharge was for misconduct because claimant failed to report an employee for making comments about another employee being a stripper in October 2017. Claimant agreed that he did not report the October 2017 comment, but testified that he did not report the comment because the loud environment prevented him from actually hearing what the first employee said, and when he confronted the first employee about it he denied having made the comment. Claimant concluded that without proof that the first employee made the comment he should not report the incident to management. Claimant's actions were consistent with his understanding of the employer's expectations. He therefore did not consciously engage in conduct that he knew or should have known would probably violate the employer's expectations. At worst, his failure to report the employee's comment was the result of a sincere but mistaken belief that he was acting in accordance with the employer's expectations, making the conduct a good faith error. Good faith errors are not misconduct.

The employer also alleged that claimant's discharge was for misconduct because claimant refused to cooperate with the employer's investigation by responding to the employer's requests to disclose his off-duty associates and activities to the employer. On this record, however, we cannot say that the employer established that claimant's off-duty activities were work-related, such that the employer had a reasonable expectation that claimant would provide such information, nor can we conclude that claimant reasonably knew or should have known that refusing to provide such information would probably result in a violation of the standards of behavior the employer had the right to expect of him. Therefore, while there is no factual dispute that claimant refused to provide the employer with information it requested about claimant's off-duty activities and associates, the record fails to show that it is more likely than not that claimant's refusal amounted to willful or wantonly negligent misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-103680 is affirmed.

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

DATE of Service: April 4, 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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