EO: 700
BYE: 201908

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0431

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95539). Claimant filed a timely request for hearing. On April 18, 2018, ALJ Griffin conducted a hearing, and on April 23, 2018 issued Order No. 18-UI-107931, concluding that the employer discharged claimant but not for misconduct. On April 30, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McDonalds of CO employed claimant most recently from January 25, 2017 until February 27, 2018 as a department manager.

(2) The employer has a zero tolerance policy regarding sexual harassment in the workplace. The policy prohibited joking remarks or other conduct that demeaned or showed hostility toward an individual because of sex or other prohibited basis that created an intimidating, hostile or offensive work environment or interfered with an individual's employment. The employer had minor employees and customers and sought to promote a family environment in its restaurants. Claimant understood these expectations.

(3) On January 17, 2018, claimant told some subordinate employees, "You guys look beautiful," at work. Transcript at 26. Claimant apologized afterwards to the employees because he thought his comment might have been inappropriate.

(4) On February 10, 2018, the employer's director of operations received an anonymous complaint allegedly from a customer stating that the person had seen claimant harassing a minor employee. The director of operations began an investigation.

(5) On February 19, 2018, the director of operations went to the restaurant where claimant worked and asked the general manager if she had had any problems regarding harassment in the restaurant. The general manager told the director of operations that an employee (T) had complained to her regarding claimant on February 18.

(6) The director of operations met with T and T told her that claimant had told him that claimant "liked his bulge," and, "He had a nice bulge," and that claimant made "rude gestures and that he was making him [T] uncomfortable." Transcript at 8. T also gave the employer a written statement alleging this and other sexual comments claimant allegedly made directed at T, customers and coworkers. Exhibit 1 at 9.

(7) The director of operations spoke with another employee, S, who alleged that she overheard claimant state over a headset, "Do you need me to change your tampon for you?" to M, another employee. S also gave the employer a written statement alleging claimant made comments regarding "vaginas," and sexual comments to another employee regarding "bending over." Exhibit 1 at 4-5. The director of operations spoke with another employee, M, who alleged she had the conversation with claimant that S allegedly overheard. M also gave the employer a written statement alleging claimant made sexual comments about customers and M. Exhibit 1 at 6.

(8) The general manager assisted with the investigation and spoke with three or four other employees who allegedly stated claimant made statements of a sexual nature to them. Three of the employees gave the employer written information about the statements.

(9) On February 27, 2018, the director of operations met with claimant and asked him about the coworkers' allegations. During the meeting, claimant denied having made any of the statements alleged by the coworkers in their written statements to the employer. Based on the meeting with claimant and the information she and the general manager had gathered, the employer discharged claimant for allegedly violating its harassment policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 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 engaged in sexually harassing conduct, thereby violating its zero tolerance policy against harassment in the workplace. The evidence the employer presented to substantiate the allegations that claimant engaged in the conduct alleged by his coworkers was entirely hearsay testimony regarding statements made by employees to the director of operations and "double hearsay" testimony regarding additional employee complaints made to the general manager, who did not testify at hearing. The director of operations' testimony was supported only by additional hearsay in the form of written statements from employees. However, although the written statements corroborated the testimony from the director of operations, claimant was the only witness at hearing who had firsthand knowledge of the truthfulness of the incidents alleged in the hearsay. Claimant denied all of the offending conduct alleged by his coworkers in the hearsay evidence and denied ever admitting to such conduct. Transcript at 26, 30, 32-35. Moreover, claimant implied that two of the employees' statements

were not credible when he testified that he had recently admonished them for their own inappropriate conduct. Transcript at 28-29, 35.

The only firsthand evidence of concerning conduct was claimant's admission that he had told his coworkers they "look beautiful." However, the record does not show that the mere statement, "You guys look beautiful," violated the employer's policy against harassment since it does not appear on its face to necessarily have been demeaning, hostile or offensive. Given that the only evidence of misconduct in this case is based upon hearsay, without firsthand substantiating evidence, and that claimant credibly denied having engaged in the conduct alleged or having admitted to engaging in such conduct, 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: Order No. 18-UI-107931 is affirmed.

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

DATE of Service: <u>June 1, 2018</u>

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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