

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0723

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114550). Claimant filed a timely request for hearing. On July 2, 2018, ALJ Schmidt conducted a hearing, and on July 3, 2018 issued Order No. 18-UI-112496, concluding claimant's discharge was not for misconduct. On July 20, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Tap House at Nye Creek employed claimant as a bartender from March 24, 2017 to April 12, 2018.

(2) The employer expected claimant to refrain from making negative comments about the employer's business. Claimant made negative comments about how the employer ran the business to a co-owner and in front of some customers who were friends of the co-owners. On March 21, 2018, a co-owner warned claimant such comments were prohibited. On April 4, 2018, the other co-owner told claimant she would be discharged if she made such comments about the business again. Claimant understood that she was not permitted to make any further negative comments about the business after April 4th, and, thereafter, did not make any.

(3) On April 11, 2018, the co-owners received reports that claimant had once again made negative comments about the employer's business and concluded that she had in fact made such comments. On April 12, 2018, the employer discharged claimant for making negative comments about the business.

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) (January 11, 2018) 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 alleged that on approximately April 11, 2018, claimant “complained about” the business to two customers “the whole time” she was serving them, and “basically made two customers so uncomfortable by talking crap to them directly again.” Transcript at 7. One customer, “a tourist,” told the manager as she left that she was “so uncomfortable” and it was “so inappropriate.” Transcript at 7-8. The other customer, a “regular,” “wrote a note on her napkin and handed it to the hostess as she walked out. Saying that she had been made so uncomfortable she didn’t know what to do or say. * * * But she wanted to make it very clear that she was very uncomfortable and she thought it was very inappropriate behavior which it obviously was.” Transcript at 8. The employer did not submit statements from the customers, manager or hostess, however, and when the ALJ asked the employer’s witness what it was that claimant specifically said, the witness could not say.

In a discharge case, the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In other words, the employer must prove that claimant acted as alleged, and that she did so either willfully or in wantonly negligent violation of the employer’s expectations. Here, the employer’s evidence did not establish what it was that claimant actually did or said on April 11th that the customers construed as complaining. Although the employer established in this case that two customers thought claimant had complained, the information was based upon vague hearsay and claimant denied having complained about the employer in the final instances. The employer therefore did not establish that claimant was, in fact, complaining to the customers, that her complaints were about the employer, that she uttered the complaints willfully or with wanton negligence, or, ultimately, that claimant engaged in misconduct on the occasion that prompted the employer to discharge her.

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

DECISION: Order No. 18-UI-112496 is affirmed.

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

DATE of Service: August 23, 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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