

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0730

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On May 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 163814). Claimant filed a timely request for hearing. On June 28, 2018, ALJ Wyatt conducted a hearing, and on July 3, 2018 issued Order No. 18-UI-112551, concluding that claimant was discharged, not for misconduct. On July 20, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted to EAB a written argument, a motion to submit additional evidence under OAR 471-041-0090 (October 29, 2006) and affidavits from two employees who allegedly overheard the conversation that culminated in the work separation. OAR 471-041-0090(2) allows EAB to consider new information on review if the party offering it shows that factors or circumstances beyond its reasonable control prevented it from presenting that information during the hearing. The employer asserted that it did not present statements or testimony from these employees at the hearing because it learned of what they had allegedly witnessed only after the hearing. However, a party is expected to investigate the facts underlying its position in advance of the hearing and to organize and present the evidence supporting its position during the hearing. The employer did not show that had it made reasonable hearing preparations it would not have learned of these employees and what they allegedly overheard at the time of the work separation. The employer's motion is denied because it did not show that factors or circumstances beyond its reasonable control prevented it from offering the evidence that it

now seeks to present during the hearing. EAB considered the employer's written argument to the extent it was based on evidence in the record.

EVIDENTIARY MATTERS: At hearing, the certified interpreter appointed by the Department to provide translation services for claimant also provided them for the employer's witness, the employer's owner, at his request. Audio at ~1:49. The interpreter stated that he had no conflicts of interest with any of the parties or witnesses in this matter and he appeared able to understand the parties and the witness. Audio at ~3:56, ~5:00. EAB has considered the interpreted testimony provided in this matter as an accurate narrative of the testimony that both parties offered.

At hearing, the ALJ failed to administer an oath or affirmation to claimant's witness, her brother, before he testified in this matter. Audio at ~59:00; Transcript at 17. It does not appear that the testimony of claimant's witness lacked credibility due to inadvertently having not been placed under oath or affirmation, or that the witness was even aware that he was providing unsworn testimony. EAB has considered the testimony of claimant's brother when reaching his decision.

Any party that objects to the interpreter providing translation services to both parties in this matter or EAB's consideration of the unsworn testimony of claimant's brother must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing of this decision. Unless such objection is received and sustained, EAB will consider the interpreted testimony of both parties and the brother's unsworn testimony when reaching his decision.

FINDINGS OF FACT: (1) Si Casa Flores Corporation employed claimant in various capacities at a restaurant from around 2006 until May 1, 2018, including as a waitress, cashier and bus person.

(2) Sometime before April 29, 2018, claimant believed that she had been sexually harassed at work by a coworker. Claimant informed the owner of the sexual harassment. On April 29, 2018, the owner met with claimant and the alleged harasser to investigate the matter. At that time, the owner did nothing about the alleged sexual harassment.

(3) On April 30, 2018, the owner contacted his attorney about the sexual harassment that allegedly had occurred. The attorney advised the owner that he needed to separate claimant and the alleged harasser and ensure that they did not work together.

(4) On May 1, 2018, claimant reported for work. Later that day, claimant's brother and father went to the workplace and joined claimant in an attempt to speak with the owner about the sexual harassment. Claimant, her brother and her father wanted the owner to take steps to ensure that claimant would not be required to work the same shifts as the alleged harasser. During the conversation, the owner told claimant and her family members that he was not a "babysitter" for employees, he was not going to "worry about [his] employees' problems" and did not intend to spend his time "looking after" claimant in the workplace. Transcript at 6, 7, 17. The owner told claimant he was not going to change the schedule so she could avoid the alleged harasser. Claimant and her family members became upset. Around that time, the owner told claimant she was "fired" and that she should leave. Transcript at 5, 18. Claimant picked up her bag, retrieved her sweater and left the workplace with her brother and father. On May 1, 2018, due to the owner's failure to take action, claimant reported to local police that she had been harassed by a coworker. By the owner's words, the employer discharged claimant on May 1, 2018.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Claimant contended that she was discharged, while the employer contended that she voluntarily left work. Transcript at 5, 10. The first issue this case presents is therefore the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

As the owner described the conversation he had with claimant, her father and her brother on May 1, 2018, he testified that they were “very very upset” and “offended” him. Transcript at 12. The owner then stated that claimant did not tell him that she was quitting work, but that she just “walk[ed] off” with her family members without saying anything at all. Transcript at 12, 13. Given the emotional tenor of that conversation, it is not likely that claimant and her family members simply would have walked away silently. It makes logical sense that something would have been said to end that meeting or to disrupt it. Claimant’s testimony that the owner told her she was fired was corroborated by the testimony of her brother. Transcript at 6, 7, 18. Both claimant and her brother described the particulars of what the owner stated to claimant in substantially the same words, including that the owner said he was not going to be a “babysitter” for claimant at work. Transcript at 7, 18. That claimant and her brother echoed each other in the detail of their account of the conversation gives their accounts indicia of reliability. As well, different from the owner’s account, their account indicates a reason that the May 1, 2018 conversation would have ended. In addition, the account of claimant’s brother, while stating that the owner discharged claimant, suggests that the brother quit work in protest over the owner’s treatment of his sister, giving weight to his testimony about claimant’s different type of work separation. Transcript at 17. The preponderance of the reliable evidence in this record shows, more likely than not, that the employer discharged claimant on May 1, 2018.

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 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).

Because the employer contended that claimant left work, it did not provide reasons for having discharged her. It does not reasonably appear to have been misconduct for claimant in the company of her brother and father to speak to the owner on May 1, 2018 about the sexual harassment allegations. As the owner, claimant and her brother described the parties’ behavior during the May 1, 2018 meeting, there was insufficient evidence to establish that claimant engaged in misconduct during that meeting. On this record, the employer did not meet its burden to show that it discharged claimant for misconduct.

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

DECISION: Order No. 18-UI-112551 is affirmed. *La Orden de la Audiencia 18-UI-112551 queda confirmada.*

DATE of Service: August 23, 2018

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

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.