

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0116

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On October 31, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103355). Claimant filed a timely request for hearing. On January 2, 2014, ALJ Menegat conducted a hearing, and on January 8, 2014, issued Hearing Decision 14-UI-08107, concluding the employer discharged claimant, but not for misconduct. On January 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For example, with its argument, the employer submitted an exhibit that was not offered at hearing because the employer "was under the impression that all previously submitted documentation would be reviewed as part of the decision process." Written argument at 1. However, the December 16, 2013 notice of hearing from the Office of Administrative Hearings (OAH) notified the employer in that regard as follows:

"The documents enclosed here (notices regarding the January 2, 2014 hearing) are the only documents that will be considered by the ALJ at hearing. If you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ at the office of Administrative Hearings at their addresses as listed on the Certificate of Mailing prior to the date of the scheduled hearing."

Hearing Notice at 1. The record fails to show that the employer did not receive the notice in question. Thus, because the employer failed to make the required showing under OAR 471-041-0090, EAB

considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Burger King #6589 employed claimant, last as a shift leader, from October 3, 2011 to October 7, 2013.

(2) The employer had a “non-harassment” policy in its workplace and expected employees to refrain from making derogatory or racist comments to others. Transcript at 5. Claimant was aware of the employer’s expectation.

(3) On September 28, 2013, at the start of claimant’s shift, he noticed two on-duty workers talking to each other but not working. He interrupted them to determine the cause and found that they were discussing finding a coworker to work for one of them during an upcoming shift. He advised them that if another worker was going to be asked to fill in, that they ensure the worker was experienced and not a new and inexperienced one. When claimant was asked to whom he was referring, claimant could not remember the new worker’s name and referred to him as “the new, young black male.” Transcript at 20. One of the coworkers to whom he was talking became upset about putting “race...into play” and complained to a manager, who ultimately sent claimant home. Transcript at 16.

(4) Subsequently, the employer suspended claimant pending an investigation. The employer received written reports from the workers to whom claimant had spoken. One worker reported that claimant had used the “n word” and the other that claimant had used the word “black.” Transcript at 8. Claimant did not forward his own report to the employer until October 7, 2013, the day the employer discharged him for violating its “non-harassment” policy by using the word “nigger” in referring to a coworker. Transcript at 5.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. 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.

Although the employer’s witness alleged claimant used the word “nigger” in referring to a coworker who was an “African-American male” in the September 28th conversation, claimant denied having done so both to the employer and at hearing. Transcript at 5, 6, 18. The employer’s witness provided only hearsay evidence regarding claimant’s alleged behavior. Absent a basis for concluding that claimant was not a credible witness, we gave his firsthand testimony under oath more weight than the employer’s hearsay evidence, and therefore found facts in accordance with claimant’s testimony on matters in dispute. The record therefore fails to show that claimant used the word “nigger” during the September 28 conversation with his coworkers.

Although claimant admitted he referred to the worker in question as “a young black male”, he asserted that his use of the work “black” was inadvertent and he did not intend to be “rude or confrontational.”

Transcript at 6, 20. The employer's witness testified that he accepted that claimant did not use the new worker's name in referring to him because he had forgotten it. Transcript at 6. On this record, the employer failed to meet its burden to establish that claimant consciously violated the employer's "non-harassment" policy by referring to the new worker as "a young black male" during the course of his September 28, 2013 conversation with coworkers.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-08107 is affirmed

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: February 19, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.