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BYE: 201439

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

2014-EAB-0178

Reversed
Disqualification

PROCEDURAL HISTORY: On October 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 163035). Claimant filed a timely request for hearing. On December 16, 2013, ALJ Monroe conducted a hearing, and on January 8, 2014, issued Hearing Decision 14-UI-08128, concluding claimant was discharged, but not for misconduct. On January 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record as well as the parties' written arguments to the extent they were based on the record. However, the parties' late evidentiary submissions and claimant's written argument contained information that was not part of the hearing record and the parties failed to show that factors or circumstances beyond their reasonable control prevented them from offering the information during the hearing or requesting a continuance for later submission. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Agate Resources, Inc. employed claimant as a data warehouse administrator from November 7, 2005 to September 27, 2013.

(2) In March 2010, claimant's coworker (AC) complained to the employer that she had to repeatedly tell claimant "to stop buying her things and stop bringing her food" that his actions were "inappropriate" for the workplace and "made her uncomfortable." Exhibit 2; Transcript at 15. She also complained that earlier that month, claimant asked her what her favorite color was and when she responded he stated the color meant she was "oversexed" and "sex motivated her every action", told her he could not believe she

did not have guys "crawling" over her "because if he were younger…" and added that he wanted to be "good friends outside of the office", which also made her uncomfortable. *Id.* On March 16, 2010, the employer disciplined claimant in writing for the described actions and comments, advised him they were "inappropriate" for the workplace and "must cease immediately", and that "[a]ll further communications" with AC were required to be "professional, appropriate and of a business nature only." *Id.* The employer warned claimant that future instances of inappropriate communication with AC would not be tolerated and could result in termination. *Id.* Claimant acknowledged receipt of the employer's written warning and was aware of the employer's expectations.

(3) On November 19, 2012, claimant brought AC gifts of food and books to work which she refused. A work email string between them included the following exchange:

> **AC:** "…Also, please stop bringing me things. I have told you before that it makes me uncomfortable."
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> **Claimant:** "I apologize. I had told you some time ago about my Persimmon's and had promised to bring some in. Same with the Joan Walsh Anglund books. I did this, in trying to keep an old promises,..I am ashamed and embarrassed for the way I have treated you and respect your wish for an end to our friendship. I removed that new Facebook request for that reason too. It's my fault, all of it, but I still miss it. All I can say is that I am truly sorry. I've not acted like a very good friend. I left the books on our desk, too. Consider them a parting gift, something to remember me by."
>
> **AC:** "I don't want the books. Did I not just say to stop bringing me things? Did I not say it made me uncomfortable? If you continue to do something that I have told you makes me uncomfortable, do you know what that is?"
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> **Claimant:** "I'm sorry. I would pick them up, but the doctor wants me in the office today. They suspect is that the cancer has spread into my throat, which is why I have been horse the past three weeks. (And "yes", I lied about that. Having people look at me with pity, treating me different, made me physically ill. The survival rate for my type of cancer is almost nil, so I am electing to not have surgery. When it gets truly bad, I am not sure what I will do.) I really wish you would keep those, to remember what I was like before all of this blew my world up and I began acting like a frantic jerk. [I] don't even, honestly, know why I am tell[ing] you this, but I still trust you more than any human being I know. However, if it is you[r] wish, I will make an attempt to get into the office and get those books. I will wrap them, put your name on them, and set them aside on my desk, so that you can pick them up after this is all over."
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> **AC:** "I DON'T WANT THE BOOKS. I also don't want to know about your personal life. Please maintain a professional and work-appropriate attitude and stop sharing personal details about your personal life with me."

Exhibit 2. AC did not report the email exchange to the employer.

(4) In late August 2013, while at work, claimant invited AC to dinner with him and "friends" which invitation AC summarily declined. Exhibit 2.

(5) On or about September 12, 2013, the employer received a report from the supervisor who administered claimant's March 16, 2010 disciplinary warning that claimant had disclosed to him that he had turned down a job offer in another state because recent interactions with AC led him to believe AC would eventually "make a decision to be with him" and he wanted to be available for that when she did. Exhibit 2.

(6) On September 16, 2013, the employer suspended claimant while it conducted an investigation regarding whether claimant "continued to interact with [AC] on a personal level." Exhibit 2. During its investigation, the employer reviewed a statement from claimant that disclosed his dinner invitation to AC in August 2013 and first became aware of the email exchange between claimant and AC on November 19, 2012. It conducted interviews of both claimant and AC who disclosed that she had treated claimant in a harsher manner during the prior six months to "establish boundaries" because acts of kindness shown to him by her were "taken wrong." Exhibit 2. The employer concluded that despite receiving a specific warning on March 16, 2010, claimant had continued to engage in communications with AC that violated its stated expectations and created a harassing environment for AC. Transcript at 49-50. On September 27, 2013, the employer discharged claimant, in part, for that reason. Exhibit 2; Transcript at 34.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-08128, after finding that the employer discharged claimant for "engaging in inappropriate and unprofessional interactions with a coworker", the ALJ concluded the employer discharged claimant but not for misconduct, reasoning that the employer failed to establish with credible evidence that claimant knew or should have known that his "recent" interactions with AC would probably violate the employer's expectation. Hearing Decision 14-UI-08128 at 5. We disagree because claimant acknowledged the conduct in question and it was not discovered until the employer's September investigation.

After March 16, 2010, the employer had the right to expect claimant to limit his communications with AC to those that were "professional, appropriate and of a business nature only." That expectation was reasonable in light of AC's complaint to the employer at that time and fairly communicated to claimant in writing, who acknowledged the employer's expectation by his signature. Claimant violated that expectation multiple times on November 19, 2012 when he persistently offered AC personal gifts and shared personal information about his health, both of which were unwanted, and in August 2013 when

he invited AC to dinner outside of work hours which she summarily declined. Claimant did not dispute the content of the November emails and by acknowledging within them that he was at "fault" for sending them, demonstrated he was aware that his conduct toward AC was both inappropriate and unwanted. Although claimant asserted at hearing that his August 2013 dinner invitation to AC was work related, that assertion was not credible as it was inconsistent with his explanation to the employer in September that the invitation was to accompany him to dinner "with friends" and was extended because AC appeared to be "down", rather than for work reasons. Exhibit 2. More likely than not, claimant was conscious of the fact that his personal dinner invitation was not "professional, appropriate and of a business nature only" and by extending it, demonstrated his indifference to the employer's expectation that he refrain from such behavior because of his interest in pursuing a personal relationship with AC. Claimant's conduct in both November 2012 and August 2013 constituted at least wantonly negligent violations of the employer's March 2010 disciplinary warning.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. An act is isolated only if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). As explained, claimant's conduct was not isolated and consisted of repeated acts similar to the March 2010 behavior for which he was disciplined and other wantonly negligent behavior.

Claimant's conduct was not the result of a good faith error in his understanding of the employer's expectations. Claimant acknowledged both receiving and being spoken to about the employer's warning on March 16, 2010 and by acknowledging fault for his November 2012 conduct to AC and changing his explanation of his August 2013 conduct at hearing, demonstrated that he did not sincerely believe or have a factual basis for believing his conduct was acceptable.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-08128 is set aside, as outlined above.

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

DATE of Service: <u>March 26, 2014</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 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.