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

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1032

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95022). Claimant filed a timely request for hearing. On June 3, 2014, ALJ Clink conducted a hearing, and on June 10, 2014, issued Hearing Decision 14-UI-19340, reversing the Department's decision. On June 13, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of West Linn employed claimant as a captain in its police department from June 20, 1994 until April 18, 2014.

(2) The employer expected claimant to refrain from dishonesty when supplying information to the employer or its representatives in the course of investigations. The employer also expected claimant to refrain from behavior that would reasonably be construed as suggesting that a subordinate employee was going to be retaliated against for engaging in workplace activities protected under state or federal law. Claimant was aware of the employer's expectations.

(3) Sometime in approximately late summer or early fall 2012, a police officer who was claimant's subordinate started sending a series of emails to the employer's chief of police suggesting changes to some of the employer's policies. Claimant was aware that the chief that the chief disliked the way in which the officer expressed himself in the emails and the chief was "increasingly vocally upset" about the emails. Transcript at 32. The chief thought that the officer was a member of a disaffected "clique" and for that reason discounted the content of that officer's emails. Transcript at 32. Claimant spoke with the subordinate officer "about toning down his emails" if he wanted them to be seriously

considered. Transcript at 32. Claimant also told the officer that he "had a target on his back related to the [clique], being a member of the [clique]." Transcript at 32.

(4) Shortly before November 30, 2012, the same subordinate officer showed claimant a memorandum that he intended to email to the chief on behalf of himself and other employees, who were all members of an employee union. The email stated the officer's position that certain of the employer's supervisors were requiring employees to perform work for which the employees were not compensated, which the officer thought violated the federal Fair Labor Standards Act (FLSA). After claimant read the memorandum, he did nothing to discourage the officer from sending it to the chief. Transcript at 35. On March 22, 2013, the subordinate officer filed a complaint with Oregon Employment Relations Board (ERB). That complaint alleged, in part, that claimant had tried to dissuade the officer from sending the memorandum about the FLSA violation to the chief by stating, after he had read it, that it was going to place a target on the officer's back. Exhibit 2 at 3. The employer's attorneys concluded that if claimant had made the "target on the back" comment to the officer after reading the memorandum it might constitute an unlawful employment practice.

(5) Between April 2013 and October 2013, the employer's attorney interviewed claimant several times about the facts underlying the subordinate officer's ERB complaint. Claimant repeatedly told the attorney that he had made the "target on the back" comment in summer or early fall 2013, before he saw the FLSA memorandum. Claimant consistently stated to the attorney that the "target on the back" comment was made in reference to the series of earlier emails addressing unrelated policy matters, and was not made in the context of the FLSA memorandum.

(6) On October 2 and 3, 2013 and December 4, 5 and 6, 2013, ERB held a hearing on the subordinate officer's complaint. At that hearing, claimant testified that he had made the "target on the back" comment" sometime in summer to early fall 2012 in response to the series of emails that the officer had sent to the chief about policy changes, at a time much earlier than when he had first seen the FLSA memorandum. Exhibit 2 at 7-8. Claimant testified that he did not recall telling or recommending that the officer not send the FLSA memorandum to the chief. In response to the question about whether he used the phrase "target on your back" during the conversation when he discussed the FLSA memorandum with the officer, claimant testified, "Not that I recall." Exhibit 2 at 8. Later, in claimant's hearing testimony, claimant was asked to give examples of why the chief might have "targeted" the officer and claimant mentioned several reasons, including the FLSA memorandum. Transcript at 40, 41, 46.

(7) Based on claimant's testimony at the hearing before ERB, the employer concluded that claimant had made the "target on the back" comment to the officer in specific reference to the FLSA memorandum, and that claimant had been dishonest with the employer's attorney when he stated that he had not made the comment in reference to the FLSA memorandum. On January 6, 2014, the employer placed claimant on administrative leave.

(8) On April 8, 2014, the employer discharged claimant for violating its policies by making a statement to the subordinate officer that suggested the chief was going to retaliate against him for sending the FLSA memorandum and for making dishonest statements to the employer's attorney when she was preparing the employer's case for the ERB hearing.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to the "target on the back comment," the employer appeared to contend that it constituted an unlawful employment practice, and violated the employer's policies, only if claimant made it to the subordinate officer in reference to the FLSA memorandum and not if claimant made that comment earlier in reference to the officer's emails to the chief suggesting some policy changes. Transcript at 11. Claimant did not dispute that if he had made the comment to the officer in connection with the FSLA memorandum it violated the employer's standards. It appears to us that if claimant made the "target on the back" comment in reference to the officer's memorandum asserting that the employer was violating the FLSA, such a comment might plausibly be construed as violating the anti- retaliatory provisions of FLSA, as well as being an unfair labor practice under Oregon statutes. *See* 29 US §215(a)(3); ORS 243.662, ORS 243.670(2)(a) and (b); ORS 243.672(1)(a) and (b). At the ERB hearing and at the hearing on unemployment benefits, claimant's testimony was consistent that he made the "target on the back" comment before he saw the FLSA memorandum, in the summer or early fall of 2013, and he did not make it in reference to the FLSA memorandum. Exhibit 2 at 7, 8; Transcript at 37, 38. Although the employer contended that evidence "came out" at the ERB hearing that claimant had actually made the comment in reference to the FLSA memorandum, which suggested that claimant's testimony had been disputed at that hearing, the employer did not present any direct or hearsay evidence in this hearing as to the nature of that rebuttal evidence or its reliability. Transcript at 11, 12. Absent specific evidence rebutting claimant's testimony at the hearing on unemployment benefits about the time of and context in which he made the "target on the back" comment, the employer did not meet its burden to establish that, more likely than not, claimant made that comment in reference to the FLSA memorandum.

With respect to the employer's contention that claimant was dishonest with the employer's attorney when he consistently denied that he had made the "target on the back" comment in reference to the FLSA memorandum, the employer failed, as stated above, to demonstrate that claimant actually made the comment about the FLSA memorandum. The employer contended that claimant's testimony at the ERB hearing when he stated that he did not recall making the "target on the back" comment in the context of the FLSA memorandum, was evidence of claimant's dishonesty because he had unequivocally denied to the attorney that he had made the statement about the FLSA memorandum. Transcript at 11, 17; Exhibit 2 at 8. As we parse this particular statement in claimant's ERB testimony, it was not inconsistent with the denials claimant made to the employer's attorney, and did not come close to admitting that he had made the comment to the officer about the FLSA memorandum. The employer also contended that claimant's testimony at the ERB hearing, when asked to provide reasons that the chief might have "targeted" the officer, that the FSLA memorandum was one such reason, indicated that claimant was dishonest when he denied making the "target on the back" to the officer in reference to the FLSA memorandum. Transcript at 40. However, the employer did not provide evidence of the actual question that claimant was asked at the ERB hearing or the context of the question, and, as distinct from

suggesting dishonesty, claimant might have been merely providing a complete list of possible reasons the chief might have, at any time, undertaken retaliatory actions against the officer. *See* Transcript at 41, 46. Claimant's apparent response to a question about the chief "targeting" the officer, when it was not clearly connected with claimant's "target on the back" comment to the officer, does not establish, more likely than not, that claimant made that comment about the FLSA memorandum, or that claimant was dishonest when he denied to the employer's attorneys that he had made that comment in connection with the FLSA memorandum. The employer failed to meet its burden to establish that claimant was dishonest in providing information to the employer's attorneys.

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

DECISION: Hearing Decision 14-UI-19340 is affirmed.

DATE of Service: July 23, 2014

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, 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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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