EO: 300
BYE: 201511

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1165

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83957). Claimant filed a timely request for hearing. On June 11, 2014 and June 19, 2014, ALJ Triana conducted a hearing, and on June 26, 2014 issued Hearing Decision 14-UI-20430, affirming the Department's decision. On July 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Transportation Security Administration employed claimant as a transportation security officer from March 11, 2002 until April 10, 2014.

(2) The employer expected employees to report to their supervisors any time they were arrested during their employment, including specifically citations that did not result in a custodial arrest, within 24 hours of the arrest. The employer specifically exempted routine traffic citations from this reporting requirement. The employer also expected employees to cooperate with inquiries made by supervisors, to provide truthful, accurate and complete information in response to those inquiries, and to refrain from actions that interfered with supervisors' attempts to gather truthful information from other sources during those inquiries. The employer further expected employees to refrain from unwelcome touching of coworkers. The employer published its expectations in its policies, which claimant certified annually that he had reviewed. Based on his review of the employer's policies and as a matter of common sense, claimant was aware of the employer's expectations.

(3) On February 1, 2014, claimant was arrested and was issued a citation for the crime of theft in the third degree arising from an alleged shoplifting incident. Claimant was not taken into custody when he was issued the citation. Claimant did not voluntarily report to his supervisor that he had been issued this criminal citation.

(4) February 17, 2014, was the last day at work for one of claimant's female coworkers who was leaving employment. On this day, several employees hugged the coworker as they told her goodbye. Claimant left his work area at the x-ray machine and initiated a hug with the coworker. During this hug, claimant moved his hand down from the coworker's back and touched her buttock. The coworker reacted by slapping claimant's front shoulder and pulling away from him. Two other transportation security officers in the area observed claimant placing his hand on the departing coworker's buttock and observed the coworker striking claimant's shoulder. Immediately after the incident, one of those transportation security officers who observed it asked claimant why he had put his hand on the coworker's buttock and claimant replied that it was "just a joke." Exhibit 2 at 23.

(5) On February 18, 2014, both transportation security officers who had observed claimant's interaction with the departing coworker reported the incident to the transportation security manager. The manager started an investigation. On that day, both transportation security officers provided written statements of what they had observed on February 17, 2014 and both statements corroborated that claimant had placed his hand on the coworker's buttock and, immediately thereafter, the coworker had struck claimant's shoulder and pulled away from him. Exhibit 2 at 23, 25. Employer representatives viewed the surveillance videotape from February 17, 2014 and their observations confirmed that accuracy of the transportation security officers' statements. Exhibit 2 at 37. On February 18, 2014, the transportation security manager directed claimant to prepare a written account of his interaction with the coworker on February 17, 2014. In this statement, claimant wrote that, although he was aware that witnesses had stated that he had inappropriately touched the coworker, "I claim this to be not true." Exhibit 2 at 21. Claimant further stated that, if he did "happen to touch" the coworker's buttocks, it was an "accident." Exhibit 2 at 21.

(6) On February 18, 2014, claimant contacted the female coworker with whom he had interacted on February 17, 2014. Claimant told the coworker that the employer was "making an issue" of the February 17, 2014 incident and his "job [was] on the line." Transcript of June 19, 2014 Hearing (Transcript 2) at 43, 44. Claimant asked the coworker to "protect" him by telling the employer that claimant did not touch her and nothing had happened on February 17, 2014 and that she had not been "uncomfortable" or "upset" during claimant's hug. Exhibit 2 at 20. Claimant asked the coworker not to discuss the incident further with the employer. Exhibit 2 at 20.

(7) On February 19, 2014, the transportation security manager and others interviewed claimant about the February 17, 2014 incident. During this interview, claimant denied placing his hand on the buttock of the coworker and stated "I am unaware that I did it." Exhibit 2 at 29, 30. Claimant stated he did not recall telling one of the other security officers that he had intended his behavior to be a "joke." Exhibit 2 at 29, 30. Claimant denied that the coworker had hit him on the shoulder during the time he was hugging her. Exhibit 2 at 29, 30. Claimant repeated his position that "I don't believe any contact was made." Exhibit 2 at 29. On February 20, 2014, claimant met with the transportation security manager for a pre-disciplinary discussion. During that meeting, claimant also denied that he had touched the coworker inappropriately on her buttock. Exhibit 2 at 31. At that meeting or shortly thereafter, the employer suspended claimant from employment.

(8) On March 1, 2014, the female coworker whom claimant had allegedly inappropriately touched discussed the February 17, 2014 incident with a one of claimant's current coworkers. The departed coworker stated that claimant had "squeezed" her buttocks during the hug and she had pushed him away.

Exhibit 2 at 26. The departed coworker stated that she was made "uncomfortable" by the manner in which claimant had touched her. Exhibit 2 at 26. The departed coworker stated that claimant had contacted her to ask her to report to the employer that the February 17, 2014 incident "didn't happen" and she had told claimant she "wasn't going to lie for him." Exhibit 2 at 26. The coworker also stated that she did not want to participate in the employer's investigation because she did not want her husband to learn of what claimant had done. Exhibit 2 at 26.

(9) On March 10, 2014, an investigator representing the employer interviewed claimant again about the February 17, 2014 incident with the departing coworker. During the interview, claimant stated that there was a "good possibility" that he had touched the coworker's buttock, but "I know I did not grab her butt." Exhibit 2 at 16. Claimant stated that he had intended to create "a funny situation" by making it appear like he was "going to touch [the coworker's] butt" to "make her [the coworker] laugh." Exhibit 2 at 17, 18. Claimant stated that the coworker had not struck him on the shoulder or done anything during the hug to indicate she disliked where he had placed his hand. Exhibit 2 at 16, 17. Claimant admitted that he had contacted the coworker after February 17, 2013, asked her to tell the employer that the February 17, 2014 incident did not happen and she was not made uncomfortable by it and that he had encouraged the coworker not to discuss the incident further with the employer. Exhibit 2 at 20. During this interview, the investigator learned about claimant's February 1, 2014 arrest and advised claimant that he was required to report that arrest and the citation that he had received to his supervisor. Exhibit 2 at 19, 20. On March 10, 2014, claimant reported to his supervisor that he had been issued a citation for theft in the third degree on February 1, 2014. On March 11, 2014, claimant submitted a written statement to the employer about his failure to report his February 1, 2014 arrest. Claimant stated that the citation was a "mishap" and that he thought the theft charge was going to be dismissed. Exhibit 2 at 49. Claimant did not state why he did not think he needed to report the arrest or the issuance of the citation to his supervisor.

(10) On March 27, 2014, the employer's assistant federal security director sent to claimant a memorandum notifying claimant that the employer proposed to discharge him from employment. The memorandum specified that claimant's proposed discharge was for off-duty misconduct (the February 1, 2014 shoplifting incident); failure to report that that he had been issued a citation (the February 1, 2014 citation); misconduct of a sexual nature (the February 17, 2014 incident); lack of candor (providing evasive and incomplete statements during the employer's inquiry into the February 17, 2014 incident); and interfering with an agency investigation (contacting the female coworker to persuade her to deny that the February 17, 2014 incident had occurred) Exhibit 2 at 11-16.

(11) On April 2, 2014, a court dismissed the pending criminal charge against claimant for theft in the third degree.

(12) On April 10, 2014, the deputy federal security director met with claimant and his union representative to read to them a written memorandum notifying them of the employer's decision to discharge claimant. The memorandum stated that, although the pending criminal charge against claimant had been dismissed and the employer had withdrawn its contention of off-duty misconduct, the employer had decided to discharge claimant for the other four alleged violations of its policies. Exhibit 2 at 68-73. At that meeting, the deputy director agreed to allow claimant to resign to avoid a discharge. On April 10, 2014, claimant submitted a resignation in lieu of a discharge and voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

In this case, the ALJ concluded that claimant's work separation was discharge because if claimant had not elected to resign on April 10, 2014, he would have been immediately discharged. Hearing Decision 14-UI-20430 at 3. We disagree with this characterization of the work separation. It is undisputed that the employer allowed claimant to resign before it acted to discharge claimant and to involuntarily separate him from employment. Because claimant acted first to sever the employment relationship by resigning, his work separation is properly considered a voluntary leaving. *See* OAR 471-030-0038(2) (August 3, 2011).

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4). Leaving work without good cause includes a resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). To determine whether claimant resigned to avoid a discharge for misconduct, and therefore left work without good cause and is disqualified from benefits, it must be determined whether the employer the intended to discharge 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.

With respect to the employer's contention that claimant engaged in unwanted sexual touching of the coworker on February 17, 2014, claimant agreed that he was aware of the employer's prohibition against such touching and that he would have violated that prohibition if he non-accidentally touched the coworker's buttock. Transcript 2 at 30. Claimant's testimony at hearing was that he had a "flirtatious" relationship with the coworker and that he had intended only to pretend to touch the coworker's buttocks when he hugged her. Transcript 2 at 35. Claimant further contended that the way in which he might have touched the coworker on February 17, 2014 was not an "unwanted situation." Transcript 2 at 35. The employer presented extensive written evidence, including contemporaneous statements from two witnesses, videotape observations and a contemporaneous account of the departed coworker's conversation about the February 17, 2014 incident with a current employee, all of which strongly suggested that that claimant touched the coworker's buttock intentionally. It is difficult to conceive of a situation in which a "squeeze" on a buttock would be accidental, or that an accidental, momentary brushing of a buttock would be noticed by two witnesses and reported as "placing" or "putting" a hand on the coworker's buttock. Exhibit 2 at 23, 25, 26. Although the employer's evidence was hearsay, it was entitled to significant weight given the thoroughness with which the employer compiled its investigative results, and the care and timeliness with which it documented the statements from the witnesses. In addition, while claimant contended that the coworker merely "tapped" him on the shoulder during his attempted hug of her, all of the employer's witnesses, the person who viewed the videotape evidence and the coworker herself characterized the coworker's reaction as "pushing" claimant away or "slapping," "hitting" or "striking" claimant to end the hug. Exhibit 2 at 23, 25, 26, 37. The weight of the evidence shows that, by her reaction to claimant's to claimant's touching her, and what she told an employee on March 1, 2014, the manner in which claimant touched the coworker on February 17, 2014

was unwelcome. Based on the weight of the reliable evidence, it is more likely than not that claimant knowingly touched the buttock of the coworker on February 17, 2014 when this touching was not invited by the coworker and claimant reasonably should have been aware that it violated the employer's expectations. Claimant's behavior was wantonly negligent.

With respect to the employer's contention that claimant was not candid in response to the employer's inquiries about his behavior on February 17, 2014 and did not provide complete and accurate information in his statements, claimant did not dispute that he was aware of the employer's expectation. Claimant's position appeared to be that he provided information in those statements to the best of his ability to recall. Transcript 2 at 48. The sequence of the information that claimant provided was telling evidence that, in fact, he was shading the truth as the employer's inquiry proceeded and he became aware of the possible implications of his behavior and the evidence that the employer had compiled. Claimant's first comment, made immediately after the February 17, 2014 incident and stating that the touching was a "joke," appeared to concede that he had knowingly touched the coworker's buttock. Exhibit 2 at 23. Claimant's next written and oral statements, made on February 18, 2014 and February 19, 2014, contradicted his first, casual comment and flatly denied that he had touched the coworker's buttock. Exhibit 2 at 21, 29, 30. The final statement that claimant made on March 10, 2014, after he was confronted with evidence from the videotape and the witnesses' statements and facing a discharge, conceded that he might have accidentally touched the coworker's buttock, but had not done so deliberately. Exhibit 2 at 16, 17. Based on the weight of the evidence supporting the conclusion that claimant knowingly touched the buttock of the coworker on February 17, 2014, the progression of statements from claimant, each adjusted to what he knew about the evidence the employer had gathered, can only have been made with the intention to obfuscate the extent of his culpability. More likely than not, claimant knowingly provided incomplete information to the employer during its inquiries to avoid disciplinary actions. Claimant's behavior was at least a wantonly negligent violation of the employer's expectation that he provide complete and accurate information in response to its inquiries.

With respect to the employer's contention that claimant interfered with its inquiries by trying to influence the information that the coworker provided to the employer, claimant was aware, if only as a matter of common sense, that the employer expected him to refrain from attempting to manipulate the coworker's statement. Claimant agreed at hearing that he had contacted the coworkers after February 17, 2014, told her that his job was at stake and asked her to "help [him] out in any kind of way," but did not ask her to "lie" for him. Transcript 2 at 43, 44. Claimant's testimony at hearing is inconsistent with the coworker's statement, and inconsistent with the statement claimant made to the employer on March 10, 2014, when he agreed that he asked the coworker to tell the employer that nothing had happened on February 17, 2014 and encouraged the coworker not to provide any further information to the employer during its investigation. Exhibit 2 at 20, 26. Given claimant's inconsistent evidence on the issue, it appears more likely than not, that his March 10, 2014 statement, which is corroborated by the coworker's statement, was an accurate account of what he asked the coworker to do on his behalf. By trying to influence the information that the coworker provided to the employer, claimant willfully violated the employer's expectations.

With respect to claimant's failure to voluntarily report the criminal citation that he received on February 1, 2014 to the employer, claimant contended that he did not do so because he was under the impression that the employer only required him to report arrests for which he was taken into police custody. Transcript at 29. Claimant did not explain the source of this misapprehension. The language of the

employer's policy is absolutely clear that all arrests, including citations for which an employee is not taken into custody, must be reported within 24 hours. *See* TSA Management Directive 1100.73-5(8) at http://www.tsa.gov/video/pdfs/mds/TSA_MD_1100_73-5_FINALv2_090521.pdf. Claimant reasonably should have known that the employer required him to report a citation that he received for criminal conduct. Since claimant was aware of the reporting requirement for arrests, even if he was confused about whether he needed to report a citation, he reasonably should have asked the employer if he was required to report a citation that he received and it was at least wantonly negligent for him to fail to do so. Either by failing to report the criminal citation that he received or by failing to inquire of the employer if he needed to report a criminal citation, claimant's behavior was at least a wantonly negligent violation of the employer's expectations. That claimant ultimately reported the citation on March 10, 2014, after the employer discovered that he had received it, does not excuse his initial failure to voluntarily report the citation.

At hearing claimant argued, in essence, that his violations of the employer's expectations should not be considered willful or wantonly negligent because he was taking medications that might have impaired his decision making and memory. Transcript 2 at 8, 9, 54; Exhibit 1 at 2. There is no evidence in the record, that claimant was taking these medications at the times of the relevant events or how his specific behaviors might have been affected by them. In the several statements claimant gave to the employer, and at hearing, there was no indication of claimant's inability to recall relevant events and no mention of impaired decision-making as contributing to his behavior on February 17, 2014 or at any other times. On this record, it does not appear that claimant was not at least conscious of his behavior when he acted or failed to act at the relevant times, or that he was not able to reasonably control his behavior. The evidence is insufficient to conclude that claimant's behavior when he violated the employer's explanation was not willful or wantonly negligent.

Claimant's behavior in violating the employer's expectations was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means 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)(A). In this case, claimant, in discrete acts, violated four of the employer's expectations with at least wanton negligence: by his behavior on February 17, 2014, by his failure to provide accurate information in the various statements that he made to the employer; by his attempted interference with the employer's investigation when he contacted the coworker; and by his failure to voluntarily report the February 1, 2014 citation until the employer discovered it. Since claimant's willful or wantonly negligent behavior was repeated, it was not a single act in violation of the employer's expectations and is not excusable as an isolated act of poor judgment. Nor was claimant's behavior excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that any of his wantonly negligent behaviors resulted from a misunderstanding of the employer's policies or expectations other than his failure to report that he had received the criminal citation on February 1, 2014. Claimant did not make the threshold showing that the excuse of good faith error applied to the first three violations of the employer's expectations. In light of the clarity of the employer's written policy expressing the expectation that all arrests needed to be reported, including when an employee was issued a citation, claimant's contention that he misunderstood that policy was implausible. On this record, none of claimant's behaviors was properly excusable as a good faith error.

The behaviors for which the employer intended to discharge claimant were misconduct that was not excused by any of the exculpatory provisions of OAR 471-030-0038(3)(b). Since claimant resigned to avoid a discharge for misconduct, the circumstances under which he voluntarily left work were without good cause under OAR 471-030-0038(5)(b)(F). Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-20430 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: August 5, 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 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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