EO: 200
BYE: 201515

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

303
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1166

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112110). Claimant filed a timely request for hearing. On July 1, 2014 and July 3, 2014, ALJ Seideman conducted a hearing, and on July 3, 2014 issued Hearing Decision 14-UI-20893, affirming the Department's decision. On July 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Oregon Employment Department employed claimant as an office specialist from February 1, 2002 until April 14, 2014.

(2) The employer expected claimant to communicate respectfully with his supervisors and to refrain from behavior or communications that disrupted workplace operations or misused work time.

(3) On March 29, 2012, claimant was called to a meeting with his immediate manager and the employer's area manager. At this meeting, claimant was told that he was not complying with employer's standards for appropriate, professional dress, that he had been parking his car in spaces designated for managers only, and that the language and tone of some of his communications with coworkers and managers was not respectful and was too argumentative. Exhibit 29. Claimant was not issued any disciplinary sanctions as a result of this meeting. Shortly after the meeting, claimant complained to several managers that he thought he had been counseled as a pretext for his manager's and the area manager's discriminatory bias due to his Mexican heritage. On April 12, 2012, one of the employer's human resources analysts came to the workplace to discuss the allegations of discrimination that claimant had made. Claimant was not satisfied with that discussion.

(4) On April 13, 2012, claimant sent a very lengthy email to the employer's director alleging that the policy violations discussed at the March 29, 2012 meeting evidenced discriminatory application of those policies to him. Exhibit 31 at 1. Claimant asked the director to initiate an investigation of his managers' practices. Exhibit 31 at 1, 3. On April 17, 2012, the director notified claimant that she had assigned a manager from the employer's human resources office to investigate claimant's allegations of discriminatory treatment. Exhibit 31 at 1. On April 24, 2012, claimant sent a long email to the assigned human resources manager questioning his immediate manager's abilities to perform his duties, complaining about his manager's alleged failure to give him copies of his personnel file, and requesting very detailed information about the parking policy and the dress code policy violations that were discussed at the March 29, 2013 meeting. Exhibit 32 at 1-2. That same day, the human resources manager sent claimant an email stating that, although he understood claimant had received copies of his entire personnel file, he would arrange for that file to be brought to claimant's workplace. Exhibit 32 at 3. On April 30, 2014, the human resources manager gave claimant a note excusing him from any discipline if he parked in a reserved parking space. Exhibit 33 at 1. On May 17, 2012, the human resources manager sent claimant a letter informing him that, after investigation, his allegations of discrimination were not substantiated. Exhibit 30 at 1. The letter stated that claimant had been allowed to review his personnel file on April 30, 2012 and that, based on claimant's complaints, some of the reserved parking spaces had been opened for general use. Exhibit 30 at 1.

(5) After May 17, 2012, claimant continued to still send emails to his immediate manager about the March 29, 2012 meeting and the alleged policy violations that had been discussed at it. On June 29, 2012, the employer issued a letter of reprimand to claimant for the volume of emails and the work time he was devoting to communicating about issues from the March 29, 2012 meeting after the employer had determined that claimant's managers had not treated him in discriminatory ways. The reprimand stated that claimant's emails were unprofessional and disrespectful in tone and included "abrasive comments" directed to his managers. Exhibit 1 at 2. The reprimand advised claimant that he "must not create or send lengthy emails regarding [his] personal views and needs on state time" and that he must not communicate in a "demanding and demeaning [] tone." Exhibit 1 at 2.

(6) On September 13, 2012, over five months after the March 29, 2012 meeting, claimant submitted a formal complaint to the employer's office of human resources alleging again that the March 29, 2012 parking violation resulted from his managers' discriminatory enforcement of the employer's policies. Exhibit 27 at 1. On September 16, 2012, claimant submitted another complaint to the employer's human resources office alleging that his March 29, 2012 violation of the employer's policy on appropriate dress resulted from his managers' discriminatory enforcement of the employer's policies. Exhibit 27 at 1. On September 24, 2012, claimant sent an email to his immediate manager and the area manager asking for, among other things, a detailed explanation of the authority under which reserved parking spots had been in place on March 29, 2012 and the cost to the employer to remove the reserved parking designations from the parking spaces. Exhibit 21 at 2. On September 24 and 25, 2014, claimant submitted two more complaints to the office of human resources alleging that he was denied career development opportunities in retaliation for the complaints he had filed with the human resources office. On September 27, 2012, both of claimant's managers responded to claimant's September 24, 2012 email and provided the requested information. Exhibit 21 at 1. On October 4, 2012, claimant's immediate supervisor, the area manager and several representatives from the employer's human resources office met with claimant to again address his claims of discriminatory treatment arising from the March 29, 2012 meeting and to explain why, during that meeting, he had been counseled about appropriate dress

standards, parking standards and excessive, repeated communications about the same issues. The employer's representatives also tried to reassure claimant that he had been able to copy his entire personnel file. Exhibit 19 at 1-6. On October 8, 2012, claimant submitted another complaint to the office of human resources alleging that, by eliminating the signs reserving certain parking spaces for managers in response to claimant's complaint, the employer had tampered with evidence that was part of an active discrimination investigation. Exhibit 27 at 2.

(7) On October 24, 2012, one of the employer's human resources analysts sent a letter to claimant informing him that her investigation had revealed no evidence of discrimination against claimant based on the circumstances described in the September 13, 2012, September 16, 2012 and October 8, 2012 complaints. Exhibit 27 at 1-3. On November 25, 2012, a human resources analyst sent a letter to claimant notifying him that, after investigation, there was no evidence of retaliation or harassment in the employer's denial of his requests for career advancement opportunities. Exhibit 12 at 1.

(8) In November and December 2012, claimant submitted approximately seven more complaints to the employer's human resources office based on the March 29, 2012 meeting. Exhibit 13 at 1. These complaints included one alleging workplace violence and another alleging claimant's public humiliation arising from that meeting. Exhibit 13 at 2. Claimant continued to send emails to his immediate manager about the March 29, 2012 meeting. On December 3, 2012, the employer sanctioned claimant with a disciplinary salary reduction for his continued practice of sending repeated, lengthy emails either addressing the March 29, 2012 meeting or with the apparent purpose only of expressing personal commentary about the employer. Exhibit 1 at 2. The letter imposing the salary reduction used the same language that had been included in the June 29, 2012 reprimand and prohibited claimant from communicating in "unprofessional," "disrespectful," "abrasive" or "demeaning" ways or "creat[ing] or send[ing] lengthy emails regarding [his] personal views and needs on state time. Exhibit 1 at 2.

(9) On December 4, 2012, claimant's immediate manager met with claimant to explain, among other things, the employer's expectations about appropriate communications and its prohibition against lengthy emails. In an email response to claimant, the manager confirmed that the word length of the email was a factor in determining whether an email was "lengthy" as well as was unprofessional content expressing his views. Exhibit 18 at 1. The manager clarified that the prohibition against "lengthy" emails included not only viewing each email in isolation, but extended to include an email chain with numerous replies when claimant was not satisfied with the resolution or answer reached. Exhibit 18 at 1. Claimant's manager told him that they would meet in person to discuss questions that were not answered after two email replies rather than continuing an unproductive email exchange. Exhibit 18 at 1. In reply, claimant thanked his manager for the explanation and did not ask for further clarification. Exhibit 18 at 1.

(10) On December 31, 2012, the employer's human resources analyst who had received the twelve complaints claimant had filed in the past four months and had responded to six of them, notified claimant that she was not going to investigate or process any further complaints from him based on the March 29, 2012 meeting. Exhibit 13 at 1-2. The letter advised claimant that investigating the many repeated complaints he had filed based on the same facts was "an inappropriate use of state resources." Exhibit 13 at 2. The letter also advised claimant that if he filed any future complaints arising from the March 29, 2012 meeting, he was subject to disciplinary actions. Exhibit 13 at 2.

(11) On September 24 and 25, 2013, claimant filed complaints with the employer's human resources office alleging that, since 2007, his managers had impeded his career development and advancement opportunities in retaliation and as harassment for certain information requests he had made about career development, his position description and his performance appraisals. Exhibit 12 at 1. After claimant filed these complaints, he submitted numerous specific follow-up questions that he wanted the human resources office to answer. Exhibit 12 at 1. On November 25, 2013, the human resources analyst assigned to investigate claimant's complaint, sent claimant a letter notifying him that she had determined that, although claimant had not received annual performance appraisals, position descriptions or individual career development plans, there was no evidence of retaliation or harassment. The human resources analyst informed claimant that the employer was in the process of correcting its failure to act annually. Exhibit 12 at 1. The human resources analyst enclosed a "resolutions list" with the letter answering the supplemental questions claimant had submitted to the office of human resources. Exhibit 12 at 1-2.

(12) On February 5, 2014, claimant sent an email to his immediate manager requesting copies of his complete personnel file in the employer's possession, including "local, supervisor [and] working" files, within five days. Exhibit 7 at 6. Due to bad weather and office closures, the employer did not give claimant copies of his personnel file until February 14, 2014. Claimant was present and witnessed the human resources analyst copying his personnel file on February 14, 2014. On February 14, 2014 at 3:25 p.m., claimant sent a two page email to his immediate manager which copied other managers and human resources analysts. When claimant sent this email, he was not on any break. Exhibit 10 at 1, 2. Claimant explained in great detail why he thought that he had not received a copy of his complete personnel file. Claimant's basic objections were that he did not make the file copies himself, had not been in a physical position to observe that all pages from the file were copied, was not given the opportunity to make a side-by-side comparison of the copied material with the material in the actual personnel file and that his coworkers were within a range of "4 to 50 feet" of the copy machine which might have allowed them to overhear any discussion he had with the analyst about his file when it was copied. Exhibit 9 at 1. Claimant also contended that the employer had "compromised" his "local" personnel file because did not receive a copy of that component of his overall personnel file and requested a second review of his complete personnel file. Exhibit 9 at 2.

(13) On February 19, 2014 at 8:44 a.m., one of the employer's human resources analysts sent an email to claimant confirming that claimant had received copies of his entire official personnel file, including the supervisory file in which the "local file" was kept. Exhibit 7 at 4-5. On February 19, 2014 at 8:45 a.m., claimant's supervisor sent claimant an email also informing him that, while in the past, there had been a separate "local file" the contents of the local file were now maintained in the supervisory file and claimant had received copies of his complete file. Exhibit 14 at 1.

(14) On February 19, 2014 at 4:53 p.m., claimant replied to both his manager's and the human resources analyst's emails of earlier in the day and stated his disagreement that he had received copies of his complete personnel file and further stated that he was going to file a complaint with the human resources office for failing to protect the privacy of his personnel records when the analyst had made copies of his file in the workplace. Exhibit 7 at 4. Claimant was not on a break when he sent this email. Exhibit 4 at 1, 2. In claimant's response, claimant stated that, although he thought the analyst was a "nice person and a good person" against whom he "harbor[ed] no ill will, latent to overt, or otherwise," he had concluded that:

> All appearances and expectations that I will ever be humanely treated as an OED employee are gone. I only expect to be treated as sub-human while I am an employee at the WPSME. I am a [sic] American of Mexican descent. I realize my brown skin, my distinct non-European, Indian features, and accent don't always win points in the WPSME or the agency and allow me to blend in non-descriptively. But it is who I am thankfully because of my mother and my lineage. I have only expectations to be hated by my management and this agency for the remainder of time I am at the Oregon Employment Department. **** Then again, as a sub-human at the Oregon Employment Department and employee at the WorkSource Portland Metro East, I don't have any need for privacy, confidentiality, nor expectation my personal information needs to be controlled in any meaningful manner.

Exhibit 7 at 4. On February 20, 2014 at 12:50 p.m., claimant responded to his manager's email from the day before about having received copies of his "local file" on February 14, 2014. Exhibit 14 at 1. In that email claimant listed eight in depth questions that he wanted his manager to answer about the "migration" of the local file to the supervisory file and whether that migration was supported by a "standardized" policy. Exhibit 14 at 1. On February 20, 2014 at 4:46 p.m., the human resources analyst responded to claimant's email and proposed to schedule a meeting to discuss the statements that claimant had made in that email that implied he thought he had been discriminated against because of his Mexican heritage. Exhibit 7 at 3.

(15) On February 21, 2014 at 10:05 a.m., claimant responded to the analyst's email and included as copied recipients several of the employer's managers and a representative from the governor's office whom he contended had "awareness and prior knowledge" of the bases for the statements he made in his February 19, 2014 email. Exhibit 7 at 2. Claimant sent this email immediately before he left on a break. Exhibit 6 at 1, 2. In his response, claimant asserted that, since December 2012, he had been placed under an "administrative gag order" prohibiting him from any communicating about any "sensitive matters or events" that occurred in the workplace. Exhibit 7 at 2. Claimant stated that he had "operated under a cloud of fear" as a consequence of the "gag order" and that:

> I have been treated and continue to be treated as a sub-human at the WorkSource Portland Metro East. I have been reduced to being treated no better than an animal. There is no place anywhere in state government, much less, the Oregon Employment Department for any employee to be treated in this manner. I no longer view myself as an employee nor [sic] a human being at the WorkSource Portland East. I am an animal and have been treated inhumanely, accordingly, by agency management and the Office of Human Resources. **** I am at a loss to explain how a state agency would allow one of their employees to be reduced to the status of sub-human and animal level.

Exhibit 7 at 3. Claimant agreed to meet with the analyst and demanded to be allowed to communicate his concerns on any matter he chose to directly to the employer's director and deputy director.

(16) On February 24, 2014 at 3:40 p.m., the analyst replied to claimant's email and included as recipients all of the individuals that claimant had copied in his email. The analyst stated that there was no "gag order" preventing claimant from communicating his concerns to the employer's management, including

the director, and attached a copy of the December 31, 2012 letter that had prohibited claimant from filing further complaints with the employer's office of human resources that arose from the March 29, 2012 meeting. Exhibit 7 at 2. The analyst set a meeting time on February 28, 2014 to discuss claimant's new allegations of discrimination.

(17) On February 24, 2014 at 4:46 p.m., claimant responded to the analyst's email message from an hour earlier. Exhibit 7 at 1. Claimant contended that the December 31, 2012 letter was a "directive" that did not allow him to discuss the "horrific" and "egregious" events that occurred in 2012, presumably the events surrounding the March 29, 2012 meeting. Exhibit 7 at 1. Claimant then continued:

> I am further saddened the chronic conditions that I have experienced that allow for an OED employee to be treated like an animal will persist. I know that the agency has determined that I am nothing more than an animal and will continue to be treated accordingly. Americans of Mexican descent have no place at the Oregon Employment Department. I, like many of my people, will continue to hold 2nd tier status at the Oregon Employment Department. I know my place.

Exhibit 7 at 1.

(18) On February 25, 2014 at 3:55 p.m., claimant sent another email responding to the analyst's email of February 24, 2014 to which the letter dated December 31, 2012 was attached. Claimant included as recipients the individuals listed in his initial email. Claimant listed six detailed bullet points communicating his position that the "public release" of the December 31, 2012 letter, apparently to the copied recipients that the analyst had included in her response, was "highly inappropriate, damaging to my personal character, emotionally distressful, insensitive, an undue source of workplace disruption and another concrete example of how I am not, and have not been treated respectfully, professionally, and humanely by the agency." Exhibit 8 at 1. Claimant continued:

> The past record of the agency mishandling my personal information from 4/2012 thru [sic] 2/19/2014, in combination with the unauthorized public release of my highly sensitive information by the agency on 2/24/2014 only reinforces my perception that I am not a person deserving of respect, entitled to due process, nor should I harbor future expectations to be treated with dignity or with any normal expectation for basic humane treatment by the agency.

Exhibit 8 at 1. Claimant ended the email by demanding an "audience" with the agency director and deputy director to discuss the events surrounding the March 29, 2012 meeting. Exhibit 8 at 1.

(19) On February 26, 2013, claimant filed another complaint with the employer's human resources office. In that complaint, claimant contended that the human resources analyst had released confidential information about him when, on February 24, 2014, she attached the December 31, 2012 letter to her response to claimant and copied all the recipients that claimant had included on his initial email that characterized the December 31, 2012 letter as "gag order." Exhibit 11 at 1. After investigation, the human resources office determined that there was no confidentiality violation because claimant had included those recipients in his initial email referring to his interpretation of the December 31, 2012 letter as a "gag order," all of the recipients except one had right to view allegedly confidential

information about claimant by virtue of their job positions in the employer's human resources office, in claimant's supervisory chain, or as claimant's union representative, and claimant had stated in his initial email that the one recipient who fell outside that group had prior knowledge of the allegedly confidential information. Exhibit 11 at 1-2.

(20) On March 14, 2014, the employer held a fact-finding meeting with claimant to address the employer's view that claimant had violated its expectations by the length, repetition and unprofessional language of the emails that he had exchanged with management during February 2014, and that he had drafted or sent the emails during work time. Exhibit 2 at 2. At that meeting, claimant denied that any of those emails used unprofessional language, were intended merely as vehicles to express his personal views or were lengthy. Exhibit 2 at 3.

(21) On March 19, 2014, claimant filed a complaint with the employer's office of human resources contending that information was missing from his personnel file when its contents had been copied for him on February 14, 2014. Claimant submitted several documents and statements in support of his claim. Exhibit 17 at 1. The employer's human resources office investigated this complaint and determined that claimant had received copies of all documents in his personnel file. Exhibit 17 at 1.

(22) On March 27, 2014, claimant filed a complaint with the employer's office of human resources contending that he was physically and sexually assaulted in the workplace on March 21, 2014 when a coworker entered his work area and touched him on the shoulder. Exhibit 16 at 1. On April 7, 2014, the human resources analyst assigned to claimant's complaint sent claimant a letter stating that there was no evidence that claimant had been touched in sexual way or sexually assaulted. Exhibit 16 at 1.

(23) On April 8, 2014, the employer convened a pre-dismissal meeting with claimant. Exhibit 1 at 2. Claimant stated at that meeting at that meeting that he had not violated any of the employer's policies. Exhibit 1 at 2. On April 14, 2014, the employer discharged claimant for sending lengthy emails on work time during February 2014 that contained unprofessional communications and expressed personal views.

CONCLUSIONS AND REASONS: 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. The employer has 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).

We have taken care to prepare detailed findings of fact that set out, to the extent possible, the context in which the employer stated its expectations to claimant about prohibited communications. A cursory review of the findings shows that, over the final two years of his employment, claimant was literally

indefatigable in generating volumes of paper to protest what he contended was wrongful treatment. Given this unrelenting backdrop, it was reasonable for the employer to become concerned about claimant's use of work time to draft and send diatribes, and the misuse of its resources in responding to claimant's repetitive complaints based on the same events it had already investigated as well as claimant's repeated requests for exhaustive information from his supervisors. It was reasonable for the employer to try to rein claimant in and to prohibit him from continuing to send communications that were lengthy, unprofessional personal commentaries and were created or sent during work time. Although claimant contended at hearing that he did not understand what the employer prohibited by the language of the reprimands and warnings that he was given on June 29, 2012, December 3, 2012 and December 31, 2012, the issue, at bottom, is whether the emails that claimant sent during February 2014 were prohibited under all reasonable interpretation of the employer's prohibition. Transcript at 15-19, 21-28.

From the quoted language in the emails that claimant sent to the employer's representatives on February 19, 2014, February 21, 2014, February 24, 2014 and February 25, 2014, it can only be concluded that the emails were, in principal part, intended to serve as platform for a sarcastic, rhetorical and insulting personal attack on the employer. The language was overblown and inescapably interpreted as inflammatory. We can discern no legitimate purpose from the use of such language. Rather, it appears to have been part of an unflagging rant against the employer after the employer had taken pains to investigate claimant's previous allegations. If claimant's aim was merely to express that he was dissatisfied with his opportunity to review his personnel file on February 14, 2014, he reasonably would have used more neutral and business-like language. Based on the reprimands and warnings that claimant had previously received, the use such apparently provocative language in February 2014 emails violated all reasonable interpretations of the employer's prohibitions against the use of unprofessional language in email communications. Since claimant consciously chose and styled the language that he used, claimant's behavior in expressing himself was at least a wantonly negligent violation of the employer's standards.

Claimant took the position at hearing that the language used in the emails could not reasonably be interpreted as violating the employer's prohibition against the expression of "personal views" because he ultimately filed human resources complaints based on the items allegedly missing from his personnel file and a breach of confidentiality in copying the contents of that file and, thus, the emails were generated or sent in the conduct of official business. Transcript at 27. However, claimant was not discharged for raising issues about the personnel file, but for the language that he consciously chose to characterize and attribute his displeasure with the employer's handling of those issues. That claimant ultimately filed complaints based on issues with his personnel file does not immunize him from complying with the employer's expectations on communicating professionally and respectfully. In addition, at hearing, claimant did not dispute that he drafted or sent the February 19, 2014, February 21, 2014, February 24, 2014 and February 25, 2014 emails on work time rather than when he was on a break. The employer presented evidence that claimant sent the first two of these emails when he was on work time, and from the late afternoon time that they were sent, we infer that claimant likely sent the final two of the cited emails while he was not on break but on active work time. Moreover, since the emails were lengthy and generated in response to emails claimant had received shortly before, we also infer that at least part of the text of most of them was likely drafted during claimant's work time. By the language in which he expressed himself and when he drafted or sent the emails of February 19, 21, 24

and 25, 2014, claimant with at least wanton negligence violated the employer's expectations as communicated to him on June 29, 2012 and December 3, 2012.

Claimant's behavior in sending the emails of February 19, 21, 24 and 25, 2014 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 sent four emails on four separate days in February 2014 that violated the employer's stated standards with at least wanton negligence. Because claimant's behavior at issue was not isolated, it cannot be excused as an instance of poor judgment. Nor is claimant's behavior in sending the February 2014 emails excused as a good faith error under OAR 471-030-0038(3)(b). Based on the number of warnings claimant received about his communications, and the fact that claimant's emails were far beyond any reasonable definition of professional communications, it is not plausible that a mistaken interpretation or understanding of the employer's standards contributed to the manner in which he expressed himself in the February 2014 emails.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-20893 is affirmed.

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

DATE of Service: <u>September 10, 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 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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