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

413
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1401

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135309). Claimant filed a timely request for hearing. On August 4, 2014, ALJ Seideman conducted a hearing, and on August 7, 2014 issued Hearing Decision 14-UI-23018, affirming the Department's decision. On August 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that did not present new information. EAB considered claimant's written argument when reaching this decision.

The employer submitted a written argument which presented new information in its narrative and enclosed documents that were not presented at the hearing. The employer did not attempt to explain why it did offer this new information or these new documents at the hearing, and it otherwise failed to show, as required under OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider those parts of the employer's written argument that contained new information when reaching this decision.

FINDINGS OF FACT: (1) CenterCal Properties, LLC employed claimant as a maintenance technician from January 28, 2013 until May 8, 2014. The employer was a retail real estate developer.

(2) The employer expected claimant to conduct his personal affairs in a manner that did not adversely affect the employer. The employer also expected claimant to observe the "highest standards of professionalism at all times." Audio at ~11:26. Claimant was aware of these expectations as he reasonably interpreted them.

(3) On April 11, 2014, claimant posted to his Facebook page the statement, "Another one bites the dust," referring to the recent bankruptcy filing of one of the employer's tenants. Audio at ~12:50. In response to others' comments to his posting, claimant further commented, "I only care [about the bankruptcy

filing] because I don't want to paint the damn windows." Audio at ~13:10. The majority of claimant's "friends" on Facebook were claimant's coworkers.

(4) On April 17, 2014, claimant met with his manager to discuss issues of concern to him, including workplace gossip that was ongoing about him. The manager did not give claimant a warning about statements or comments that he had made on social media sites, including Facebook.

(5) On May 2, 2014, claimant was dissatisfied with certain of the employer's behavior in the workplace. That day, claimant posted to his Facebook page, "[Employer]'s mission statement: What have you done for us lately?" Audio at ~13:48. Claimant intended to "vent" his frustration, principally to the coworkers who were also his Facebook "friends," about the employer's workplace behavior. Transcript at ~18:37. Several of claimant's coworkers expressed that they were in agreement with claimant's posting or "liked" it. Audio at ~18:37.

(6) Sometime before May 8, 2014, the employer learned that claimant had posted a statement about it on Facebook on May 2, 2014. On May 8, 2014, the employer discharged claimant for making a "derogatory" comment about the employer in his May 2, 2014 post on Facebook.

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).

In Hearing Decision 14-UI-23028, the ALJ concluded that the posting that claimant made to Facebook on May 2, 2014 was a willful violation of the employer's standards. Hearing Decision 14-UI-23028 at 3. The ALJ based this conclusion on his finding that, before claimant made the posting, claimant's supervisor had warned him "on a couple of occasions" about posting negative statements about the employer on social media sites and had "told him to not do it anymore." Hearing Decision 14-UI-23028 at 2, 3. The ALJ also rejected claimant's argument that the May 2, 2014 posting was protected activity under the National Labor Relations Act (NLRA), reasoning that the NLRA only protected employee communications relating to a labor disputes. Hearing Decision 14-UI-23028 at 3. We disagree.

The first and dispositive issue in this case is whether claimant was reasonably on notice that the employer prohibited him from making references to the employer similar to that in his May 2, 2014 Facebook posting. The assertion of the employer's witness that this prohibition was apparent from the employer's policy that prohibited personal conduct that "adversely affected" the employer and from its policy requiring employees to observe "the highest standards of professionalism at all times" is not compelling. Audio at ~11:26. These broad policies, while they might be subjectively interpreted to prohibit all manner of comments that the employer disliked, do not clearly or objectively inform an employee of the specific behaviors that they prohibit. An employer may not reasonably expect an employee to conform the employee's behavior to standards that are vague, dependent on circumstances,

or susceptible to interpretation. The employer's policies, viewed alone, were insufficient to reasonably inform claimant that his May 2, 2014 Facebook posting was contrary to the employer's standards and were an insufficient ground on which to base a conclusion that claimant engaged in misconduct. The employer's witness further asserted that, because that claimant's manager had directed him on two occasions before May 2, 2014 to "correct his negative attitude," claimant should have been reasonably aware that a Facebook posting that might be interpreted to reflect negatively on the employer was prohibited behavior. Audio at ~10:23, ~14:27. Although claimant disputed that he received any such warnings from his manager, even if we accept the testimony of the employer's witness as accurate, it is not at all apparent that from such a warning claimant would necessarily and reasonably have inferred that a cryptic, mildly critical posting about the employer on a social media site was part and parcel of the "negative attitude" he had been directed to correct. Audio at ~16:24, ~17:51. In addition, despite the ALJ's findings, there was, in fact, absolutely no evidence in the record that the employer ever told claimant to stop making negative comments about or references to the employer on any social media sites, or that any of the employer's policies, under all objective and reasonable interpretations, prohibited the Facebook posting claimant made on May 2, 2014. Hearing Decision 14-UI-23028 at 2, 3. Because the employer failed to demonstrate, more likely than not, that claimant violated an expectation of which he was at least reasonably aware, the employer did not meet its burden to show that claimant engaged in willful or wantonly negligent misconduct.

It further appears that claimant's May 2, 2014 Facebook posting might have been protected activity under the NLRA for which the employer's discharge of him was an unfair labor practice. *See* 29 USC §§157, 158. The NLRA protects both unionized and non-unionized employees from discharge for a communication if the employee's communication is undertaken as a "concerted activity," or at least in part for the purpose of bringing matters of workplace concern to the attention of other employees and to induce group action. *See* O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 Or Law Rev 337 (2014). The National Labor Relations Board (NLRB) has interpreted NLRA protections to apply to an employee's communications to other employees made through social media sites, including Facebook, when the communication addresses employment conditions. *Id.*; *Hispanics United of Buffalo, Inc.* 359 NLRB No. 37 (December 14, 2012) (Facebook message making unflattering comments about supervisor, intended for and responded to by other employees, when employee intended to raise concerns about supervisor later with employer, was protected); *Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (April 19, 2013) (Facebook message in which unflattering comments made about employer and a supervisor in the course of expressing a concern about working conditions, when message was intended to be read by other employees, was protected). The ALJ's interpretation of the NLRA to extend protections only during "labor disputes" was incorrect. Hearing Decision 14-UI-23028 at 3. Because claimant presented unrebutted testimony that he made the May 2, 2014 posting to communicate to other employees his complaints about working conditions similar to those that they had experienced, it appears that his May 2, 2014 posting was arguably a "concerted activity" within the meaning of 29 USC §157 and, if so, the employer's discharge of him for that communication was an unfair labor practice under 29 USC §158. However, we do not further consider this issue because we have already decided this case in claimant's favor under OAR 471-030-0038(3)(a).

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

DECISION: Hearing Decision 14-UI-23028 is set aside, as outlined above.

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

DATE of Service: <u>September 26, 2014</u>

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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