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

422
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1919

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but nor for misconduct (decision # 153734). The employer filed a timely request for hearing. On November 28, 2014, ALJ Shoemake conducted a hearing, and on December 5, 2014, issued Hearing Decision 14-UI-29936, concluding that the employer discharged claimant for misconduct. On December 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Goodwill Industries of Columbia Willamette employed claimant from September 22, 2005 to September 22, 2014, last as a production associate.

(2) The employer's policy prohibited employees from making or publishing false, vicious or malicious statements about any supervisor, employee, or participant in the employer's program. Claimant knew and understood this policy because she received a copy of it during her orientation in 2005. The employer maintains a hotline, a toll free number that employees can and are expected to use to report any concerns or problems in the workplace; claimant was aware of the employer's hotline.

(3) At some time prior to claimant's discharge, the employer concluded that employees in the store where claimant worked were gossiping inappropriately and excessively. The employer's intervention specialist conducted three meetings with the employees at this store in which he told employees that they should not discuss problems with other employees among themselves; instead, they should directly report any such concerns to supervisors or the employer's hotline. Transcript at 9.

(3) On September 11, 2014, claimant's coworker asked claimant if he could become a Facebook friend with one of the employer's supervisors. Claimant said she did not have the answer to that question, but would get back to the coworker with a response. During their conversation, claimant learned that an employee had posted pictures of program participants on Facebook, and that one of the employer's supervisors knew about these pictures. Claimant believed the pictures had been posted without the participants' permission in violation of the employer's policy, and that the supervisor should have taken action to remove the pictures from the social media website.

(4) On September 12, 2014, claimant and the coworker's wife exchanged texts regarding the participants' pictures on Facebook. In the first text she sent, claimant told the coworker's wife to have her husband read the text, explained it was against the employer's policy to post participants' pictures without their permission, and stated that the supervisor knew about it but did not correct the situation or report it. (Claimant sent the text to the coworker's wife because she did not have the coworker's telephone number). Transcript at 51. In subsequent texts, claimant and the coworker's wife discussed to whom the coworker's wife should report the Facebook postings. Claimant initially told the coworker's wife to talk to a supervisor, but then decided it would be better if she called the employer's hotline. Claimant told the coworker's wife that when she called the hotline, "be sure to mention [supervisor] knows that way he gets his talkin [sic] to also." Exhibit 2; Transcript at 55.

(5) The coworker's wife talked with a supervisor about the pictures that had been posted on Facebook, and the supervisor arranged to have the pictures removed.

(6) On September 17, 2014, the employer suspended claimant for gossiping with the coworker's wife about the pictures posted on Facebook.

(7) The employer investigated the incident involving the Facebook pictures. During this investigation, claimant told the employer's intervention specialist that her role in the incident was to direct a coworker to report her concerns to the appropriate supervisors. The intervention specialist concluded that claimant had not been truthful about her actions. Transcript at 8.

(8) On September 23, 2014, the employer discharged claimant for violating its policy and expectations on September 12, 2014 by discussing another employee's behavior with a coworker rather than reporting the concern to a supervisor, for manipulating a coworker to create difficulties in the workplace, and for materially misrepresenting her actions on September 12 incident.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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. 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 carries the burden to establish a claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976).

Claimant's discharge resulted from a September 11, 2014 discussion claimant had with a coworker. During this discussion, claimant learned that an employee had posted pictures of participants in the employer's program on a social media site. Claimant believed these pictures had been posted without the participants' consent, in violation of the employer's policy, and also believed that one of the employer's supervisors knew about the pictures but had done nothing about them. On September 12, 2014, claimant sent texts to the coworker's wife, urging the coworker to report the inappropriate posting of the pictures, and telling the coworker's wife to mention the supervisor who knew about the pictures.

The employer discharged claimant because it concluded that claimant willfully violated its expectations by: discussing another employee with a coworker rather than directly reporting the problem to a supervisor, attempting to get another employee in trouble, and subsequently lying about these actions. We disagree, and conclude that the employer failed to meet its burden to establish that claimant engaged in misconduct.

The employer's policy prohibited employees from making false, vicious, or malicious statements about fellow employees, supervisors, or participants in the employer's program. The employer expected that employees would refrain from talking about other employees among themselves and would, instead, report their concerns directly to a supervisor or the employer's hotline. Claimant knew about the employer's policy, because she received a copy of it at orientation, and knew about the employer's expectations, because she attended three meetings at which the employer's manager explained these expectations. We conclude, however, that claimant did not violate these policies in the text messages she sent on September 12, 2014.

In her text messages, claimant directed her coworker to appropriately resolve the problem regarding the pictures on the social media website by reporting it to a supervisor or the employer's hotline.[1] We find nothing in these text messages that could reasonably be considered as false or malicious; claimant sincerely believed the employer's policy had been violated and wanted her coworker to report this violation. The only name claimant mentioned in her text messages was that of a supervisor; claimant mentioned the name because she considered it part of the policy violation she wanted her coworker to bring to the attention of a supervisor or the employer's hotline. Claimant did not directly report the purported violation of the employer's policy because she had no direct knowledge of the pictures at issue – her coworker and his wife, but not claimant, had viewed the website. Transcript at 23 and 27.

[1] The In Hearing Decision 14-UI-29936, the ALJ concluded that claimant engaged in misconduct by directing her coworkers "to bypass their supervisor and make a complaint to corporate about an individual posting pictures on a social networking site." Hearing Decision 14-UI-29936 at 5. We disagree. At the hearing, the employer acknowledged that the employer's hotline was a legitimate method for employees to report workplace concerns. Transcript at 29.

We conclude that by telling a coworker to report concerns about a possible breach of the employer's policy, claimant did not violate the employer's expectations that employees refrain from discussing other employees among themselves and report any concerns through the appropriate channels.

The employer contended, however, that claimant's interest in advising her coworker to report the pictures posted on social media was not to correct a possible policy violation, but to create difficulties for other employees and to get at least one other employee – the supervisor who knew about the pictures -- in trouble. Exhibit 2. As proof of claimant's intent, the employer noted claimant's statement that the coworker's wife should report the supervisor's failure to take any action in regard to the pictures so the supervisor would get his "talkin [sic] to." We conclude, however, that the employer did not meet its burden to demonstrate that claimant made this statement with the intent of creating trouble for the supervisor. Claimant testified that she neither wanted nor intended to create problems for the supervisor; according to claimant, her only motive in sending the September 12 text messages was to have her coworkers report what they saw because claimant believed the supervisor should have removed the pictures from the website. Transcript at 31. Other than the statement claimant made about the supervisor, the only other evidence the employer presented of claimant's intent were the opinions of the employer's intervention specialist and the supervisor to whom the coworker's wife reported the problem with the pictures.[2] We find claimant's testimony under oath more persuasive than the opinions expressed by the employer's witnesses, and conclude that the employer failed to meet its burden to show that the statements claimant made in her September 12 text messages constituted a deliberate attempt to create difficulties for another employee.

Based on our conclusion that claimant's September 12 text messages were not an attempt to create problems for a coworker, we also conclude that claimant did not materially misrepresent her actions. Claimant's statement during the investigation of the incident that resulted in her discharge -- that her role was to urge her coworkers to report a possible violation of the employer's policy – was not untruthful.

For the foregoing reasons, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 14-UI-29936 is set aside, as outlined above.

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

DATE of Service: <u>February 6, 2015</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

[2] At the hearing, the supervisor to whom the coworker's wife reported the problem with the pictures admitted that the written statement she made during the investigation – that claimant was interested in getting a coworker in trouble and not interested in correcting any issue raised by the pictures – was based solely on the supervisor's opinion and her knowledge of claimant and the coworker's wife. Transcript at 60 – 61.

"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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