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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0145

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95405). Claimant filed a timely request for hearing. On January 27, 2015, ALJ Shoemake conducted a hearing at which the employer did not appear, and on January 30, 2015 issued Hearing Decision 15-UI-32465, affirming the Department's decision. On February 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which presented information about claimant's background, his need for unemployment benefits and the employer's alleged history of unfair labor practices. None of this information was relevant to the events that precipitated claimant's discharge and EAB did not consider it. *See* OAR 471-041-0090(2)(a) (October 26, 2006). EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Expert Janitorial LLC employed as a district manager claimant from April 28, 2014 until December 3, 2014. The employer was a company that supplied janitorial services for cleaning the premises of various large retail store clients. Claimant was responsible for supervising janitorial crews and cleaning crew subcontractors to ensure that the work they performed was adequate.

(2) Before December 2, 2014, the employer had not issued any disciplinary warnings to claimant. On December 2, 2014, claimant's supervisor, the regional manager, gave claimant a warning, principally because he had expressed disagreement with particular store director's comments about his alleged failure to adequately instruct the janitorial crew assigned to that store and he had told the director that he did not appreciate the director's questioning his honesty. The issued warning instructed claimant not to "argue" with store directors. Audio at ~12:53.

(3) Sometime before December 1, 2014 the employer had arranged with a subcontractor to wax the floors of a client's store in Roseburg. The waxing was scheduled to begin on the night of December 1, 2014 and to take four nights of work or until December 4, 2014. The client agreed that to have its

employees move a great deal of equipment from the store's floors in preparation for the waxing. Sometime before December 1, 2014, claimant spoke with the client's store director and told her that the waxing crew would be at the store to begin the waxing as scheduled. The subcontractor's waxing crew drove five or six hours to reach the Roseburg store and when it arrived on the night of December 1, 2014 no equipment was moved from the floors of the client's store. The waxing crew left and did not perform any work because the floors were not cleared. By December 2, 2014, the store director had arranged for the removal of the equipment from the floors. However, the waxing crew did not arrive to wax the store's floors beginning on December 2, 2014.

(4) On December 3, 2014, claimant and the employer's regional manager travelled to Roseburg to perform a walk-through of the client's store and to discuss with the store director any concerns that she had with the work performed by the employer's cleaning crews. When they arrived at the Roseburg store, the store director met them. She was very angry. Her voice was raised as she addressed the men in the main aisle of the store in front of customers and store employees. The store director shouted at claimant that the waxing crew had not arrived to work as he had promised her. Claimant tried to explain to her that the waxing crew had reported to work on the night of December 1, 2014, but could not perform the waxing because the store equipment had not been moved. The store director's anger escalated, she talked over claimant and started to blame the waxing crew for failing to begin the waxing. Claimant tried to stop her so he could explain, but was unable to do so. When the store director continued to blame the waxing crew, claimant commented, "Yeah, just like the propane." Audio at ~21:01. Claimant was referring to a previous episode when the store director had blamed a waxing crew for not buffing the floors of the store, when the crew could not buff the floors because the store had neglected to purchase the propane it had agreed to supply to power the buffing machines. Claimant made the comment to point out that, as with the propane, the store was partially responsible for the inability of the waxing crew to perform its work because the store had not removed the equipment from its floors by the night that the store director had agreed. After claimant made the comment about the propane, the store director became "super, super mad." Audio at ~ 21:14. The store director yelled at claimant, "I'm so done with you. Get out of my store." Audio at ~21:00. Claimant left the store while the employer's regional manager continued to try to speak with the store director. Claimant re-entered the store to see if he might calm the store manager down. When the store manager saw claimant in the store she said told him, "You need to get out of the store." Audio at ~21:23. Claimant again left the store.

(5) Later in the day on December 3, 2014, while in their car, claimant heard the regional manager talking to the employer's vice president about the incident in the Roseburg store. On December 3, 2014, the regional manager told claimant that the vice-president had decided that he was discharged.

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 15-UI-32645, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant was aware that he was expected not to engage in argumentative behavior based on the warning that he received on December 2, 2014. Hearing Decision 15-UI-32645 at 3. The ALJ characterized the comment that claimant made to the store director on December 3, 2014 about the incident involving propane as "sarcastic" reference, and further concluded that by "choos[ing] to make a sarcastic comment to her [the store director] about a previous incident," when he knew the store director was already angry at him, claimant violated with wanton negligence the employer's expectation that he refrain from arguing with store directors. Hearing Decision 15-UI-32645 at 3. We disagree.

At the outset, the employer did not appear at hearing and did not provide any evidence to rebut claimant's testimony about the interaction with the store director on December 3, 2014. To the extent that claimant was able to describe the employer's expectation that he thought the vice-president might have concluded that he violated on December 3, 2014, it was a vague directive to refrain from "arguing" with store managers. Audio at ~9:25, ~12:53. While an employer may reasonably expect a claimant to conform to objective behavioral standards when working, an employer cannot reasonably require a claimant to conform to behavioral standards that are nuanced, vague, dependent on circumstances or susceptible to interpretation. Therefore the evaluation of whether what claimant said to the store director on December 3, 2014 was misconduct centers on a determination of whether there are no circumstances under which claimant's comment would not violate the employer's prohibition against arguing with store directors.

In general, the word "argue," as commonly understood when it refers to spoken interactions among people, means to express a view in disagreement to that of the other participant(s) in the conversation in a heated and upset way that invites escalated responses. http://www.merriamwebster.com/dictionary/argue; http://.google.com/#q=definition-of-argue. While the ALJ is correct that claimant's comment about the "propane" incident might be considered sarcastic and intended to incite an even more angry or inflammatory response from the store director, it could also be considered, as claimant suggested was his intent, a relatively benign short-hand reference to a situation in which the store was at least partially responsible for the failure of the waxing crew to perform its work and to enable claimant to make the point that the shortcomings of the waxing crew were not the sole cause of the situation that gave rise to the store director's response. Audio at ~23:05, ~23:26, ~23:40, ~24:00, ~24:32, ~26:52, ~27:43. Claimant's testimony that he did not provoke the store director's initial anger towards him, that he did not yell or speak in an elevated voice to the store director during the incident and that he actually was able to say very little to the store director in light of her anger was not contradicted by any evidence in the record. Audio at ~21:23. Because there was no evidence was presented to rebut claimant's testimony about his intentions and what he said and did not say, and the single comment, "Yeah, like the propane," is susceptible of a non-argumentative interpretation, there is not sufficient evidence in the record to support the ALJ's conclusion that the comment violated all reasonable definitions of the employer's standards prohibiting him from "arguing" with store managers. Accordingly, there is insufficient evidence to conclude that the employer discharged claimant for misconduct.

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

DECISION: Hearing Decision 15-UI-32645 is set aside, as outlined above.

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

DATE of Service: March 30, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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