

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0578

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153547). The employer filed a timely request for hearing. On April 29, 2015, ALJ Triana conducted a hearing, and on May 1, 2015 issued Hearing Decision 15-UI-37855, concluding claimant's discharge was for misconduct. On May 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant alleged the ALJ erred by admitting documents the employer submitted after the hearing into evidence. Oregon law allows the ALJ to admit documents not provided prior to the hearing into evidence. *See* ORS 657.270(2) (permitting the ALJ to continue the hearing upon request by a party to allow parties to receive and respond to documents); OAR 471-040-0025 (setting forth the evidentiary rules for unemployment insurance hearings, without requiring the ALJ to exclude evidence not received prior to the hearing). It is also notable that the ALJ held the record open to allow claimant to object to her receipt of those materials into evidence. The ALJ did not err with respect to the employer's documentary evidence. EAB considered claimant's remaining arguments when reaching this decision.¹

FINDINGS OF FACT: (1) Robert Half Corporation employed claimant from November 24, 2013 to February 12, 2015. The employer is a temporary agency. The employer assigned claimant to work as a customer service representative for its client, Cover Oregon.

(2) In approximately March 2014, one of claimant's subordinates reported to the claimant's supervisor that claimant had repeatedly asked her out despite her refusal to date him. The supervisor told claimant to be courteous and respectful with all employees.

¹ EAB exercised its discretion to allow an extension of the written argument deadline to June 15, 2015. OAR 471-041-0080(4) (October 29, 2006).

(3) Within a couple months of that incident, claimant brought food to the office to reward his coworkers for their work the previous week, and remarked to a coworker who had been absent the previous week that she had not earned the food item and was only entitled to eat the frosting. Claimant intended the remark as a joke, but the employee felt offended and complained. Claimant's supervisor again spoke with claimant about his behavior with coworkers.

(4) Claimant and a coworker, Yulia, dated from approximately November 2014 through January 2015. Following the end of their relationship, Yulia expressed the hope that she and claimant could remain friends, but also told claimant she did not want claimant to contact her anymore. Yulia subsequently sent claimant emails and made phone calls in which she made comments about claimant's deceased wife that upset and offended claimant.

(5) On February 3, 2015, claimant sent an email to Yulia's work account that stated:

Got knows the whole truth __ And he knows what you did with me....and if you don't understand that and you use Gods grace to forgive you...then you are evil going into Gods house...when you post your bible verses and gospel music think of the lies you emailed and text me and the filth that came out if [*sic*] your mouth...pray for that my Russian beauty...but God will forgive you right²

On the morning of February 11, 2015, claimant sent an email to Yulia's work account referencing Yulia and her off-duty behavior that stated:

WHOS [*sic*] THE FUCKING STUPID PERSON hahaha at least you fucked a model³

(6) On February 11, 2015, Yulia reported claimant's emails to her supervisor at Cover Oregon. Cover Oregon investigated, and, on February 12, 2015, requested that the employer discharge claimant from the assignment. On February 12, 2015, the employer did so.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship is deemed severed at the time that a work assignment ends. OAR 471-030-0038(1)(a) (August 3, 2011). Claimant's work assignment ended on February 12, 2015. Therefore, and regardless whether the employer has or will continue to provide claimant with temporary assignments after that date, the employment relationship is deemed severed as of February 12, 2015 for purposes of determining whether claimant is subject to disqualification from unemployment insurance benefits.

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) 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

² See Exhibit 2.

³ *Id.*

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 had the right to expect claimant to treat his coworkers at Cover Oregon with courtesy and respect. Claimant knew or should have known that expectation based on conversations his supervisor had with him about his interaction with one or more other employees, and based on ordinary common sense about workplace behavior. On February 3 and February 11, claimant violated that expectation by sending a coworker discourteous and disrespectful emails in which he referred to her as "evil" and a "fucking stupid person." Even if claimant felt the coworker incited him to make discourteous and disrespectful comments to retaliate against her for her offensive comments about his deceased wife, claimant's violation of the employer's expectation was willful.

Claimant's behavior cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d) provides that an isolated instance of poor judgment is a single or infrequent occurrence in the employment relationship rather than a repeated act or other pattern of willful or wantonly negligent behavior. Each decision to act or not to act is considered a separate judgment. In this case, claimant exercised poor judgment on two occasions a week apart when he deliberately sent each email to his coworker. Each email was the result of a separate process of discernment and comparison by claimant. Accordingly, his conduct was not a single or infrequent exercise of poor judgment, but was instead a repeated act or pattern of willful conduct.

Claimant's emails cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant testified that he did not think he was violating an expectation by sending the two emails at issue. In support, he alluded to some cocktail recipe emails someone else sent to him. However, claimant did not establish that cocktail recipe emails gave him a reasonable basis for concluding that Cover Oregon had a culture whereby it was commonplace for employees to send emails calling each other "fucking stupid" or "evil," such that he formed a sincere and founded belief that Cover Oregon would condone his behavior or consider it acceptable. Claimant was not acting out of a sincere but mistaken belief the employer would condone his conduct when he sent those emails to his coworker, and, therefore, was not acting in good faith.

The employer showed by a preponderance of the evidence that it discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-37855 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: July 2, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.