

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0683

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 15, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112225). Claimant filed a timely request for hearing. On May 15, 2015, ALJ Triana conducted a hearing, and on May 22, 2015 issued Hearing Decision 15-UI-38968, affirming the Department's decision. On June 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Because no party filed an objection to the admission of Exhibit 1 into the hearing record within the time period set out in Hearing Decision 15-UI-38968, Exhibit 1 remains a part of the record.

FINDINGS OF FACT: (1) Greystar Management Services, LP employed claimant as a service technician in its maintenance department from August 9, 2010 until March 11, 2015. The employer managed the operations of rental properties.

(2) The employer expected claimant to refrain from threatening other employees. Claimant understood the employer's expectations as a matter of common sense.

(3) In approximately February 2013, claimant sustained an injury in the workplace. Claimant was off from work as a result of this injury until approximately February 2014. After claimant returned to work, he perceived that he was treated differently in the workplace than before. On May 3, 2014, the employer issued a verbal warning to claimant for not completing his work in a timely and efficient manner. Exhibit 1 at 8. The warning stated that a follow-up meeting would be held on May 28, 2014 to assess claimant's progress in more promptly completing his work. Claimant disagreed with the warning. The employer never held the follow up meeting. On December 12, 2014, the employer issued a second verbal warning to claimant for inadequate work performance and failure to manage his time efficiently. Exhibit 1 at 11. Claimant disagreed with this warning. Claimant began to suspect that his supervisor and others in the employer's management were creating a record to discharge him.

(4) On February 20, 2015, the employer issued a written warning to claimant for failing to perform his work adequately and in a timely manner from January 1, 2015 to February 18, 2015. The warning stated, among other things, that claimant had been assigned the task of cleaning an apartment on December 31, 2014 and had reported in writing on January 3, 2015 that he had completed all the cleaning work. The employer attached date stamped photographs from January 3, 2015 to the warning allegedly showing that the apartment was not clean after claimant's report represented that it was. Exhibit 1 at 11. When claimant received the warning, he told the employer representative who gave it to him that the photographs attached to the warning did not accurately depict the condition of the apartment as he had left it, and that he thought that the photographs were falsified, either because they were not of the apartment in question or because the date stamp on them was altered. Despite the representative's assurances, claimant continued to insist that the photographs were not genuine. Claimant became convinced that his supervisor and the employer's other managers were going to great lengths "trying to get rid of" him. Transcript at 40-41. Claimant thought that the employer representative was not listening to him.

(5) Shortly after claimant received the February 20, 2015 warning, claimant called the employer's director of employee relations to tell her he thought that the warning was not merited, that the photographs attached to the warning were falsified and that that he was being "targeted" in preparation for his eventual discharge. Transcript at 17. The director told claimant she wanted to set up a meeting with him, herself, the service supervisor and claimant's supervisor, the community manager. The director told claimant that she wanted him to speak with these members of management to improve their communications with him and to allow him to more readily "accept" those communications. Transcript at 17.

(6) On February 25, 2015, the meeting set up by the director of employee relations was held. The meeting lasted approximately one and one-half hours. Claimant continued to focus on the photographs attached to the February 20, 2015 warning and adamantly insisted that they were falsified. The service supervisor who had taken the photographs with his cell phone told claimant that they and the date stamps on them were accurate. Claimant still insisted otherwise. The director of employee relations told claimant that he could not prove the photographs were falsified and, rather than debating the authenticity of the photographs, the purpose of the meeting was for him to "move forward" and to ensure that his supervisors adequately communicated their expectations to him and he understood them. Transcript at 18.

(7) On March 4, 2015, claimant and the service supervisor encountered each other in the workplace. At that time, claimant told the service supervisor that he had been trying to figure out how he had falsified the date stamps on the photographs accompanying the February 20, 2015 warning and that he had recently learned from internet sites "that it was not hard to do." Transcript at 29. Claimant commented to the service supervisor that it was "sad" that the supervisor would go to such lengths to try to discharge him and that the supervisor would "lie" about the authenticity of the photographs attached to the warning. Exhibit 1 at 4. Claimant also told the service supervisor that he "wanted to set [the supervisor's] mind at ease," and he assured the supervisor that, although he knew the supervisor lived on the property, he "would not be taking any actions against [the supervisor] or [the supervisor's] family" because he was a "Christian" and "that is not the kind of person [he] was." Transcript at 29; Exhibit 1 at 5. The service supervisor did not perceive claimant's statement as a threat, did not think claimant meant

to indirectly imply an intention to harm him or his family and thought claimant had actually intended only to reassure him that he would not take any retaliatory steps as a result of the warning he believed was falsified. Transcript at 30. The service supervisor informed the real property manager of what claimant had said to him that day because he thought claimant's statement and apparent fixation on the falsification of the photographs was "bizarre." Exhibit 1 at 5.

(8) On March 11, 2015, the employer discharged claimant for making threatening comments to the service supervisor on March 4, 2015.

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. 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 show 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-38968, the ALJ concluded that the comments that claimant made to the service supervisor were a wantonly negligent violation of the employer's standards against making threatening statements in the workplace. The ALJ based this conclusion on her belief that claimant's comments that day were "bizarre" and, although claimant might in fact have intended to reassure the service supervisor that he was not going to retaliate against him, "a reasonable and prudent person would understand those statements were or reasonably could be perceived as a veiled threat." Hearing Decision 15-UI-38968 at 4. We disagree.

The comments that claimant made to the service supervisor were not threatening on their face, and did not announce an intention to do anything at all, let alone harm, the service supervisor or his family. In fact, the comments were prefaced by claimant's statement that he "wanted to set [the supervisor's] mind at ease" about any retaliatory intention. Transcript at 29. Claimant affirmatively testified that he did not intend his comments as threats and wanted only to reassure the service supervisor that he "forgave" him and was not going to take any action against him. Transcript at 29, 43, 44, 62, 63. The non-threatening nature of claimant's comments, as well as their underlying subtext, was substantially corroborated by the service supervisor's failure to perceive them as threats and the supervisor's belief that claimant meant only what he said and nothing more, *i.e.*, in the event the supervisor had any apprehensions about claimant's future behavior, claimant was not going to retaliate. Transcript at 30. That the employer also did not perceive claimant's comments as actually threatening is supported by the week that the employer allowed claimant to continue working after the service supervisor reported his comments and before the employer discharged him, when the employer would reasonably have been expected to take much more prompt disciplinary action if it thought claimant's comments were actual threats. While the ALJ concluded that a hypothetically reasonable person could construe claimant's facially innocuous

comments as “veiled threat[s],” her conclusion is not credibly supported by the circumstances surrounding those comments, including that claimant had no history of physical outbursts or physically aggressive, threatening or harmful behavior. The ALJ’s conclusion also did not rule out that a reasonable person in the same circumstances could construe claimant’s comments as non-threatening, especially given the facts of this case. Unless no reasonable person would construe claimant’s comments other than as threats or “veiled threats” under the circumstances in which they were made, it is not appropriate to infer that they were a wantonly negligent violation of the employer’s standards.

Although claimant’s comments may have been unusual, and perhaps were not well thought out, the employer did not demonstrate that they were threats or reasonably would be construed as such. Because the employer discharged claimant for allegedly threatening the service supervisor, it did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-38968 is set aside, as outlined above.

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

DATE of Service: July 31, 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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