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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-0759

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 165327). The employer filed a timely request for hearing. On June 15, 2015, ALJ R. Davis conducted a hearing, and on June 19, 2015, issued Hearing Decision 15-UI-40390, concluding the employer discharged claimant for misconduct. On June 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

On July 28, 2015, claimant submitted to EAB a supplemental written argument and request for punitive damages in support of his Application for Review dated June 23, 2015. We construe claimant's submission as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows that it was material and the party was prevented by factors or circumstances beyond its reasonable control from presenting it at the hearing. The request for punitive damages is not material to our review or decision because the board is without jurisdiction to consider such a claim. Moreover, on June 23, 2015, EAB mailed to claimant its notice of receipt of his application for review with a copy of the administrative rule that allows parties to submit written argument as long as it is received by EAB within 20 days from the date of mailing of EAB's notice of receipt. Because claimant's supplemental written argument was neither material nor received within the time allowed, it was not considered.[1]

[1] Claimant's assertion, without more, that he did not receive EAB's Notice of Receipt along with the referenced rule is not sufficient to overcome the presumption of receipt set forth in OAR 137-003-0520 (9)("Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary.")

FINDINGS OF FACT: (1) Daniel Snyder Attorney at Law employed claimant as a legal assistant from August 4, 2014 to April 10, 2015.

(2) The employer had written policies that prohibited employees from engaging in various forms of harassment, including sexual harassment, as well as dishonesty regarding work-related activities. Exhibit 2. Claimant received a copy of the employer's handbook that contained its policies at hire and was aware of the employer's expectations.

(3) The employer shared office space with other attorneys and utilized a common receptionist employed by another law firm. Claimant often interacted with the receptionist and occasionally covered for her when she was away from the reception area. They often teased and joked with each other and occasionally served as each other's "emotional support" regarding relationship issues with their own partners. Transcript at 37. Claimant often responded "as you wish" or "yes dear" to requests by the receptionist to which she did not object, and the receptionist told claimant she preferred the term "darling" which she stated meant "my favorite minion" in Scottish. Transcript at 8, 15, 37, 49; Exhibit 1, I. On one occasion, the receptionist exclaimed "Fuck!" in exasperation while trying to locate a client file on a computer drive. Transcript at 11. Claimant, who was nearby, immediately responded, "No thanks. Not here. Not now" "as a joke" to calm her down. Transcript at 49. The receptionist did not appear to take offense to the remark as she did not criticize claimant for making it, report it or any other conduct to her or claimant's employer, and continued to address claimant as "darling." Transcript at 48-49.

(4) On March 9, 2015, the receptionist made a comment to claimant to which he responded, "as you wish." She then flicked a disposable antiseptic towel at him that struck him in the eye, causing him to moan in pain, for which she apologized. That afternoon, claimant's employer asked claimant what had happened with the receptionist and claimant reported her conduct, attributing it to horseplay. The employer sent the receptionist's employer an email describing her actions and requesting that she be careful in the future. On March 11, her employer responded that she had flicked the towel at claimant in frustration because he had stated "as you wish" and "darling" to her, which she found offensive. That day, claimant's employer met with him, accused him of sexual harassment of the receptionist, and inquired if he had ever asked her out or discussed sex with her, all of which claimant denied. The employer warned him that any future use of a term of endearment or conduct that could be construed as sexual in nature would result in his termination.

(5) On April 2 and 7, 2015, claimant sought medical treatment for his eye injury and a worker's compensation claim was filed.

(6) On April 8, the receptionist prepared a lengthy email for her employer regarding the March 9 incident, and also reported that prior to that date, she had objected to claimant calling her "darling", responding "as you wish" to her statements and joking about dating her. She also reported that in response to her exclamation "Fuck", claimant had stated, "What, you, me, here, now?" which she found offensive. The receptionist's employer forwarded the email to claimant's employer.

(7) On April 10, 2015, the employer discharged claimant for sexual harassment of the receptionist and lying to the employer about his prior conduct toward her based on the receptionist's April 8 email.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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.

As a preliminary matter, claimant's first-hand testimony in response to the receptionist's email report substantially differed from her hearsay accounts of their interactions prior to March 11, 2015. In the absence of persuasive evidence demonstrating claimant was not a credible witness, his testimony under oath was at least as credible as the employer' s evidence, which based substantially on hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion -- here, the employer -- has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

In Hearing Decision 15-UI-40390, after finding that the employer discharged claimant for his "harassing behavior" toward the receptionist prior to March 9 based on her April 8 email, the ALJ concluded claimant was discharged for misconduct, reasoning,

> Claimant acknowledged harassing the receptionist in a writing sent to the employer because "she made such a big deal about it." Claimant knew or should have known that his conduct would be a violation of the employer's policy or expectations.

Hearing Decision 15-UI-40390 at 2, 3. However, we disagree that claimant "acknowledged harassing the receptionist" in writing or that the record shows he knew or should have known that his conduct prior to March 11 violated the employer's sexual harassment policy.

The employer discharged claimant for "sexual harassment" of the receptionist prior to March 9, and "lying" about it on March 11, all based on the receptionist's April 8 email. However, claimant consistently asserted in both his April 13 response to the employer and at hearing that he did not consider his conduct toward the receptionist to be sexual harassment, but rather innocent teasing or joking which he asserted was mutual. Exhibit 1, K. The complete text of claimant's written statement the ALJ partially quoted in his decision reads as follows: "[The receptionist] was fun to tease because she made such a big deal about it; she also dished out as much back." Exhibit 1, K at 3. Claimant went on to state, "Those words 'as you wish' and 'yes dear' were part of my normal conversational modus operandi. To hear that [the receptionist] chose to accuse me of sexual harassment with those words is shocking to me." Exhibit 1, K at 3.

At hearing, the employer stated the conduct described in the receptionist's email that caused him to terminate claimant's employment was claimant's reported response to the word "Fuck!" the receptionist

exclaimed while trying to locate a client file on a computer drive. Transcript at 11. She reported that claimant's response was, "what, you, me, here, now?" which she considered "extremely inappropriate." Exhibit 1, at 1. However, claimant asserted that he responded, "No thanks. Not here. Not now" which he intended as a joke to calm her down, that his remark was "innocent" and that she did not act offended by it afterward as she did not criticize him for making the statement and continued to address him as "darling." Transcript at 48-49. The evidence on this issue is in dispute and the receptionist did not testify at hearing, even though, according to the employer, she "would have been available." Transcript at 72.

Claimant's testimony was consistent with his April 13 response to the employer, and the ALJ did not explicitly find that claimant was not credible.[2] The receptionist's April 8 email to her employer and the employer's testimony were its principal evidence of claimant's reported sexual harassment of the receptionist, and because the person who was the source of that evidence did not testify at hearing, claimant was denied the critical opportunity to question her regarding her observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from the receptionist to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that his first-hand testimony is not outweighed by the employer's hearsay. Accordingly, the evidence as to whether claimant consciously harassed the office receptionist on the basis of sex prior to March 9, and later lied about it was, at best, equally balanced, and the ALJ's finding that claimant consciously harassed the receptionist is not supported by substantial evidence.[3]

In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to meet its burden here. Claimant was discharged, but not for misconduct under ORS 657.176 and he is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-40390 is set aside, as outlined above.[4]

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

DATE of Service: <u>August 13, 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

[2] *See*, ORS 657.275 (2)(EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to implied credibility findings).

[3] *See, Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

[4] 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.

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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