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BYE: 201608

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-0978

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133213). Claimant filed a timely request for hearing. On April 29, 2015, ALJ Seideman conducted a hearing, and on May 5, 2015, issued Hearing Decision 15-UI-37922, affirming the Department's decision. On May 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On July 16, 2015, EAB issued Appeals Board Decision 2015-EAB-0557, reversing Hearing Decision 15-UI-37922 and remanding the case to the Office of Administrative Hearings (OAH) for additional information. On July 23, 2015, ALJ Vincent conducted a second hearing, at which the employer failed to appear, and on July 31, 2015, issued Hearing Decision 15-UI-42434, adopting Hearing Decision 15-UI-37922 and affirming the Department's decision. On August 18, 2015, claimant filed an application for review of Hearing Decision 15-UI-42434 with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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 hearings when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Bert's Beverage Shoppe Inc. employed claimant as a general clerk from January 18, 2010 to March 4, 2015.

(2) On or about March 1, 2015, a female coworker of claimant reportedly told the employer's owner that claimant had made sexual advances and innuendos toward her and another coworker that made her feel "violated." Transcript at 5. Shortly thereafter, the owner told claimant about the allegations of the coworker and claimant explained that he had made sexual comments to her in jest on one occasion three to four months earlier in response to sexual comments she had made to him. He denied making such

statements to anyone else. The owner told claimant that he intended to conduct an investigation. That day, claimant sent a text message to the coworker, whom he drove to and from work every Tuesday night, to tell "the whole truth" to the owner. Transcript at 18.

(3) On March 3, 2015, the coworker told the owner about claimant's text message to her. On March 4, 2015, the owner discharged claimant for contacting the coworker before he finished his investigation and because he could not trust him not to engage in sexual harassment.

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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's owner asserted that claimant's female coworker told him that claimant had made statements of a sexual nature to her and engaged in other conduct that made her uncomfortable, and that on March 3, 2015, he informed claimant he would investigate and directed him to not contact the coworker, which directive claimant violated. Transcript at 5-10. Claimant asserted that any statements he made to the coworker were made in jest three to four months prior to his discharge in response to comments his female coworker made to him, otherwise denied his coworker's allegations and asserted the employer never directed him to not contact the coworker. Transcript at 11-15, 18. In Hearing Decision 15-UI-37922, after finding that claimant disobeyed the owner's directive to not contact his female coworker by sending her a text message to "tell the truth", the ALJ concluded, without analysis, that claimant's text message violated the employer's directive and could not be excused as an isolated instance of poor judgment:

> The next question is whether they were an isolated instance of poor judgment. They were not. There were many over a period of time…

Hearing Decision 15-UI-37922 at 3-4. We disagree and conclude the employer failed to meet its burden to establish misconduct under ORS 657.176(2)(a).

Although claimant and the owner differed on whether the owner directed claimant to not contact the coworker while he conducted an investigation, they did not disagree that claimant sent a single text to

her to "tell the whole story." Transcript at 7. With regard to the employer's allegations of sexual harassment toward that coworker and another, the record fails to show whether the employer had a policy prohibiting sexual harassment or what it may have consisted of, and if so, whether the employer ever notified claimant of the policy. The record also fails to show whether the employer ever questioned any coworker about if or when claimant made sexual comments to them or that he ever questioned the first coworker about claimant's assertion that any sexual comments or actions between them had been mutual and made in jest. This was particularly important because the allegations against claimant were based largely on written hearsay statements from the first female coworker and another employee, each prepared after claimant was discharged and read into the record but never provided to claimant. Transcript at 18-27. Viewing the record as a whole, there seems to be no reason to believe the employer's witness over claimant, leaving the evidence regarding whether claimant violated a no contact order, or made sexually suggestive comments to his coworkers in violation of employer expectations at best, equally balanced. Where the evidence is equally balanced, the party with the burden of production, here the employer, has failed to establish with substantial evidence that a claimant violated separate employer expectations; much less that he did so willfully or with wanton negligence.[1]

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-42434 is set aside, as outlined above.[2]

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>September 22, 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 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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[1] *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).

[2] This decision reverses a hearing decision that denied benefits. Please note that if any payment of any benefits is owed, it may take from several days to two weeks for the Department to complete.