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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1251

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81317). Claimant filed a timely request for hearing. On October 9, 2015, ALJ S. Lee conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46068, affirming the Department's decision. On October 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Blue Star Gas Associates employed claimant from December 12, 2012 to August 25, 2015. Claimant lived in Springfield, Oregon and worked for the employer as a local salesperson at its Eugene, Oregon office.

(2) The employer had written policy prohibiting sexual harassment in the workplace. The policy stated, in relevant part, that federal and state laws other than California law defined sexual harassment as unwanted sexual advances, requests for sexual favors or verbal contact of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating hostile or offensive working environment. The policy further stated, in relevant part, that California law defined sexual harassment as unwanted verbal conduct of a sexual nature, including unwanted sexual advances or derogatory epithets, slurs, sexually explicit jokes or comments about an individual's body or dress, verbal sexual advances or propositions, verbal abuse of a sexual nature, graphic verbal compliments about an individual's body, or sexually degrading words to describe an individual. Claimant was aware of the employer's policy and understood he was prohibited from engaging in unwanted verbal contact or conduct of a sexual nature with other employees.

(3) On or about August 10, 2015, claimant was assigned to ride along with a new female employee while she learned to drive the employer's "bobtail" truck. Exhibit 1. During the first ride-along, the employee told claimant "there were no bounds in any of their discussions," that she had been raised in a "biker environment," and that "nothing [claimant] could say was going to bother her." Audio Record at 22:00-22:30. The employee also nicknamed claimant "BJ," which claimant interpreted as a joke of a sexual nature. Audio Record at 22:30.

(4) Claimant rode along with the employee for the following two weeks, and they often teased each other during that time. On one occasion, the employee asked claimant why the employer had hired her, given her lack of driving experience. Claimant replied that she was hired for "two good reasons," which the employee interpreted as a reference to her breasts. Audio record at 23:15-23:30. The employee did not appear or indicate to claimant that she was offended. On another occasion, claimant jokingly referred to the employee as a "slutty little girl." Exhibit 1. The employee did not appear or indicate to claimant that she was offended. On another occasion, claimant and the employee were discussing her divorce, and claimant joked that the employee turned her husband "gay." Exhibit 1. The employee did not appear or indicate to claimant that she was offended. Claimant believed he and the employee were "getting along very well, like brother and sister, poking fun at one another." Audio Record at 35:00.

(5) On August 21, 2015, the employee called to claimant as he was leaving work for the day, and claimant joked, "Look, unless this about sexual favors, I've got to go." Audio Record at 24:30. The employee did not appear or indicate to claimant that she was offended, and wished claimant a "great weekend." Audio Record at 24:45.

(6) On August 24, 2015, the employee quit work, citing claimant's behavior toward her as her reason for quitting. The employer discharged claimant for violating its sexual harassment policy.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-46068, the ALJ found that although claimant intended his comment to the female employee on August 21, 2015 as a joke, the employee was offended by the statement.[1] Based on that finding, the ALJ concluded that although claimant did not intend to sexually harass or offend the employee, his comment was willful or wantonly negligent "harassing statement" that could not be excused as a good faith error.[2]

However, the record shows that claimant understood from the employer's policy and as a matter of common sense only that he was prohibited from engaging in *unwanted* verbal contact or conduct of a sexual nature with other employees. The record further shows that claimant did not know, and had no reason to know, that the female employee found his comments offensive. The record therefore fails to show that claimant consciously engaged in conduct he knew or should have known violated the employer's expectations as he understood them, or that he was indifferent to the consequences of his actions. Absent such a showing, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence, and that his conduct was not the result of a good faith error in his understanding of those expectations.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>November 12, 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] Hearing Decision 15-UI-46068 at 2.

[2] *Id*. at 3-4.