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

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# EMPLOYMENT APPEALS BOARD DECISION
# 2015-EAB-1372

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On September 10, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 140446). Claimant filed a timely request for hearing. On October 27, 2015, ALJ Frank conducted a hearing, and on October 30, 2015 issued Hearing Decision 15-UI-46878, affirming the Department's decision. On November 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented information that it did not present during the hearing. The employer did not explain why it did not offer this information during the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present in its argument. EAB considered only evidence admitted into the record when reaching this decision.

**FINDINGS OF FACT:** (1) Ride Connection, Inc. employed claimant as a travel navigator from June 5, 2015 until July 27, 2015. As a navigator, claimant responded to calls from customers in the employer's customer service center.

(2) The employer expected claimant to refrain from harassing his coworkers or engaging in behavior intended to cause them discomfort. Claimant understood the employer's expectations.

(3) Claimant's performance during the period in which he was being trained did not please the employer. By late June 2015, the employees training claimant thought that he was inattentive during training sessions and viewed his cell phone when he should have been focusing on the sessions. The trainers noted that claimant was easily frustrated and overwhelmed when handling customer calls, complained about customers and, on one occasion, walked out of a training session. The trainers also thought claimant was sometimes rude to his coworkers, gave incorrect information in response to

customer inquiries and sometimes spent too long on particular customer calls. In late June or early July 2015, the employer issued a performance improvement plan to claimant to improve his performance in handling calls.

(4) On July 26, 2015, claimant brought his same-sex husband with him to work. Claimant and a coworker who was also in the workplace began a conversation. Claimant and the coworker often talked in the workplace about non-work related matters and they had friended each other on the social media site Facebook. In the conversation, claimant mentioned that he might divorce his husband and that he would then be "with" the coworker. Audio at ~37:20. Claimant also discussed domestic abuse issues with the coworker and asked the coworker if her boyfriend had ever hit her. Claimant then stated that his husband would never hit him, but "I wish he would hit me." Audio at ~36:57. Claimant's coworker never told claimant that the topics he was discussing that day made her uncomfortable, and she had never previously told claimant at any time that any matters he had spoken about with her caused her to experience discomfort. In the past, the coworker had been involved in an abusive relationship and thought that claimant might have been trying to "trigger" a reaction from her by the topics he discussed that day. Audio at ~39:25. However, the coworker also "pretty much" thought that claimant was "joking" with her "for the most part" during their conversation. Audio at ~37:25.

(5) On July 27, 2015, the coworker reported to her supervisor that that topics that claimant discussed with her the previous day had made her "uncomfortable." Audio at ~37:30, ~39:53. Later that day, the employer met with claimant, handed him a document and told him that he was required to sign it and resign. Audio at ~34:07. Claimant did so. On July 27, 2015, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for misconduct.

The first issue is the nature of work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Because claimant submitted a resignation, the first issue is whether the work separation is properly characterized as a voluntary leaving. Both parties either referred to the separation as a discharge or presented evidence as if it was. Audio at ~13:04, ~17:27, ~34:20; Employer's Written Argument at 1. There is no evidence in the record that claimant was not willing to continue working for the employer for an additional period of time when the separation occurred. The weight of the evidence shows that as of July 27, 2015 the employer was unwilling to allow claimant to continue working. That the employer demanded that claimant immediately sign a resignation, which he did, appears to have been decided on by the employer as a means to achieve its goal of involuntarily severing its work relationship with claimant. Although claimant signed the resignation, the separation was a discharge on July 27, 2015.

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

disregard of an employer's interest. The employer has the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer appears to have discharged claimant based on the conversation he had with his coworker on July 26, 2015. Audio at ~13:29. The employer's witness contended that claimant violated the employer's policy against harassment because some of the topics that claimant introduced in that conversation made the coworker feel "uncomfortable." Audio at ~16:30, ~18:28. However, that behavioral standard, as described, is vague, dependent on circumstances, susceptible of interpretation and subjective. The employer could not reasonably expect employees to adhere to an expectation that is not reasonably understandable, and claimant's purported violation of it is, therefore, not misconduct. *See e.g.* OAR 471-030-0038(1)(d)(C); *Appeals Board Decision* 09-AB-1767, June 29, 2009.

Even if we had concluded that the employer's expectation was reasonable and that claimant had violated it with respect to his conversation with a coworker on July 26th, our decision would remain the same. In order for claimant's behavior to be considered misconduct, it must have been either willful, meaning, that he intentionally engaged in conduct he knew would violate the employer's expectation, or he must have been conscious, or aware, of the fact that he was engaging in such behavior. In other words, for claimant's misconduct to be established, the record must show that claimant acted with the intent of, or awareness that, he was making his coworker uncomfortable, or that circumstances were such that he should have known his behavior was having that effect. The record fails to show that claimant had such a mental state. The subject matter was not so clearly objectionable, particularly between coworkers who had discussed or joked over personal matters in the past, that claimant reasonably should have known not to mention it in his workplace. The coworker did not tell claimant she felt uncomfortable, had never before told claimant that he made her feel uncomfortable, the record fails to show that she engaged in body language intended to demonstrate her discomfort; rather, the situation led her to believe that claimant might have just been joking, all of which tend to show that claimant did not intend, and was not aware of, his coworkers discomfort. The circumstances as described were not such that claimant knew or should have known he was violating the employer's expectation that he refrain from making his coworker uncomfortable.

During the hearing, the employer's witness also testified about various aspects of claimant's work performance that were deficient. However, these issues do not appear to have been the proximate cause of claimant's discharge. In addition, the employer did not show that any of these alleged performance inadequacies were due to claimant's willful or wantonly negligent disregard of the employer's standards. *See* OAR 471-030-0038(3)(a). Furthermore, claimant was still in training at the time he was discharged, and the performance issues the employer raised generally involved claimant's perceived inability to function effectively in his job during the training period. The applicable regulation plainly states that mere inefficiency resulting from lack of job skills or experience is not misconduct. *See* OAR 471-030-0038(3)(b). The employer did not show that claimant's performance deficiencies were misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-46878 is affirmed.

Susan Rossiter and J. S. Cromwell participating.

**DATE of Service: December 24, 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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