

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1397

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141056). Claimant filed a timely request for hearing. On November 4, 2015, ALJ M. Davis conducted a hearing, and on November 6, 2015 issued Hearing Decision 15-UI-47284, concluding the employer discharged claimant, but not for misconduct. On November 25, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Southern Oregon Adolescent employed claimant as a cook from February 22, 2010 until September 15, 2015.

(2) The employer expected claimant to refrain from engaging in disruptive behavior in the workplace. The employer defined "disruptive behavior" as behavior that was "perceived by coworkers to interrupt their ability to perform their job functions." Exhibit 1 at 5 ¶15.6.2. The employer also expected claimant to "interact appropriately" with coworkers and clients. *Id.* at ¶15.16.1. Claimant was aware of these expectations.

(3) Sometime in June or early July 2015, when claimant's supervisor was on vacation, claimant received permission from her supervisor's supervisor to bypass the employer's safety guidelines and open the kitchen windows because of hot summertime temperatures. On July 7, 2015, after claimant's supervisor had returned to work, claimant again opened the kitchen windows but neglected to inform the supervisor that she had permission to do so. On August 4, 2015, the employer issued to claimant a final written warning for opening the kitchen windows before discussing the matter with her supervisor. Exhibit 1 at 7. In that warning, the employer also warned claimant about unspecified "negative behavior" she had allegedly exhibited toward her supervisor. *Id.* The employer considered that behavior "disruptive." *Id.*

(4) Sometime shortly before September 8, 2015, claimant discovered that some mozzarella cheese she had gathered and stored with the intention of preparing lasagna for the residents was missing. Claimant had labelled the container in which the mozzarella was stored “FOR LASAGNA.” Exhibit 1 at 2. Claimant reported to her supervisor that the cheese had been taken and used for some other purpose. The supervisor responded, “I wonder who did that?” Audio at ~21:06. Claimant told her supervisor that she was going to send an email to the other cooks about the missing cheese. Audio at ~ 21:06. The supervisor told claimant, “Okay.” Audio at ~21:10. Claimant and the other cooks often exchanged emails when they encountered problems or difficulties in the kitchen.

(5) On September 8, 2015, claimant sent an email addressed to the other cooks. The email stated, “Hey . . . whoever used the mozzarella cheese clearly marked “FOR LASAGNA” really screwed me over. Thanks a lot . . . we are supposed to be a team . . . that was not a team thing . . . “ Exhibit 1 at 2. Claimant did not think the email was inappropriate, contained inappropriate language or would be viewed as disruptive.

(6) Shortly after September 8, 2015, claimant’s supervisor and other employer representatives spoke with claimant about her behavior. They did not disclose that they were concerned about the September 8, 2015 email and told claimant that the reasons they were speaking to her about her behavior were “confidential.” Audio at ~14:00, ~22:36, ~22:49.

(7) On September 15, 2015, the employer discharged claimant for the email on September 8, 2015 because it considered the act of sending it to the other cooks and its contents to have been disruptive, inappropriate and hostile. Audio at ~8:45, ~10:08, ~10:30, ~11:40.

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 in a discharge case carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer’s witness contended both that claimant’s act of sending the September 8, 2015 email to the other cooks was disruptive as well as was the language claimant used in the email. Audio at ~10:30, ~11:40. With respect to sending an email addressed to the other cooks about a difficulty claimant experienced in the workplace, the employer’s witness testified that the employer’s method of “collaborative problem solving” required claimant to raise any issues she had with her supervisor and not directly with the other cooks. Audio at ~11:40. However, the employer did not present evidence demonstrating that claimant was aware of the employer’s collaborative model or aware that she was forbidden from communicating directly with coworkers about problems she believed arose from one the

behavior of one or more of her coworkers. Moreover, the employer did not dispute that claimant's testimony that she first raised the issue of the missing mozzarella cheese with her supervisor and told the supervisor she intended to send an email to the other cooks. Audio at ~21:06, ~29:44. By telling claimant "okay," and not forbidding her from sending the email, it was reasonable for claimant to assume, as she testified she had, that the supervisor condoned her communicating directly with the other cooks about the missing cheese, or at least had not forbidden it. Audio at ~21:23. On this record, the employer did not demonstrate that claimant violated its standards by sending the email on September 8, 2015 to the other cooks.

With respect to the substance of the September 8, 2015 email, viewed objectively, it reasonably should not have offended or insulted its addressees, particularly since claimant's testimony was unrebutted that the cooks routinely raised concerns, problems and issues they had in email communications with each other. Audio at ~21:23. While the mail could be viewed as somewhat hostile or accusatory since it suggested that one or more of its recipients might have been responsible for taking the cheese, any communication addressed to multiple coworkers about the problem of items missing from the workplace could be similarly construed. Claimant's email, however, did not accuse any coworkers by name of wrongdoing and, although she chided whichever unidentified coworker might have been responsible for the missing cheese, it was no more hostile than merely expressing her displeasure at the circumstance and also expressing that taking the cheese, when it was designated for a particular use, was contrary to her understanding of the concept of teamwork in the workplace. In addition, claimant's use of the colloquialism that she had been "really screwed over" when the cheese went missing was her short-hand way of stating that some coworker(s) had left her in a bad situation and from its context did not refer, and reasonably should not have been construed as referring, to any sexual or other generally offensive matters. Claimant's use of the particular phrase should not reasonably have offended any of the addressees of the email or reasonably been viewed by them as objectively inappropriate since the phrase "screwed over" has entered the common vernacular as a non-foul expression and claimant was communicating to the other cooks, her close coworkers in the workplace, where a certain level of informality in communication was not unacceptable.

Even if some or one of the addressees of the September 8, 2015 email might, in fact, have been disturbed or made subjectively uncomfortable by its contents, claimant still did not violate the employer's standards willfully or with wanton negligence. The employer's definition of "disruptive" behavior set out in its policies, based on the individualized, unique and subjective perceptions of each of claimant's coworkers, was not reasonable. *See Exhibit 1 at 5 ¶15.6.2.* An employer may not reasonably expect employees, including claimant, to conform their workplace behavior to standards that are vague, dependent on varying idiosyncratic perceptions and circumstances or susceptible to individualized interpretations. An employer may reasonably expect its employees only to conform their behavior in the workplace to generally applicable objective standards. *See Appeals Board Decision 09-AB-1767, June 29, 2009.* For the reasons set out above, the content of the September 8, 2015 email that claimant sent to the other cooks was not an objectively inappropriate or disruptive communication. On this record, the employer did not demonstrate, more likely than not, that the contents of the email violated the employer's reasonable standards.

Although the employer discharged claimant, it did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-47284 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: January 7, 2016

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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