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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-1465

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90814). Claimant filed a timely request for hearing. On December 2, 2015, ALJ McGorrin conducted a hearing, and on December 3, 2015 issued Hearing Decision 15-UI-48715, affirming the Department's decision. On December 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Jewelers, Inc. last employed claimant as a sales associate from January 20, 2013 to October 9, 2015.

(2) The employer prohibited employees from harassing others or making sexually suggestive gestures. The employer provided claimant with copies of its harassment policies. The policies prohibited "sexual harassment and other forms of harassment because of one's race, color, religion, gender, national origin, age, disability, or sexual orientation." Sexual harassment was defined to include making sexually suggestive or explicit gestures. Other forms of harassment included "[h]arassment because of one's race, color, religion gender, national origin, age, disability or sexual orientation," "defined as verbal or physical conduct that: Denigrates or shows hostility or aversion toward an individual because of his/her race, religion, color, gender, national origin, age, disability, or sexual orientation, or that of the individual's relatives, friends or associates," and "Has the purpose or effect of creating an offensive work environment, unreasonably interferes with an individual's work performance, or otherwise adversely affects an individual's work performance." The examples of other forms of harassment contained in the policy included "[m]aking derogatory ethnic or racial statements, or belittling one's religion or religious practices," "[p]erpetuating stereotypes about one's age, gender, etc.," "[r]efusing to

assist [anyone] because of his/her race, gender, etc.," and "[d]isparaging the sexual orientation of [anyone]." The policies did not include any prohibition against complaining about coworkers' work performance.[1]

(3) Claimant had concerns about a coworker's work performance and mistreatment of claimant, and repeatedly complained about her to management. Claimant was frustrated with management because she did not observe that anything changed as a result of her complaints. The coworker thought claimant got mad at her when she needed help and acted as if helping her was inconvenient; the coworker complained to management about claimant. On July 31, 2015, the employer suspended claimant for her behavior toward her coworker, concluding that she had violated its harassment policy.

(4)After the suspension, claimant continued to observe and complain about her coworker. Claimant did not observe any changes in the coworker's behavior as a result of her complaints.

(5) On October 3, 2015, claimant asked a loss prevention specialist to watch her coworker via the employer's surveillance cameras. The loss prevention specialist told claimant that requests for surveillance had to be handled through management. Claimant replied that the coworker had the manager wrapped around her finger, and coupled the remark with oral and hand gestures that imitated the act of fellatio.

(6) The same day, the loss prevention specialist later described the conversation to the loss prevention manager via an email that stated,

> The FM Jeweler's F/A Associate that was closing tonight, the extra make-up, extra drama specialist, tried to tell me about what a thief the new blonde haired F/A that she has problems with, is. I recommended that she talk to you if she had any suspicions as that are an internal matter. She then bowed out saying that she had suspicions that the blonde had gotten to you… she then made a fellatio motion with her hand and her tongue against her cheek. I walked away.[2]

The loss prevention specialist's complaint reached human resources, where a manager reviewed surveillance footage of claimant's gesture and concluded that claimant had made a gesture imitating fellatio during the conversation with the loss prevention specialist.

(7) On October 6, 2015, the human resources manager concluded claimant had made the gesture, and interviewed claimant. During the interview, claimant made ambiguous statements about whether or not she had made the gesture. On October 9, 2015, the employer discharged claimant for making the gesture.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ, and conclude that claimant's discharge was not for misconduct.

[1] Policies contained in Exhibit 6.

[2] Exhibit 6.

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 had the right to expect claimant to refrain from making sexually explicit gestures, and notified claimant of that expectation. Claimant knew or should have known the expectation both as a matter of common sense and because of the policies prohibiting sexual harassment and harassment that the employer gave to her. The employer alleged that claimant violated the sexual harassment policy by making a gesture imitating fellatio toward the loss prevention specialist on October 3, 2015. Claimant argued at the hearing that she did not mime performing fellatio, but instead was using her hand to fan herself because she was suffering a hot flash during the conversation. Transcript at 39. Claimant also alleged that the loss prevention specialist reported claimant was "fluttering" her hand in front of her face, not making a fellatio gesture. *Id.* However, in the email the loss prevention specialist sent to his manager, made the night of his conversation with claimant, the specialist described claimant's gesture as imitating fellatio, not as "fluttering." The human resources manager who watched the surveillance footage of the conversation and provided an eyewitness description of claimant's gesture described it as imitating fellatio. Claimant's statement to the employer about whether she made that gesture was ambiguous and included an admission that she probably had done so. Furthermore, the alternative explanation for the gesture claimant gave at the hearing is implausible, the differences between the two gestures – fanning a face and imitating fellatio -- are readily discernible upon observation, and two eyewitnesses to claimant's gesture agreed that it was an imitation of fellatio and not a fanning motion. On this record, it is more likely than not that claimant made a sexually explicit gesture to the loss prevention specialist on October 3, 2015, and did so with conscious indifference to the employer's expectations, making her conduct on that occasion wantonly negligent.

In Hearing Decision 15-UI-48715, however, the ALJ further concluded that claimant's conduct could not be excused as an isolated instance of poor judgment, reasoning that "[c]laimant violated the policy before that date" and was suspended for "harassing the same co-worker about whom claimant complained" in the final incident. Hearing Decision 15-UI-48715 at 4. We disagree with the ALJ. OAR 471-030-0038(1)(d)(A) defines an isolated instance of poor judgment as a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. Therefore, we must examine the behavior and judgment that gave rise to the July 31st suspension to determine whether that behavior was willful or wantonly negligent.

The employer suspended claimant on July 31st because claimant allegedly violated its harassment policy with respect to her coworker. However, the harassment policy covers situations in which an employee subjects another to certain types of treatment, or interferes with their ability to work, based on sex, or because of another's race, color, religion, gender, national origin, age, disability, or sexual orientation, that denigrates or shows hostility to the other person with the purpose of creating an offensive work environment or unreasonably interferes with or affects the individual's work. The employer did not

allege or show that claimant subjected her coworker to sexual harassment, or harassment based on the other categories listed in its policies. Nor do the policies in evidence include any provisions prohibiting claimant from correcting her coworker's errors, asking a coworker to perform other duties instead of one claimant did not trust her to perform, or complaining to management or loss prevention about her coworker's perceived work performance problems, policy violations and treatment of claimant. The record therefore fails to show that claimant violated a known policy or standard of behavior with respect to how she treated her coworker.

In fact, the record fails to show that claimant's complaints about her coworker were unfounded, given the testimony of one employer witness,

> [She] was a new associate and she was learning – there were mistakes made, you know, that are gonna be made when you're a new associate, that's just part of the learning curve. That when those happened, instead of having the patience enough to help with them, [claimant] would just jump on her about it and not try to help her. And then also just creating the environment where every day that she would come in – [the coworker] would come in, [claimant] would find something to complain to me about her and then I would have to talk to [the coworker] about it and it was just an ongoing thing. Every day was – I'm gonna try to find something wrong with this person doing – what they're doing today so that I can complain about it. And there's – we've got documentation on all these different things that have happened and been said. So it's just the constant environment for [the coworker] that was just uncomfortable because every day she'd come in, she didn't know if [claimant] was gonna be nice to her or if she was gonna be all over her and so it just created a bad environment for her, enough to where she didn't want to come to work . . ."[3]

Given the totality of the circumstances, it is more likely than not that claimant's complaints about her coworker were valid, but that claimant lacked awareness that the employer disapproved of the way in which claimant corrected her coworker's work performance or interacted with her until after she received the July 31st suspension. For those reasons, we conclude that the conduct that prompted claimant's July 31st suspension was not willful or wantonly negligent. In the absence of further evidence establishing claimant had engaged in other willful or wantonly negligent acts prior to the October 3rd gesture, we must conclude that the October 3rd gesture was an isolated instance of wantonly negligent behavior.

Although some isolated conduct is not excusable because it is unlawful, tantamount to unlawful conduct, creates an irreparable breach of trust, or makes a continued relationship impossible, claimant's conduct did not exceed mere poor judgment. *See* OAR 471-030-0038(1)(d)(D). Claimant's gesture was not unlawful or tantamount to unlawful conduct, and the employer did not explain why making a single sexual gesture was such egregious behavior on claimant's part that no reasonable employer would trust her to continue working without making such gestures in the future, or would continue to employ her an

[3] Transcript at 27-28.

additional time. In the absence of such evidence, we cannot conclude that claimant's gesture exceeded a mere isolated act of poor judgment.

We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct. Thus, claimant's discharge was not for misconduct, and she is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-48715 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 8, 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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