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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-1481

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 90100). The employer filed a timely request for hearing. On December 1, 2015, ALJ Wymer conducted a hearing, and on December 4, 2015 issued Hearing Decision 15-UI-48857, affirming the Department's decision. On December 8, 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) Schneider, Kerr and Gibney employer claimant as a legal assistant from September 6, 2012 until August 5, 2015.

(2) Although the employer had no written policies setting out its expectations and provided no training to employees on them, the employer expected employees to refrain from making comments of a sexual nature to coworkers or sexually harassing them. Claimant was aware of these expectations as he reasonably interpreted them.

(3) During his employment, claimant sometimes made comments or exhibited behaviors that disrupted or insulted his coworkers. The coworkers complained about claimant to the employer's senior attorney. The employer moved claimant to different departments in an attempt to minimize the disruptions caused by his interactions with his coworkers. Claimant's supervisor thought that, at times, claimant "lacked the capacity to pick up on social cues" and needed assistance with "various aspects of socialization." Exhibit 3 at 3. The supervisor worked with claimant to "be more present of his surroundings" when he

interacted with his coworkers. *Id.* The employer's senior attorney talked with claimant several times about "getting along with people and not being such an irritant in the office." Transcript at 25. The employer did not receive any complaints that claimant was speaking about sexual matters in the workplace or sexually harassing his coworkers.

(4) Sometime before August 5, 2015, a coworker was performing filing and asked claimant to hand her a hole punch. In response, the coworker understood claimant to say that he wanted to "punch a hole in [her] instead." Transcript at 41, 55-56. Claimant had asked this coworker out on a few occasions, consistent with an accepted workplace practice in which coworkers went out together for meals or drinks after work in a group or on individual dates. The employer had no policy against fraternization or socializing with coworkers away from the workplace.

(5) Sometime before August 5, 2015, claimant asked another coworker out. That coworker told claimant she was unable to go out with him at that time, but she would at some other time. Claimant later asked that coworker out and she declined to go with him. The coworker did not perceive that claimant was "overtly sexual in his conversation" and "in no way did he physically cross lines." Exhibit 3 at 2. On one occasion, claimant saw that coworker and another coworker sharing a water bottle and claimant stated that it might be unsafe because "you never know where her mouth has been." Exhibit 3 at 2.

(6) Sometime a few months before August 5, 2015, claimant walked into the adjacent cubicle of a coworker. Claimant kicked over a receptacle on the floor containing recycling because he was "pissed off" at the coworker. Transcript at 53. This incident was reported to the senior attorney and the senior attorney understood that claimant had dumped garbage on the coworker's desk. The senior attorney spoke with claimant about this incident.

(7) On August 5, 2015, claimant entered an office looking for a particular coworker. The coworker was not there, but her office-mate was. Claimant noticed that there was a very small fan on the desk of the coworker he was looking for and the fan was very powerfully moving the air in the office despite its small size. The day was hot, the employer did not air-condition the workplace well, and employees often brought in their own fans to compensate for the lack of air-conditioning. Claimant picked up the absent coworker's fan, began to play with it, and commented how powerful it was despite its miniature size. Claimant then told the coworker, referring to the fan's output and power, "big things come in small packages." Transcript at 36, 52-53. The coworker interpreted claimant's comment to be a veiled reference to his genitals and told him that she thought the comment was inappropriate. Claimant was confused and asked her why she had said that. The coworker insisted that the comment was improper and claimant stated, "Whatever" and left her office. Transcript at 5, 36.

(8) On August 5, 2015, the employer discharged because it thought that the comment he made that day about the fan that day was a sexual reference and constituted sexual harassment of his coworker.

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. Behavior that would otherwise constitute misconduct is excused from being considered misconduct if it was an isolated instance of poor judgment or a good faith error. OAR 471-030-0038(3)(b). The employer 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).

At hearing, the employer's witness, the senior attorney, was clear that the reason the employer discharged claimant was for the alleged "sexual innuendo" of the comment he made to his coworker on August 5, 2015, and at the time it discharged claimant, the employer was not aware of the three other occasions it brought up at hearing in which it asserted that claimant also made direct or implied sexual references. Transcript at 19, 26, 61; Exhibit 2 at 1. EAB's function is to determine whether the employer discharged claimant for reasons that constituted misconduct, and incidents of which the employer had no knowledge when it discharged claimant cannot as a matter of logic have caused the discharge. *See* ORS 657.176(2)(a). Accordingly, most of the employer's written argument addressing incidents other than on August 5, 2015 when claimant allegedly made other direct or veiled sexual references, are not relevant to EAB's inquiry unless EAB first determines the employer demonstrated that claimant's behavior on August 5, 2015 was a willful or wantonly negligent violation of the employer's standards. If it makes such a determination, EAB is then required to consider whether claimant's behavior on that day was excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

At hearing, claimant contended that the comment he made to the coworker about the miniature fan was "big things come in little packages" and the employer's witness contended that he said "the best things come in small packages." Transcript at 6, 36, 52. While the employer took the position in its written argument the ALJ's acceptance of claimant's version about what he actually stated to the coworker on August 5, 2015 was decisive in concluding that he had not violated the employer's standards, this is not the case. *See* Employer's Written Argument at 1, 2. If the version presented by the employer's witness is accepted, viewed against the undisputed backdrop of the conversation leading up to it, it remains reasonably susceptible of an innocent, non-sexual interpretation. According to the employer's witness, claimant first picked up and played with the miniature fan, commented directly on its power to move air in relation to its size, before immediately stating "the best things come in small packages." Transcript at 6, Exhibit 2 at 3. It is more reasonable to interpret claimant's final comment in its immediate context as being made in reference to the power of the fan in relation to its small size, rather than to male genitalia. Claimant's apparent confusion as to why the coworker had assumed his comment was an inappropriate reference to sexual matters serves to strengthen his contention his comment referred solely to the fan. Exhibit 2 at 3. While the coworker might have subjectively perceived claimant's comment as an oblique sexual allusion, other reasonable people who heard it in its context would not objectively perceive it as a sexual innuendo. An employer may not reasonably expect a claimant to conform his or her behavior to standards that are vague, dependent on individualized circumstances or personal idiosyncrasies or susceptible to varying interpretations. Since the employer did not demonstrate either that claimant intended the comment he made to his coworker on August 5, 2015 as a veiled sexual reference or that all

reasonable people would have interpreted it in that way, the employer did not meet its burden to show that claimant willfully or with wanton negligent violated its standards. Misconduct has not been demonstrated.

Since EAB has concluded that the behavior for which the employer discharged claimant was not misconduct, it need not and does not address the prior incidents that employer raised at hearing. The employer discharged claimant but not for misconduct. Claimant therefore is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-48857 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 12, 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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