

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0100

Reversed
Disqualification

PROCEDURAL HISTORY: On October 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145523). Claimant filed a timely request for hearing. On January 11, 2016, ALJ Murphey conducted a hearing, and on January 12, 2016 issued Hearing Decision 16-UI-50852, concluding the employer discharged claimant, but not for misconduct. On January 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, including EAB Exhibit 1 (*see* Evidentiary Matter, below), but did not consider the employer's argument when reaching this decision.

EVIDENTIARY MATTER: The employer offered Exhibit 1 into evidence at hearing, but the ALJ did not admit it, stating that the employer failed to provide a copy to claimant and could testify to its contents. Audio Record at 9:14 to 9:39; *see* OAR 471-040-0023(4) (August 1, 2004). However, the record shows that the employer provided the parties with a copy of the documentary evidence on January 8, 2016, prior to the hearing, and the ALJ did not ask the employer to testify to the contents of the document or read them into the record. The factual basis of the ALJ's decision to exclude the exhibit was, therefore, flawed. The exhibit was relevant, material and provided to the parties, and should not have been excluded from evidence.

OAR 471-041-0090(1) (October 29, 2006) provides that EAB may receive exhibits offered, but not received, into evidence at the hearing as necessary to complete the record. The documents offered by the employer are necessary to complete the record because they contain the text messages that the employer used as a basis to discharge claimant, claimant did not deny having sent the text messages, and the ALJ did not have the employer read the contents of the messages at hearing. Accordingly, that document, marked as EAB Exhibit 1, is admitted into the record. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting

forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Peacehealth employed claimant from September 23, 2013 to September 25, 2015 as a caregiver.

(2) The employer had a policy prohibiting any type of retaliatory action against a caregiver who filed a concern under the employer's sexual harassment policy or who assisted in a sexual harassment complaint investigation. EAB Exhibit 1 at 6. Claimant understood the employer's anti-retaliation policy.

(3) On September 14, 2015, an employer human resources representative met with claimant and his supervisor to discuss comments claimant made to a nurse coworker on an online social networking service and that the employer considered the comments to be inappropriate. The representative explained the employer's sexual harassment and anti-retaliation policies to claimant.

(4) On September 23, 2015, claimant's coworker provided the employer with text messages of a sexual nature that claimant had sent to her regarding another coworker. The employer initiated an investigation to determine if claimant had violated its policy against sexual harassment in the workplace. On September 24, 2015, as part of the employer's investigation, a human resources representative discussed the text messages with claimant. The representative warned claimant to refrain from retaliating against the employees involved in the employer's investigation and explained to claimant that retaliation included making a coworker feel threatened or treating them differently due to their involvement in the investigation. EAB Exhibit 1 at 4.

(5) Shortly after the September 24 meeting with claimant, claimant sent the coworker new text messages. In the new text messages, claimant told the coworker that he would lose his job if he were to "get in trouble for this," and stated that he would provide human resources with information, including a video, regarding an incident that occurred when the coworker had been intoxicated at a party. EAB Exhibit 1 at 12-13. Claimant stated further in the text messages, "I want your word you won't do this again and in return I won't put you in that situation and I'll be good." EAB Exhibit 1 at 13. Claimant also stated, "[I]f you go to [human resources] about this[,] this conversation is over." EAB Exhibit 1 at 14.

(6) The coworker who provided the employer with the text message information that initiated the employer's investigation approached claimant's supervisor "in tears" regarding the new text messages she had just received from claimant regarding her involvement in the investigation. Audio Record at 23:41 to 23:47. The supervisor saw that the text messages came from claimant's telephone number.

(7) On September 25, 2015, the employer discharged claimant for violating its anti-retaliation policy.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 16-UI-50852, the ALJ concluded that claimant was not disqualified from receiving unemployment benefits because the evidence in the record did not outweigh claimant's testimony denying that he threatened a coworker with the dissemination of an unfavorable video of her if she were to disclose further text messages to the employer.¹ We disagree with the ALJ's conclusions.

The employer discharged claimant because he threatened to retaliate against a coworker if she continued to provide the employer with information regarding allegations of sexual harassment against claimant. Claimant understood the employer's reasonable expectation that employees refrain from engaging in retaliatory conduct against other employees. Audio Record at 36:45 to 37:07.

Claimant asserted at hearing that he did not violate the employer's expectations because the coworker, and not claimant, initiated the text conversation on September 24 containing the retaliatory statements. Audio Record at 31:28 to 31:45. Whether claimant or his coworker initiated the conversation is not relevant; it does not tend to prove or disprove whether claimant threatened to retaliate against the coworker. Claimant also argued at hearing that he did not have a video of the coworker and would not have threatened her with a video he did not have. Audio Record at 33:09 to 33:33. However, regardless of whether claimant had a video, a reasonable person would construe claimant's text messages to mean that claimant had a video or access to it, was willing to use it against her, and meant to threaten her with it to dissuade her from continuing to participate in the employer's the investigation.

Claimant did not deny having discussed the sexual harassment investigation and the video of the coworker with her, but argued that the text messages had been misconstrued by the employer as a threat. Audio Record at 32:20 to 33:34. We are not persuaded by claimant's assertion because his testimony was inconsistent throughout the hearing and thus lacks credibility, and because the plain meaning of the text messages does not support his assertion. Claimant's testimony was inconsistent when he first testified that "four girls teamed up against [him] and blackballed [him] and got [him] fired," but then testified that one of the four women, the coworker to whom he made the allegedly sexually-charged statements, was a friend who was bullied by other caregivers to give the employer the information. Audio Record at 26:50 to 27:07, 29:45 to 30:26. Claimant also testified that the employer told him at the end of the September 24 meeting that he was "not to have anything to do with" the coworkers involved with the sexual harassment complaint. Audio Record at 31:27 to 31:36. Claimant later contradicted his earlier testimony by stating that the employer only told him to refrain from retaliating against his coworkers, and did not tell him to avoid the coworkers. Audio Record at 36:45 to 37:07. Finally, claimant knew or should have known that the text messages would reasonably be construed as retaliatory, and by common sense inference, could only have intended them to be threatening and retaliatory. Claimant willfully disregarded the employer's anti-retaliation policy.

¹ Hearing Decision 16-UI-50852 at 2-3.

Claimant's willful disregard of the employer's anti-retaliation policy on September 24 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an "isolated instance of poor judgment" if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, a single act of willful or wantonly negligent behavior cannot be excused as an isolated act of poor judgment if, among other things, it was the sort of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's behavior toward his coworker on September 24 was the sort that caused an irreparable breach of trust in the employment relationship. The employer had an obligation to investigate and maintain a safe environment for discrimination complainants, and retaliation against a coworker for participating in workplace investigations interfered with the employer's ability to do so. Based on claimant's immediate, willful disregard of the employer's warning to refrain from retaliating against his coworker, any reasonable employer would objectively conclude that, based on claimant's behavior on September 24, 2015, it could not trust claimant to behave appropriately in the future at work. For this reason, claimant's behavior on September 24, 2015 exceeded mere poor judgment and is not excusable as an isolated instance of misconduct.

Claimant's conduct was not excusable as a good faith error. Almost immediately before the final text messages, the employer had warned claimant, and claimant understood, that he was to refrain from retaliating against his coworkers. Claimant had no basis to believe that it was acceptable to even discuss the investigation with the coworker who provided the text messages that were the basis for the complaint, let alone send her text messages threatening her with retaliation if she continued to participate in the investigation.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-50852 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 26, 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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