

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0230

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 11235). Claimant filed a timely request for hearing. On December 24, 2015 and February 2, 2016 ALJ Frank conducted a hearing, and on February 10, 2016 issued Hearing Decision 16-UI-52750, affirming the Department's decision. On February 24, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: During the February 2, 2016 continuation of the hearing, the employer belatedly objected to claimant's Exhibit 2, which the ALJ had already admitted into evidence during the December 24, 2015 hearing, on the ground that it was an illegally obtained recording of a phone conversation between claimant and the employer's owner since the owner was not informed at that time that the conversation was being recorded. Audio of December 24, 2015 Hearing (Audio 1) at ~5:24; Audio of February 2, 2016 Hearing (Audio 2) at ~11:39, ~20:36. While the ALJ overruled the employer's objection based on its failure to object to the admission of Exhibit 2 during the initial hearing, it appears that the phone conversation was indeed illegally recorded. *See* ORS 165.540(1)(c). The ALJ erred in allowing a transcription of the illegally recorded conversation into evidence as Exhibit 2 because of the employer's purported waiver of an objection based on illegality. EAB has not considered Exhibit 2 when reaching this decision.

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

FINDINGS OF FACT: (1) Carte Blanche Caterers, doing business as Soup Nation, employed claimant from September 7, 2014 until November 3, 2015, last as manager.

(2) The employer expected claimant to follow the owner's instructions. Claimant understood the employer's expectations as a matter of common sense.

(3) During claimant's employment, he was a student in college taking classes in environmental health and sustainability. Claimant was very concerned about environmental protection.

(4) On November 2, 2015, the employer's owner assigned to claimant the duty of cleaning the grease traps in the café's sink. Claimant had never before performed this task and it had been done, up to that time, by the employer's owner. The owner regularly cleaned the grease traps by emptying their contents into buckets and placing those buckets in the café's garbage dumpsters. That day, claimant sent a text message to the owner notifying him that he did not have the proper tools to open the trap to perform the cleaning. As the day progressed, claimant became concerned that the owner's disposal method for the contents of the grease traps might not be environmentally sound. Claimant then called the water resources department of the Eugene Public Works and asked about the proper method for disposing of greasy waste mixed with water. A representative from that department told claimant it was "highly recommended" that kitty litter be mixed with the greasy waste water in whatever receptacle it was placed for disposal to ensure it solidified and would not leach into the soil of the disposal site. Audio at ~27:22. Claimant interpreted this comment to mean that the owner's usual method for disposing of the contents of the grease traps might be illegal.

(5) After speaking with the representative of the Public Works Department, claimant sent a text message to the owner setting out the information he had received from that body about the proper method for disposing of waste from the grease traps and asking for some kitty litter. The owner called claimant in response to this text message. The owner told claimant that the information he had received from the Public Works Department was incorrect and, when claimant attempted to explain further the environmental hazards that would result from not using kitty litter, the owner "went off," began shouting that claimant and whoever he had consulted with were "wrong" and the owner "would not listen to any of it." Audio at ~32:06. The owner instructed claimant to come in early before his next shift and to empty the grease traps using his method and without using kitty litter. The owner then hung up on claimant.

(6) On November 2, 2015, after the call from the owner, claimant sent a second text message to the owner. In the second text message, claimant stated that he was not going to clean the traps using the owner's method because of its environmental hazards. Referring to the owner's previous instruction that he clean the grease traps without using kitty litter, claimant stated, "I'm not gonna do the grease trap [], but you can get someone else to do it [tomorrow]." Audio 2 at ~31:06, ~33:32.

(7) On November 3, 2015, the employer discharged claimant for refusing to clean the grease traps without using kitty litter and for calling the Public Works Department about the employer's method of disposing of the contents of the grease traps.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show

claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's owner testified that the employer discharged claimant both for contacting a regulatory agency about the propriety of the employer's customary method for disposing of the contents of the grease traps and for refusing to clean the grease traps using the employer's methods. Audio at ~7:00, ~8:00, ~9:40, ~14:00. To the extent the employer expected claimant to refrain from seeking guidance about whether its proposed methods for accomplishing a task complied with legal requirements or the recommended practices of a regulatory body, that expectation was unreasonable. The record was devoid of evidence that claimant's inquiry to the Public Works Department was motivated by anything other than a good faith concern about environmental consequences, was intended to stir up trouble for the employer or was a pretext to enable claimant to avoid performing his assigned task of cleaning the grease traps. The employer did not meet its burden to show that by contacting the Public Works Department about the owner's instructions for cleaning the grease traps claimant willfully or a wanton negligent violated the employer's standards.

With respect to claimant's refusal to clean the grease traps unless he was provided with kitty litter, the employer presented an email authored by a supervisor from the Lane County Environmental Health Department stating that disposing of waste from grease traps using buckets was not illegal so long as the buckets did not have leaks and were not spilled. Exhibit 2 at 2. Presumably, by not mentioning the need to place kitty litter in the buckets, that Department did not require its use when disposing of the contents of grease traps. Notably, however, this email was the opinion of a regulatory body different from that which claimant consulted on November 2, 2015 and was sent to the owner two and a half months after claimant was discharged. In addition, the employer presented no evidence that before claimant refused to clean the traps, the owner gave claimant objective information showing that the Public Works Department incorrectly advised to use kitty litter to clean the traps. On this record, absent having information from some regulatory agency that contradicted that which he had received from the Public Works Department, it was plausible claimant for claimant to believe that he would violate environmental standards if he used the owner's method for disposing of this waste. Assuming the opinion the owner received from Lane County Environmental Health Department was authoritative, claimant's refusal to clean the grease traps without kitty litter was, at worst, a good faith error based on the opinion he received from the Public Works Department. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer did not meet its burden to show that claimant's refusal to clean the grease traps under the circumstances was willful or wantonly negligent.

Although the employer discharged claimant, it did not do so based on claimant's unexcused willful or wantonly negligent behavior. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-52750 is affirmed.

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

DATE of Service: March 23, 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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