

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0315

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85548). Claimant filed a timely request for hearing. On March 7, 2016, ALJ Jarry conducted a hearing, and on March 10, 2016 issued Hearing Decision 16-UI-54777, concluding the employer discharged claimant, not for misconduct. On March 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Education Association (OEA) employed claimant as a Uniserv consultant from August 24, 2010 until December 8, 2015.

(2) OEA is a union which indirectly represents public school educators through its affiliations with and the support it provides to local bargaining unit associations. Claimant worked with the leadership of at least one local bargaining unit affiliated with OEA, the Southern Oregon Bargaining Council (SOBC). As an OEA employee, claimant was member of Professional Staff Organization (PSO), a union that represented him and other OEA employees in establishing collective terms of employment with OEA.

(3) The employer expected claimant to comply with the reasonable requests of affiliates with which he worked and to comply with Oregon law. Claimant understood the employer's expectations as a matter of common sense.

(4) Shortly after claimant was hired, he began working closely with the leadership of SOBC, regularly attending meetings and providing advice and support services. Sometime between April and June 2015, SOBC leadership tasked claimant to research candidate and voter eligibility in an upcoming contested SOBC election. Claimant determined, among other things, that he was a member of SOBC's executive body, along with SOBC's president, past-president, president-elect, secretary and treasurer. Claimant was a non-voting member of the executive body, while the others were voting members. Claimant reported the results of his research to SOCB's executive body. In September 2015, claimant, on behalf of the executive body, was the chair of SOBC's monthly meeting.

(5) In October 2015, claimant attended SOBC's monthly meeting. Claimant took his cell phone and laptop computer to the meeting since it was his usual practice to stay on in the meeting room after the meeting ended to perform work. When the meeting took place, claimant and at least one member of SOBC's executive body had disagreed over some items of business and were not getting along. During the meeting, claimant used his cell phone to record the comments he made when addressing the attendees at the meeting and answering their questions. Claimant recorded only his own statements and not those of other attendees or the questions from the attendees that he answered. Claimant did not notify the attendees or the executive body at the meeting that he was recording his own comments. Claimant recorded his comments because he feared they would later be misrepresented.

(6) Later during the SOBC's October 2015 general meeting, the member of the executive body with whom claimant was in conflict stated he was calling the executive body into executive session, intending to exclude the presence of the general meeting attendees from that session. Claimant understood that member wanted the executive session to obtain an update on the contract negotiations between OEA and PSO, the union of which claimant was a member. Claimant did not leave the meeting room, stating that he was a member of the executive body and entitled to be present during the executive session. Further conversation ensued, with claimant repeating he did not need to leave because he was a member of the executive body. Realizing they were at a stalemate, claimant then proposed that the executive body wind up their general business, end the general meeting and then convene a separate meeting to discuss the business they wanted to address outside of the presence of him and the general attendees. The executive body took the approach claimant suggested. After the end of the general meeting, claimant absented himself from the meeting room, but left his cell phone and laptop behind on the conference table because, after the separate meeting amount the executive body was concluded, he intended to return to the meeting room to perform his own work.

(7) Sometime after the October 2015 meeting, the employer's received a formal complaint from some member or members of SOBC's executive body stating that claimant had refused to leave the meeting room when an executive session was called during the October 2015 meeting. The complaint also alleged claimant had recorded parts of the general meeting without notifying the attendees of that meeting and, after he absented himself at the conclusion of the general meeting, he left his cell phone in the room with its recording function activated, intending to secretly record the executive session.

(8) Sometime after receiving the formal complaint, the employer initiated an investigation of the allegations against claimant. Sometime before December 4, 2015, the employer determined that claimant's behavior during the October 2015 meeting had been unacceptable. On approximately December 4, 2015, the employer notified claimant and his PSO union representative that in lieu of discharging him, it would allow him to remain employed if he and PSO executed an agreement in which he accepted a two week unpaid disciplinary suspension, agreed, for purposes of the suspension, to a modification of the collective bargaining agreement to allow discipline for reasons other than good cause and agreed to "waive any and all claims, contract grievances, unfair labor practice complaints and/or any cause of action arising out of the facts leading up to this disciplinary action and the disciplinary action itself." Exhibit 1 at 16.

(9) After December 4, 2015, claimant's union representative contacted the employer to try to have the waiver provisions in the agreement removed. The employer refused. On December 6, 2015, claimant's union representative notified the employer that PSO had determined it could not sign the agreement

since claimant and the PSO were required to forego protections under the collective bargaining against discipline for less than good cause. Transcript at 41-42; Exhibit 1 at 12-15.

(10) On December 8, 2015, the employer discharged claimant for not initially leaving the October 2015 meeting when an executive session was called and for making a recording of parts of the October 2015 general meeting and the executive session that followed the meeting in violation of ORS 165.540.

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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the ALJ concluded the reason for claimant's discharge was the failure of claimant, his union or both to agree to the terms of the employer proposed suspension of claimant, it appears that after claimant or the union determined the suspension terms were unacceptable, the employer actually discharged claimant for his alleged behavior during the October 1 2015 meeting. Hearing Decision 16-UI-54777 at 4; Transcript at 5-9, 11; Exhibit 1 at 3-4, 17-18. We therefore focus on that alleged behavior as the proximate cause of claimant's discharge.

It most clearly appears from the record, the claimant did not immediately leave the October 15, 2015 after the executive session was called because he believed he was a member of the executive body, was entitled to remain during the executive session and the executive body was acting unreasonably and contrary to SOBC's own bylaws by acting to exclude him. Transcript at 9, 23, 25. The employer did not dispute the sincerity of claimant's belief that he was entitled to participate in the executive session or that the executive body would not be properly constituted in his absence. In addition, while the employer contended that claimant "refused" to leave to allow the executive session to proceed, claimant stated he never refused but tried simply to explain his position to the executive body before proposing an acceptable compromise that allowed the executive session to proceed in a manner consistent with SOBC's bylaws. Transcript at 7, 10, 16, 23. The employer did not contend that it ever communicated to claimant an expectation that he would not attend executive sessions or that he should allow SOBC to act in violation of its own bylaws if its executive body chose to do so, and did not dispute the research on which claimant based his conclusion that he properly should attend executive sessions. On this record, the employer neither demonstrated claimant refused to allow the executive session to proceed if he was not included nor that claimant acted willfully or with wanton negligence when he did not leave until he was able to arrange a way for the executive session to proceed in compliance with SOBC's bylaws. The employer therefore did not meet its burden to show the manner in which claimant responded to the calling of the executive session was misconduct.

As to the employer's contention that claimant recorded, or attempted to record the closed executive session following the October 2015 meeting, claimant testified he did not. Rather, he testified that he

left his cell phone on the table when he absented himself to allow the executive session to convene and, although his cell phone happened to be present during the executive session, its recording function was not activated. Transcript at 22. Absent evidence showing claimant was not a credible witness, of which there is none in this record, claimant's first-hand testimony on this issue is entitled to greater weight than the employer's hearsay, particularly when it was not at all clear on what observation the hearsay declarant based his or her conclusion. Claimant readily admitted he recorded the approximately five minutes of comments he made during the general meeting without notifying the meeting attendees, but emphasized he did not record the comments of the attendees or the questions they asked him. Transcript at 21-23. While making such a recording was arguably a technical violation of ORS 165.540(1)(c), since it was part of a conversation, or an oral communication under ORS 165.535(1), it appeared from his testimony that claimant was not aware of this technicality, and thought that if he recorded his own voice exclusively, it was permissible for him not to inform the other meeting attendees that he was recording. Transcript at 21, 22. In view of the highly technical nature of this violation, and the fact that the obvious and principal purpose of ORS 165.540 is to protect the communications of others from being captured without their knowledge, claimant's contention that he sincerely did not know that his actions were contrary to Oregon law is plausible. As such, although claimant's behavior in recording himself for a very short period during the general meeting was a nominal violation of ORS 165.540, it was a good faith error. Good faith errors do not constitute misconduct. OAR 471-030-0038(3)(b).

None of the grounds on which the employer discharged claimant constituted misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-54777 is affirmed.

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

DATE of Service: April 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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