

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0379

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 72425). The employer filed a timely request for hearing. On March 7, 2016, ALJ Frank conducted a hearing, and on March 15, 2016 issued Hearing Decision 16-UI-55056, affirming the Department's decision. On April 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which the employer presented new information about an alleged conversation that claimant had with "management" during the investigation of the final incident. Employer's Written Argument at 1. The employer did not explain why it did not present this information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information the employer sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from July 19, 2012 until November 30, 2015, last as a manager in its seafood department.

(2) The employer expected claimant to avoid making sexually suggestive or sexually explicit comments or jokes in the workplace that created an offensive, hostile or intimidating work environment or had the effect of substantially interfering with her coworkers' work performances. Claimant understood the employer's expectation.

(3) On April 6, 2015, the employer issued a warning to claimant for making sexually offensive comments in the workplace. Exhibit 1 at 27. On August 4, 2015, the employer issued a written warning to claimant for making comments in the workplace on July 30, 2015 about her sex life. Exhibit 1 at 8-11. When claimant received this warning, the employer required her to review its sexual harassment

policy. Claimant was also suspended for three work days as a result of her behavior. This warning notified claimant that if she violated the sexual harassment policy in the future she would be subject to discipline up to and including discharge.

(4) On October 27, 2015, the employer required all managers, including claimant to attend a special three hour seminar on sexual harassment. On November 6, 2015, the employer received complaints from some of its employees stating claimant had said “fuck [an employee] and fuck this place” while working in the seafood department. Exhibit 1 at 4-7. The employer did not issue a warning to claimant based on these allegations.

(5) On November 19, 2015, claimant and a male subordinate had a conversation near the refrigerator case in the seafood department. The subordinate came up to claimant and stated that another employee was the “blow job queen.” Audio at ~ 28:51. Claimant responded to him, “I don’t do that unless I really care about a person.” Audio at ~29:00. Claimant did not initiate this conversation and did not make explicit sexual references during the conversation.

(6) Later on November 19, 2015, claimant’s subordinate submitted a written statement to the employer in which he stated that claimant had begun the conversation earlier that day by telling him she “isn’t a big fan of giving blow jobs and she doesn’t just give anyone a blow job, just the people she really cares about.” Exhibit 1 at 3. The subordinate’s statement went on to allege that claimant made these statements in front of a third-party refrigeration technician who was working on the refrigeration case. *Id.* The subordinate’s statement also alleged that claimant had pulled up her shirt to expose her bare and pregnant belly and asked the subordinate to feel how “hairy” it was. *Id.*

(7) On November 20, 2015, the employer met with claimant to discuss the subordinate’s statement. Claimant started crying. Claimant stated the subordinate had started the conversation and had made all the references to “blow jobs.” Exhibit 1 at 2. On November 20, 2015, the employer suspended claimant to investigate further the alleged conversation between claimant and the coworker. Around this time, the employer contacted the refrigeration technician to learn what he had overheard, if anything, on November 19, 2015. The technician stated he could recall nothing about the conversation which the subordinate alleged he had overheard. Audio at ~15:07.

(8) On November 30, 2015, the employer discharged claimant for making sexually suggestive comments on November 20, 2015, and violating its sexual harassment policy.

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. 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 witness testified that the employer discharged claimant because the comments she made to the subordinate on November 19, 2015 violated its sexual harassment. Audio at ~ 11:06. At hearing,

claimant denied she made any explicit or sexually suggestive references during the November 19, 2015 conversation. Audio at ~28:51, ~29:19, ~31:03. Claimant also denied she lifted her shirt in front of the subordinate or invited him to touch her belly. Audio at ~33:21. Claimant first-hand testimony about her interaction(s) with the subordinate on November 19, 2015 are entitled to more weight than the hearsay testimony of the employer's witness about what claimant supposedly said and did in the presence of the subordinate. Claimant's testimony at hearing was markedly consistent with the denial she gave to the employer on November 20, 2015. It is also significant that the refrigeration technician, whom the subordinate contended would corroborate his statement, was not able to recall any part of the conversation between claimant and the subordinate, when if claimant had said what the subordinate contended, the technician would reasonably be expected to recall such comments. For these reasons, the employer did not meet its burden to show that claimant violated its sexual harassment policy when in response to the subordinate's comments about another employees "blow jobs," she stated "I don't do that unless I really care about a person." Audio at ~29:00. While claimant allusion would be considered by some as being in poor taste, it is difficult to see how claimant's facially neutral comment was explicitly or sexually suggestive or how it created the offensive, intimidating or hostile work environment that was needed to constitute a violation of the employer's sexual harassment policy.

Although the employer discharged claimant, it did not show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-55056 is affirmed.

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

DATE of Service: May 5, 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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