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BYE: 201707

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
2016-EAB-0571

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124805). Claimant filed a timely request for hearing. On May 3, 2016, ALJ Shoemake conducted a hearing, and on May 10, 2016, issued Hearing Decision 16-UI-59245, concluding the employer discharged claimant, but not for misconduct. On May 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) City of Salem employed claimant as a parks maintenance operator from July 20, 2015 to February 22, 2016.

(2) The employer's non-discrimination and harassment policy prohibited employees from engaging in "verbal, non-verbal, physical contact that is derogatory, shows hostility or is designed to threaten, intimidate or coerce an individual because of his race, religion national origin, color, sex, sexual orientation, gender identity, age, physical or mental disability [or] marital status…and has the purpose or effect of creating an offensive, hostile, threatening environment or unreasonably interfering with an individual's work performance or otherwise substantially adversely affects the individual's employment opportunities or access to programs, services, facilities or activities." Transcript at 6-7. Claimant was aware of the employer's policy.

(3) In January 2016, claimant could not find her keys one day at work. Claimant became visibly upset and asked each of her coworkers if they had taken them before she eventually found them. At that time, the employer counseled claimant for "jump[ing] to conclusions" and accusing coworkers for the loss of her keys instead of working "collaboratively" to find them. Transcript at 10-11. She later learned that a coworker had hidden her keys from her as a joke, which the other coworkers knew at the time. When she reported that to her supervisor, he simply told her "if anything like that happens again, [just] come to him." Transcript at 19.

(4) On February 10, 2016, a coworker sat at a table with his lower back area exposed. As claimant walked by with her keys in her hand, she ran the d-ring attached to her keys across the lower backside of the coworker, who was a friend of claimant outside of work. Claimant did not intend to embarrass or upset him but "was just trying to have some fun" with a coworker she had joked with before. Transcript at 21. No one, including the coworker, said anything to claimant about the incident until several weeks later when the employer asked claimant about it and told her that the coworker had been embarrassed by claimant's actions when he learned of it from another coworker. Claimant explained her actions and intention to the employer, and although in hindsight she described it as a "lack of judgment", she did not believe it violated the employer's policy because she did not intend to offend him in any way. Transcript at 10, 21.

(5) On February 18, 2016, the employer discharged claimant for violating its non-discrimination and harassment policy for touching the employee "in a sexualized manner." Transcript at 5.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that claimant's conduct in running the d-ring attached to her keys across the exposed lower backside her coworker was at least wantonly negligent, reasoning that "claimant acknowledged touching the coworker with her key fob [although] not to the extent alleged", and regardless of the fact that claimant "was joking with the coworker because they were friends outside of work and had joked with each other before." Hearing Decision 16-UI-59245 at 3. Assuming, without deciding, that claimant was at least wantonly negligent in that incident, we agree with the ALJ's subsequent conclusion that her discharge was not for misconduct because the February incident was no more than an isolated instance of poor judgment, which is not misconduct under OAR 471-030-0038(3)(b). *Id.*

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Here, in January, claimant was understandably upset by the loss of her keys and the employer failed to show that her conduct at that time in asking each of her coworkers if they had taken them, even if she raised her voice while upset, constituted a violation of employer policy or demonstrated conscious indifference to the employer's interests. Therefore, even if claimant's conduct violated the employer's expectation that she work "collaboratively" with coworkers to solve problems, the employer failed to show that the conduct was at least wantonly negligent. Therefore, claimant's arguably wantonly negligent conduct in February was no more than isolated.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as conduct that is unlawful, tantamount to an unlawful act, causes a breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible exceeds mere poor judgment and cannot be excused. Here, claimant's February conduct was not unlawful or tantamount to an unlawful act. The record shows she lacked the intent to intentionally harass or otherwise annoy[1] her coworker and was "just trying to have some fun" with a coworker with whom she had joked with before in an environment where joking around amongst coworkers was not unusual or actively discouraged by the employer. Nor did the employer establish that her conduct, viewed objectively, caused a breach of trust or otherwise made a continued employment relationship impossible. Rather, more likely than not, the employer concluded that claimant's continued employment was just "not a good fit", as the employer told claimant when it discharged her. Transcript at 11, 18.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 16-UI-59245 is affirmed.

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

DATE of Service: <u>June 21, 2016</u>

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

[1] Under ORS 166.065, a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting the other person to offensive physical contact. This record fails to show that claimant acted with "intent" (defined in ORS 161.085(7) as acting "with a conscious objective to cause the result or to engage in the conduct"), or even recklessly (defined in ORS 161.085(9) as when an individual is "aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exist," when the "risk" is "of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation").

'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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