

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0711

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 130946). Claimant filed a timely request for hearing. On May 23, 2016, ALJ Menegat conducted a hearing, and on May 31, 2016 issued Hearing Decision 16-UI-60699, affirming the Department's decision. On June 15, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of that argument to claimant as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, EAB did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Best Buy Stores, LP employed claimant from November 6, 2009 until February 23, 2016, last as one of the managers of the Geek Squad. Geek Squad agents repaired computer hardware and software for customers.

(2) The employer expected claimant not to harass coworkers or supervisors and not to behave inappropriately in the workplace. Claimant understood the employer's expectations.

(3) The atmosphere prevailing in the Geek Squad work area was one of fast paced work interspersed with playful behavior when work slowed down. There were frequent pranks and jokes among Geek Squad agents.

(4) On August 13, 2015, the employer issued a warning to claimant for several incidents of alleged "inappropriate conduct" occurring on several different days, including making an allegedly inadvisable comment over a walkie-talkie to an employee whom he supervised about walking away from customers on the sales floor; tossing pens, rubber bands and on one occasion a small box at employees when claimant was playing with them during down time; sitting at his station when he was supervising Geek Squad agents on the sales floor without his headset on to receive requests for assistance; allegedly

reacting to feedback in an angry or emotionally charged manner; and, allegedly sending sexually inappropriate text messages to a female member of management. Exhibit 1 at 9. The warning advised claimant his behavior had been inappropriate in the instances cited and, to guide his future behavior, stated that it was claimant's "responsibility and obligation to create a positive work experience in his store at all times." Exhibit 1 at 10.

(5) On February 13, 2016, claimant was at work managing the Geek Squad. At the beginning of the shift, claimant was giving a "chalk-talk" to Geek Squad agents in a back room away from the sales floor. Claimant was going over his expectations for the upcoming shift. Transcript at 15. The general manager approached claimant, greeted the agents who were assembled and asked them all how they were doing. Claimant reached behind the general manager, and the general manager began to laugh or "giggle." Transcript at 15. Claimant asked the general manager if he was "ticklish" since he had laughed when claimant placed his arm around him. Transcript at 15. Claimant tickled the general manager in his side. Claimant thought that he and the general manager had a sufficiently close professional relationship, as managers, that it was "no big deal" to tickle him briefly. Transcript at 15.

(6) Later in the day on February 13, 2015, claimant and a Geek Squad agent whom he managed and who was claimant's good friend were in the back room joking around and playing "robot," with claimant pretending to be the "dad robot" and the agent pretending to be the "kid robot." Transcript at 15, 24. The agent was responding to claimant by speaking in a monotonic "robot voice" when claimant directed him to go to the customer service area and begin helping customers. Claimant asked the Geek Squad agent, "Mr. Robot, do you want me to carry you there [to the customer service area]?" Transcript at 16. The Geek Squad agent who was pretending he was the "kid robot" replied, "Yes please, carry me there." Transcript at 16. Claimant then lifted the agent who was standing upright approximately six inches off the floor, moved him to the customer service area and set him down. Both claimant and the agent thought their behavior was "hilarious." Transcript 24.

(7) On February 23, 2016, the employer discharged claimant for his behavior toward the general manager and the Geek Squad agent on February 13, 2016, finding that it violated the employer's standards against harassment and inappropriate conduct. Exhibit 1 at 6; Transcript at 5.

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 excused from constituting misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer cited the two incidents on February 13, 2016 as the proximate cause of claimant's discharge, contending that each involved a willful or wantonly negligent violation of the employer's standards against harassment and inappropriate conduct. Transcript at 5, Exhibit 1 at 5. With respect to the incident in which claimant and the Geek Squad agent were "playing robot," it appears that claimant

and the agent were mutually “goofing off” and claimant did not intend to harass, annoy, demean or bully the agent by his behavior. Transcript at 25. Although the employer’s witness testified that the agent seemed to him to be laughing “uncomfortably” when claimant lifted him up and moved him to the customer service area, he did not persuasively and non-speculatively rebut claimant’s contention that they were good friends and both were willingly playing roles in a game that both thought was “hilarious.” Transcript at 15, 16, 24. As well, the employer did not demonstrate that claimant was aware or should have been aware that his briefly carrying the agent to the customer service area violated the employer’s prohibition against “inappropriate conduct.” The employer’s prohibition specified some concrete types of behaviors that the employer deemed to be inappropriate but did not include behaviors similar to that of claimant’s with the agent and the behaviors it generally identified in the policy’s catchall provisions as prohibited were defined as those that were “inconsistent with our values or negatively impacts the work environment.” Exhibit 1 at 4. Accepting claimant’s explanation that he and the agent were merely playing roles in a game which might have been briefly viewed by customers, it is difficult to conclude that all reasonable people would find that type of behavior to conflict with the employer’s values or to have unreasonably negative impacts on the workplace environment. For these reasons, the employer did not demonstrate that claimant’s behavior toward the agent violated the employer’s reasonable standards barring harassment or inappropriate conduct.

With respect to claimant’s behavior in tickling the general manager on February 13, 2016, the employer did also did not demonstrate that even if claimant’s behavior violated the employer’s standards it was not excused as a good faith error. Claimant testified credibly that he subjectively thought the close professional relationship he perceived himself to have with the general manager allowed him to joke with or tease the general manager by tickling him. Transcript at 15. Had claimant not erroneously thought his tickling behavior was condoned by the employer, it is difficult to conceive of why he would tickle the general manager since from the circumstances as described by both claimant and the general manager, claimant was not apparently angry at the general manager and it was not contended that claimant intended to embarrass or demean the general manager by the tickling. On these facts, assuming claimant violated the employer’s standards against inappropriate conduct by tickling the general manager, his behavior was excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 16-UI-60699 is affirmed.

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

DATE of Service: August 1, 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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