

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0826

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151221). The employer filed a timely request for hearing. On June 16, 2016, ALJ Shoemake conducted a hearing, and on June 16, 2016, issued Hearing Decision 16-UI-62469, affirming the administrative decision. On July 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Royal Caribbean Cruises employed claimant from April 30, 2012 until April 8, 2016, last as a supervisor in the employer's sales division.

(2) The employer's code of ethics specified that supervisors were expected to serve as positive role models for employees, particularly in the areas of sound decision making and ethical behavior. The employer also expected that employees would respond honestly when questioned during an investigation. Claimant knew about and understood the employer's code of ethics, and also understood, as a matter of common sense, that he was expected to provide honest responses when questioned during an investigation.

(3) In July 2015, claimant used his personal phone to send a photo text of a male body part to a friend's personal phone; claimant sent the photograph outside of work hours. At the time claimant sent the photograph, claimant and the friend worked together in the employer's service division, but neither were on duty. Claimant meant the photograph to be a joke, and his friend was not offended by the photo. Claimant did not intend for the photograph to be shared with other individuals who also worked for the employer.

(4) In December 2015, claimant began working in the employer's sales division. Claimant did not have friendly relationships outside of work with any of his coworkers in the sales division.

(5) Beginning in December 2015, employees began circulating the photograph that claimant sent to his friend in July. Claimant was unaware that employees were circulating this photograph.

(6) Sometime prior to April 4, 2016, an employee saw the July photo claimant had sent to his friend and was offended by it. The employee complained to the employer's human resources (HR) division, and, on April 4, the employer began an investigation into the matter.

(7) On April 5, 2016, the employer's managers met with claimant and asked him if there was anyone in the sales division to whom he may have sent an inappropriate and offensive photograph. Claimant said there was no one in the sales division with whom he had a personal relationship outside of the workplace, denied that he had sent an inappropriate photograph, and told the investigators that he would never do such a thing. Audio recording at 22:16, 23:45. During this meeting, claimant was told that the employer believed the photograph had only been circulated among employees in the sales division.

(8) On April 8, 2016, the employer's managers again interviewed claimant, and told him that the employer now believed that the photograph that was the subject of the investigation was first circulated among employees in the employer's service division. Audio recording at 26:55. When claimant was again questioned about the photograph, he stated that it was "very likely" that in July 2015, he sent a photograph to a personal friend.¹ *Id.*

(9) Also on April 8, 2016, the employer discharged claimant for his alleged failure to exercise sound judgment when he sent an inappropriate photograph to a coworker and for his alleged lack of truthfulness during the employer's investigation into the photograph. Audio recording at 18:07.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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.

The employer's code of ethics specified that claimant, as a supervisor, would appropriately model ethical behavior and sound decision making to subordinate employees. The employer also expected that claimant would provide truthful answers to any questions asked in the course of an investigation. Claimant knew about and understood these employer expectations. The employer discharged claimant because it believed he did not exercise sound judgment when he sent an inappropriate photograph to a

¹ Claimant was never shown the photograph that was the subject of the investigation. Audio recording at 27:02.

coworker that ultimately was shown to other employees, and because it determined that he did not provide truthful responses during the investigation into the photograph.

To the extent that the employer discharged claimant for choosing to send an offensive photograph to a coworker, it failed to demonstrate that it discharged claimant for misconduct. Claimant sent the photograph at issue from his personal phone, during non-work hours, to the personal phone of a friend with whom claimant worked. At the time claimant sent the photograph – in July 2015 – he meant the photograph to be a joke, and had no intention or expectation that his friend would choose to share the photograph with coworkers. In addition, there is no evidence in the record to indicate that claimant knew or should have known his friend planned to show the photograph to coworkers several months after claimant sent it to him. Claimant’s decision to send his friend an inappropriate photograph outside of work hours was not undertaken with a deliberate and knowing disregard of the employer’s expectation that he exercise sound judgment by preventing the introduction of offensive material into the workplace. We conclude that the employer failed to prove that claimant engaged in misconduct when he sent his friend an inappropriate photograph in July 2015.

To the extent that the employer discharged claimant for his lack of truthfulness during the investigation into the photograph, it also failed to demonstrate that it discharged claimant for misconduct. The employer asserted that on April 5, claimant repeatedly denied that he had ever sent an inappropriate or offensive photograph to any of the employer’s employees, and only admitted that he had done so when the employer confronted him with additional evidence on April 8. Audio recording at 13:16, 13:55. Claimant, however, testified that on April 5, he was only asked if he had sent an inappropriate photograph to any employees in the employer’s sales division, and that he truthfully responded that he had not, since the friend to whom he sent the photograph worked in the employer’s service division. Audio recording at 22:16, 23:45. Claimant asserted that when he was again questioned on April 8 and told that the photograph first began circulating in the employer’s service division, he explained that it was “very likely” that he had sent a photograph to a friend who worked in that division. Audio recording at 26:55. Absent any reason to doubt the credibility of claimant or the employer’s witness (and we find none), the evidence as to whether claimant truthfully responded to questions asked about the inappropriate photograph on April 5 and 8 is, at best, equally balanced. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore failed to meet its burden to demonstrate that claimant was untruthful during an investigation.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-62469 is affirmed.

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

DATE of Service: August 11, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.