

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0957

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160242). Claimant filed a timely request for hearing. On July 12 and 27, 2016, ALJ Murdock conducted a hearing, and on August 1, 2016 issued Hearing Decision 16-UI-64819, concluding the employer discharged claimant, but not for misconduct. On August 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the July 12, 2016 hearing, the ALJ admitted documents submitted by the employer into the record as Exhibits 1 and 2. However, the exhibits admitted were not marked. EAB has therefore marked Exhibits 1 and 2, based on the ALJ's descriptions. Exhibit 1 is the employer's description of the formal concern process, and Exhibit 2 is the employer's summary of the formal concerns imposed on claimant. Audio Record (July 12, 2016) at 5:17 to 5:53.

We considered the employer's written argument and the entire hearing record.

FINDINGS OF FACT: (1) People's Food Cooperative employed claimant from December 1, 2013 to May 7, 2016 as an on-call, substitute shopkeeper.

(2) The employer expected claimant to refrain from using discriminatory speech at work, including racist and classist terminology. The employer's managers informed claimant of this expectation and gave him training about how to communicate in a nondiscriminatory manner at work. Exhibit 2 at 6.

(3) In February 2014, after receiving complaints from claimant's coworkers that claimant had made comments that related to gender, race, and weight at work, the employer's managers met with claimant and gave him additional training and advised him to refrain from commenting on people's gender, weight, appearance, religion and economic status at work. After employees made additional complaints about claimant's statements at work, the employer provided claimant with harassment training in May 2014.

(4) After May 2014, there were fewer complaints about claimant's comments. However, claimant made additional unwanted comments to staff and customers regarding appearance, race, sexual preference, ethnicity, feminism, homelessness, urination, and his own body. The employer warned claimant to refrain from making inappropriate comments at work and provided additional and ongoing guidance to him about how to do so.

(5) On April 22, 2016, claimant sent an email to his coworkers reporting that an item was missing from the employer's store. Later that evening, claimant sent another email to his coworkers stating that he had seen a person who he believed used to steal returnable bottles from the employer "riding a bicycle" away from the store the day before he noticed the item was missing from the store. Transcript at 7. In the email, claimant described the person as "rough looking" with "light brown skin." *Id.* Claimant described the individual's approximate age, height, facial hair and hair, and body mass index. Claimant also described the individual as being "brazen," and a "bro/hoodlum" and "gangster." *Id.*

(6) On May 7, 2016, the employer discharged claimant for using inappropriate speech at work.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant 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 has the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for sending his coworkers an email on April 22, 2016 that contained descriptive terms that the employer considered to be racist and classist. The employer argued in its written argument that claimant's email was the final incident in a series of incidents that amounted to misconduct, stating that the email "was the final incident in a 2+ year long accountability process to address an ongoing series of actions that amounted to [misconduct]." Employer's Written Argument. We agree that the record shows that, throughout his employment, claimant repeatedly violated the employer's expectations regarding appropriate statements at work. However, in a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The owner did not decide to discharge claimant until May 7, 2016, after claimant identified a suspected thief, in part, as a "bro," "hoodlum," and "gangster" in an email he sent to all the employer's staff on April 22, 2016. Accordingly, claimant's April 22 email was the proximate cause of claimant's discharge and is the proper initial focus of the misconduct analysis.

The employer had previously warned claimant to refrain from making racist or classist statements while at work. As a matter of common sense, claimant understood that he should not refer unfairly to an

individual's race or say "hateful things or derogatory things" based on a person's race or socio-economic class. Transcript at 54. However, the record fails to show that claimant understood that the terminology he used in the April 22 email violated the employer's expectations.

The employer asserted that claimant's email was inappropriate "profiling" because claimant based his accusations on the individual's appearance and mode of transportation. Transcript at 10. Claimant asserted, however, that he was "all but absolutely certain" that the individual had stolen from the employer in the past, and used the words "bro," "hoodlum" and "gangster" without intending to be racist or classist, but rather, in an attempt to give a "physical description" and "character depiction" of the individual so that his coworkers could identify him to prevent further theft. Transcript at 72-74. Although it was not unreasonable for the employer to perceive claimant's statements as inappropriate, the employer failed to show that claimant knew from prior training, experience or warnings that the terms he used would probably result in a violation of the employer's expectation that claimant refrain from using racist and classist terminology. Nor do we find the employer's expectation so obvious that claimant should have known as a matter of common sense that using what he believed were "character" descriptions to identify someone he believed had stolen from the employer in the past would violate the employer's standards. Absent such a showing, the employer failed to establish claimant violated its expectations willfully or with wanton negligence.

We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-64819 is affirmed.

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

DATE of Service: September 16, 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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