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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-1436

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 143217). Claimant filed a timely request for hearing. On December 12, 2016, ALJ Vincent conducted a two-part hearing, both sessions held on that day, and on December 21, 2016, issued Hearing Decision 16-UI-73409, affirming the Department's decision. On December 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) TCS Traffic Control Services employed claimant as a certified traffic control supervisor and flagger from May 22, 2016 to September 2, 2016.

(2) The employer expected its employees to use its radio equipment for business purposes only, to be professional and courteous while doing so, and to refrain from intimidation or sexual harassment at work. Claimant was aware of the employer's expectations through certification training and experience.

(3) One of claimant's coworkers (SM) was flagger who worked for a staffing company the employer had contracted with. SM had been a "very close friend" of claimant for several years and had resided with him for a time in Medford, Oregon. Transcript (December 12, 2016, 3:30 p.m.) at 8. SM initially worked with claimant in June 2016 on what the employer called the North Phoenix Road Project and subsequently was assigned to work with claimant, and did so, on other jobs. Transcript (December 12, 2016, 9:30 a.m.) at 11.

(4) In July 2016, the employer asked claimant to relieve two flaggers on a nearby job so they could take a lunch break. When he approached one of the flaggers (JL) for that purpose, he noticed the flagger did not have his protective vest zipped up, which he believed was an OSHA violation, and directed the flagger to fully zip his vest. The flagger complained to the employer about claimant's conduct, which he considered to be rude. The employer did not investigate or discipline claimant for his actions.

(5) During the weekend of August 14, 2016, claimant attempted to call SM several times after hours and outside of work without success concerning with whom she had been assigned to work on jobs in the coming days. He then sent to her a text message that he would come to her house if she didn't respond to his calls and questioned their friendship because of her lack of response. She eventually responded by text that she was dealing with a fatally ill relative and was unable to communicate with him at that time. Exhibit 1. A few days later she complained to the employer about claimant's phone calls and message exchange, and gave the employer copies of the text messages upon its request. She also complained that claimant and his coworker (MA) had made her uncomfortable in June on the North Phoenix Road Project when they reportedly discussed their sex lives over the radio when she was on the radio as well.

(6) On or about August 15, 2016, claimant and a coworker were told by a supervisor they could claim travel time on their time cards for a particular job. Claimant did so, on his time cards dated August 15 and August 22, before finding out on August 29 that that particular job would not pay for travel time. After that date, he no longer claimed travel time. However, the employer believed claimant knew travel time was not allowed prior to August 29, and had attempted to falsely claim travel time as work time on two time cards.

(7) On August 22, 2016, the employer spoke to claimant about the reported discussion of MA and his discussions of their sex lives in June, and the text messages between claimant and SM the weekend of August 14. The employer admonished claimant to avoid communicating with SM in the future unless it was for professional reasons. The following day, after hours, claimant saw SM in her car near the employer's office, drove his car next to her, rolled down his window and asked SM why she had given the employer copies of their texts. After SM responded, "I don't know", claimant told her "Well, it isn't doing no good. I don't know", and then drove off. Transcript (December 12, 2016, 3:30 p.m.) at 15.

(8) Around August 23, another coworker (BK) mentioned to the employer that claimant, who was gay, in response to the coworker's comment that a particular vehicle "suck[s]", jokingly responded "just like me" and that this had occurred on August 22, 2016. Transcript (December 12, 2016, 3:30 p.m.) at 16-17, 31-32; Exhibit 1.

(9) On August 30, 2016, in response to the employer's request, SM described her encounters with claimant in writing and submitted it to the employer. On September 1, 2016, in response to the employer's multiple requests, BK described his exchange with claimant in writing and submitted it to the employer. The employer's manager LR gave BK directions about the content of his written statement even after BK told him that he had not been offended by claimant's comment and did not want to write a statement. Transcript (December 12, 2016, 3:30 p.m.) at 31-34; Exhibit 1.

(10) On September 2, 2016, the employer discharged claimant for his confrontation with SM on August 23, his comment to BK on August 22 and his purported attempt to falsely claim travel time as work time on August 15, and 22, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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 is conscious of his conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the employer asserted at hearing that it discharged claimant for making a sexually harassing comment to BK on August 22, confronting SM on August 23 about turning in copies of their August 14 text messages to the employer, and attempting to falsely claim travel time for work time on his August 15 and August 22 time cards. Transcript (December 12, 2016, 3:30 p.m.) at 56-60. In Hearing Decision 16-UI-73409, the ALJ found the employer discharged claimant for those reasons in addition to others not offered by the employer as the proximate cause of his discharge, ultimately concluding that the employer had met its burden of proof in establishing misconduct. Hearing Decision 16-UI-73409 at 2-3. We disagree with the ALJ that the employer met its burden.

The employer expected claimant to refrain from sexually harassing coworkers by making "inappropriate" comments to them. Exhibit 1. The employer failed to show that claimant consciously violated that expectation by responding "just like me" or "so do I" to BK's comment that Prius vehicle types "suck." The employer's proof consisted of BK's written statement regarding the exchange. Exhibit 1. At hearing, however, BK testified that by the time claimant made his comment, he knew claimant was gay and was not offended by claimant's remark and was encouraged several times and, in fact, assisted by the employer's manager to write his statement, even though the manager knew that BK did not consider claimant's comment offensive. The employer then attempted to discredit its own witness, asserting he was unworthy of belief because he had prior felony convictions and a potentially pending criminal complaint against him relating to the employer. Transcript (December 12, 2016, 3:30 p.m.) at 39-41, 56-60. Viewing the evidence objectively, the employer failed to establish by a preponderance of the evidence that claimant consciously violated the employer's expectation that he refrain from committing sexual harassment against a coworker by making the purported comment to BK.

The employer also failed to establish by a preponderance of evidence that claimant consciously submitted time cards that included travel time knowing that such time had not been authorized. Both claimant and a coworker asserted at hearing that a supervisor (PR) told them that they would be paid travel time for the job in question and claimant presented evidence that he first learned that he would not be paid for travel on August 29, after which he did not claim travel time on his time cards. Transcript (December 12, 2016, 3:30 p.m.) at 49-50; Exhibit 1. Moreover, the time cards show that claimant

clearly labeled the time he claimed for travel as such, which, when viewed objectively, suggests that claimant believed he was authorized to claim such time when he did so. Accordingly, the employer failed to meet its burden regarding this allegation of misconduct.

The third reason the employer discharged claimant on September 2 was for his confrontation with SM on August 23 at which time claimant questioned SM about why she had provided the employer with a copy of their text messages during the weekend of August 14. Claimant admitted that after SM responded to his question with, "I don't know", claimant stated, "Well, it isn't doing no good. I don't know", before driving off, but asserted he did not believe his comment violated an employer expectation because the exchange concerned their friendship "outside of work." Transcript (December 12, 2016, 9:30 a.m.) at 16. Assuming, without deciding that the conduct in question was at least wantonly negligent, we disagree with the ALJ's conclusion that claimant's discharge was for misconduct because, on this record, claimant's August 23 exchange with SM was no more than an isolated instance of poor judgment, which is not misconduct.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. Here, besides the three bases upon which the employer made its decision to discharge claimant, discussed above, the employer asserted that claimant also violated its expectations by his comment to JL to zip his vest up in July, by his alleged discussion of his sex life with MA on June 14, and by his text messages to SM the weekend of August 14. However, the employer failed to meet its burden to show that claimant's comment to JL was somehow harsh or inappropriate and violated a known employer expectations, or that claimant and MA actually discussed their sex lives over the radio in June, as SM reportedly told the employer, in violation of the employer's prohibition against sexual harassment. Claimant denied that he was inappropriate in his comments to JL or that he discussed his sex life over the radio in June, and his assertions were supported by MA's sworn testimony at hearing. Transcript (December 12, 2016, 3:30 p.m.) at 43-48. Although the text messages in question demonstrate that claimant was irritated by SM's apparent failure to answer his calls or directly respond to his inquiries by text, the record fails to show that claimant was aware that he knew or should have known at the time that his conduct probably violated the employer's expectations. Viewed objectively, the messages themselves were not threatening and appear to have been motivated by concern, although perhaps misplaced, for a friendship going sour. Accordingly, the employer failed to establish that on a prior occasion, claimant willfully or with wanton negligence violated a reasonable employer expectation, and that his exercise of poor judgment on August 23 conduct was not isolated.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible exceeds mere poor judgment and cannot be excused. Here, claimant's August 23 comments to SM were not unlawful or tantamount to an unlawful act, nor of the sort, when viewed objectively, that would make a continued employment relationship impossible. It appears that claimant's comment, "Well, it isn't doing no good. I don't know", was his reaction to SM's statement "I don't know" in answering claimant's query regarding why she gave the employer copies of their text messages. Although the employer presented hearsay evidence that SM was concerned for her safety after claimant's comment, claimant denied that he had ever threatened SM in any way, and the record shows that had been friends for several years to the extent that SM actually resided with claimant for a period of several months when they lived in Medford. Exhibit 1; Transcript (December 12, 2016,

3:30 p.m.) at 8. Because the employer did not call SM as a witness at hearing, claimant was denied the critical opportunity to cross-examine her regarding her observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from SM to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that his first-hand testimony is not outweighed by the employer's hearsay. The evidence as to whether claimant made comments to SM that made a continuing employment relationship impossible was, at best, equally balanced, and the ALJ's conclusion that claimant was discharged for misconduct was not supported by substantial evidence.[1]

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 failed to meet its burden here. The employer discharged claimant because of an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 16-UI-73409 is set aside, as outlined above.[2]

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

DATE of Service: <u>February 14, 2017</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 '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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[1] *See, Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.