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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0086

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85958). Claimant filed a timely request for hearing. On January 3, 2017, ALJ L. Lee conducted a hearing, and on January 5, 2017 issued Hearing Decision 17-UI-74111, concluding the employer discharged claimant, but not for misconduct. On January 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Chilhowee Motorcycle Leather employed claimant from 2005 until April 4, 2016 in its manufacturing shop.

(2) The employer expected claimant to engage in respectful interactions with his coworkers, free from racism, sexism and harassment. The employer also expected claimant to refrain from retaliating against coworkers who complained about disrespectful statements made at work. Claimant understood the employer's expectations as a matter of common sense.

(3) Before the end of March 2016, claimant supervised the two other employees, one female and one male, who worked in the manufacturing shop. The female employee had worked with claimant since December 2015. Claimant was displeased with her work performance because she often argued with him about his instructions or failed to follow them. Claimant complained to the operations manager about the employee's failure to follow instructions at work.

(4) In late March 2016, the female employee who was the subject of claimant's complaint told the operations manager that she was offended by claimant's comments at work on three previous occasions. She reported that, on one occasion, claimant stated that, "black communities were the only ones that

were rioting and causing destruction.” Transcript at 6. She also reported that claimant made a derogatory comment regarding women’s problem-solving skills, and another comment about a video game claimant had played where the women made sexually suggestive noises in the game. The operations manager asked the male employee about the allegations, and he stated that the allegations were accurate. Before March 2016, no employees had complained about claimant making inappropriate comments in the workplace.

(5) The operations manager told claimant about the employees’ allegations and gave him a written warning to refrain from making inappropriate comments at work, including “racially biased [comments], disparaging gender comments, and inappropriate sexual comments regarding a video game.” Transcript at 32. Claimant responded that the comments were “misconstrued.” Transcript at 9. Because of the allegations, the employer permanently removed claimant’s supervisory duties from him and assigned them to the other male employee in the manufacturing shop.

(6) After the employer gave claimant the warning, claimant discussed the employer’s actions with the other male employee, now his supervisor. Claimant told the supervisor that he wanted the matter with the female employee resolved so the employees could work without tension. Transcript at 30-31. The supervisor repeated claimant’s statements to the general manager, and allegedly told the operations manager that claimant stated that the employer should discharge the female employee who had reported his comments because “she’s creating all the issues here in the shop.” Transcript at 13.

(7) On April 4, 2016, the employer discharged claimant for allegedly creating animosity at work by suggesting the employer should discharge the employee who complained about statements he made 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. 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’s general manager testified at hearing that the employer discharged claimant for making statements at work concerning race, gender and sexual content from a video game that it considered “inexcusable.” Transcript at 5. However, in a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. Although the employer gave claimant a verbal and written warning and demoted him because of his comments, the employer did not decide to discharge him until the general manager allegedly received a further report from claimant’s supervisor that claimant stated that the employer should discharge the female employee. The general manager testified that claimant “still continued . . . to converse with the male employee, saying [the employer should discharge her].” Transcript at 13. Accordingly, claimant’s alleged comment suggesting retaliation toward the female employee was the proximate cause of claimant’s discharge and

is the proper initial focus of the misconduct analysis. Only if we conclude that claimant's conduct in that instance was willful or wantonly negligent would we then analyze the prior incidents for evidence of willful or wantonly negligent misconduct.

Claimant testified that he discussed the female employee with his supervisor after he received the employer's warning, but denied having stated that the employer should discharge her. Transcript at 30. The supervisor who made the report to the employer's operations manager did not testify during the hearing. The secondhand testimony from the operations manager was the employer's only evidence of claimant's reportedly retaliatory comment about the female employee. Because the supervisor who was the source of the evidence did not testify at hearing, claimant was denied the opportunity to ask him under oath about his alleged statement to the operations manager. The employer could have, but did not, present first-hand testimony from the supervisor who reported claimant's alleged comment. That claimant had the opportunity to question the operations manager about what the supervisor told him was insufficient to test the reliability of the statements themselves since the supervisor made the statements, not the operations manager. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that his first-hand testimony was not outweighed by the employer's hearsay evidence. The evidence as to whether claimant recommended to his supervisor that the employer discharge the female employee who complained about his comments was, at best, equally balanced. Additionally, although claimant told the supervisor that he wanted the matter with the female employee resolved so the employees could work without tension, the employer did not assert or show that such a comment deviated from the employer's expectation that he treat coworkers with respect.

Because the evidence regarding the incident that prompted the employer to discharge claimant was no more than equally balanced, the employer failed to meet its burden to establish misconduct by a preponderance of evidence. Therefore, claimant was discharged, but not for misconduct under ORS 657.176. He is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-74111 is affirmed.

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

DATE of Service: February 14, 2017

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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