EO: 200
BYE: 201745

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

315
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0091

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101835). Claimant filed a timely request for hearing. On January 17, 2017, ALJ Seideman conducted a hearing, and on January 18, 2017 issued Hearing Decision 17-UI-74907, affirming the Department's decision. On January 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Goodwill Industries of the Columbia-Willamette employed claimant as an employment coordinator from July 27, 2012 to November 9, 2016.

(2) The employer had an anti-harassment policy that prohibited, among other things, unwanted or unwelcome advances, suggestive comments or joking and physical contact, if the behaviors created an intimidating, hostile or offensive environment. The employer included the anti-harassment policy in its employee handbook.

(3) It was not uncommon for male and female employees to compliment each other on their appearances. Claimant repeatedly commented on his coworkers' appearance, including that of two female coworkers, A and B.[1] Claimant leaned into A's workspace and whispered or mouthed "Wow, Mmm, WOW." Exhibit 3. Claimant asked A if she had been on TV in a manner that led her to infer that he was insinuating she had been in pornography. Claimant told A, "somedays I come in 'looking Mighty Fine,' but other days I look like (he scrunched up his face and stuck out his tongue)." *Id*.

(4) On October 31, 2016, claimant twice told A that she had fuzz on her backside and she removed it; later when A was walking ahead of claimant he removed a piece of fuzz from her backside. On November 2, 2016, claimant told A "he thought his wife was fine, but also thought that somebody else was fine, and that somebody else was a little girl," then "paused and then told me that little girl was me."

[1] To preserve the privacy of the parties involved, we have assigned claimant's coworkers pseudonyms.

Exhibit 3. A made facial expressions indicating "complete disgust." *Id.* Later, after A changed her mind about going to a fast food restaurant with claimant, he whispered to her, "you have never been with a brother have you, or alone in a car with a brother." Exhibit 1, 3. He then took a walk with A, during which he said that he and another individual thought she was racist, and suggested that the reason she had declined to go to the fast food restaurant with him was that she did not want anyone to see her in the same car as a Black man. He told her that she was "a fake," he did not believe that she was "actually a nice person," and asked her "[w]hy you aint attracted to a brotha . . . so what you got against a brotha?" Exhibit 3.

(5) A felt uncomfortable with claimant because of his comments and behavior. She began to feel afraid of him and unsafe. On November 3, 2016, A reported claimant's behavior to the employer.

(6) On November 4, 2016, the employer's executive loss control manager met with claimant to discuss A's complaints. Upon entering the loss control manager's office, claimant immediately acted agitated and angry and said, "I shouldn't have to be here, and I did not do any sexual harassment." Exhibit 5. At the time he made that statement, the employer had not asked him any questions or suggested he was suspected of harassment. In response to the employer's questions, claimant said he had never done anything in a harassing manner. He denied having said that A was a "sweet" "pretty young girl." *Id.* He denied having asked A if she had ever "been with a Brother" and said that A had brought up the subject with him and that "he tried to counsel her." *Id.*

(7) The loss control manager suspended claimant pending investigation and escorted him from the workplace, but asked claimant to provide a written statement to the employer describing what happened from his perspective. The loss control manager asked him to write down his side of the story. Claimant prepared a statement in which he stated that the female employees' reports were "twisted and fabricated" and that he "did not intend for any of this to be taken in a sexual manner. If anything as a compliment or something to lift there [*sic*] spirit, because they are going through so much with their kids." Exhibit 2.

(8) The employer continued investigating claimant's behavior. Another employee, B, reported that claimant "smacked" her on the backside. Exhibit 4. The employer already knew about that incident because claimant had reported it to the employer shortly after it happened and he had apologized to B. B also reported, though, that claimant "would always look me up and down, obviously looking me up and down." *Id.* She reported that he repeatedly commented about how attractive she was, that she had a pretty face, and was "fine." Transcript at 11. Claimant repeatedly commented that B's makeup looked nice, "insisted that I must have a date after working because I was looking so good, that he might have to follow me home to see what I was doing" and said that he liked it when she wore eyeshadow or eye makeup. Exhibit 4. B began to feel uncomfortable wearing skirts to work because of the way he looked at her, and began to feel like she should not wear makeup to work because of his comments. She felt uncomfortable working with claimant. A and B both felt that claimant waited until others in the office were not around before he made comments to them.

(9) On November 9, 2016, the employer discharged claimant for violating the employer's anti-harassment policy with respect to A and B.

(10) On November 10, 2016, claimant sent an email to the employer's director of vocational services regarding his "abrupt departure from Goodwill," which he said occurred "because someone decided to twist my words & make it into something that was unprofessional and harassing" and that he "wasn't being aggressive or intimidating to anyone." Exhibit 6. Claimant indicated that although he and A had discussed "other things, including race," it was nothing of "a sexual nature," and he "was intending to be an uplift to them," and "felt that I was setup [*sic*] by her and another." *Id.*

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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 persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means that in order to prove misconduct, the employer must establish that, more likely than not, claimant violated the employer's policy, and that his violation was done willfully or with wanton negligence.

Claimant repeatedly made statements to both A and B that were unwelcome and on at least two occasions engaged in unwanted physical contact, which had the result of making A and B feel uncomfortable and unsafe in the workplace. Claimant argued that he did not violate the employer's policy because he did not intend that result, and that in order to constitute harassment his comments had to have been misinterpreted. *See e.g.* Transcript at 20, 22. Notably, however, the employer's policy does not require that claimant have intended that result in order for a violation to have occurred, only that the result happened. Claimant argued that his racially-related comments to A about "being alone in a car with a brother" was meant as a joke; the employer's policy, however, specifically includes jokes as potentially harassing behavior if it had the effect of making the recipient uncomfortable. Transcript at 5; 31-32. We therefore conclude that it is more likely than not that claimant violated the employer's anti-harassment policy by making unwelcome comments and engaging in unwanted physical contact.

The next question is whether claimant acted willfully or with wanton negligence. Claimant's testimony suggests that he did not intentionally engage in harassing behavior towards A or B. His testimony that he did not intend to make either A or B uncomfortable seemed sincere. However, the record suggests that claimant's conduct did constitute a wantonly negligent violation of the employer's anti-harassment policy by demonstrating a conscious disregard for the consequences of his conduct. For example, with respect to having unwanted physical contact with A's backside, the record shows that claimant repeatedly looked at A's backside to identify that she had fuzz on it and then removed the fuzz himself and, although the office space was small, interpreted A standing at the fax machine as her standing "in a

way to where her butt was right in my face." Transcript at 40. He testified further that he construed A and B stretching at their workstations as sexual provocation. Transcript at 23.

Although he disputed some of the particulars, claimant acknowledged that he complimented A and B, suggesting, however, that his behavior toward A and B was akin to telling "men they look nice today and their ties look nice." Transcript at 22. On this record, however, claimant's comments to and about A and B were not innocuous or generalized compliments on a piece of clothing, they were specific and sexual in nature, and A and B both observed that claimant seemed to wait until others were out of the area before making those sorts of comments to them. The record does not suggest that the sorts of comments and conversations claimant made to or had with A and B were typical in the workplace among employees or analogous to complimenting a man's tie. Nor does the record suggest, for example, that claimant had conversations with his male colleagues or other female colleagues about the races of their intimate partners, commented to male colleagues on their attractiveness or that they were "Mighty Fine," or suggested to that he might have to follow them home from work to see what they were doing. The record suggests that it is more likely than not that claimant made particularly personal and intimate comments to both A and B, comments of a sort he did not make toward other colleagues, whether male or female.

Although claimant testified that he did not intend to make A and B uncomfortable and that they must have misinterpreted his comments, his claim is implausible. Claimant was conscious of what he was saying and doing at all relevant times, and he should reasonably have known that his comments – repeatedly commenting on A's and B's physical characteristics or attractiveness, looking them up and down, commenting "Wow, MMm, WOW" or that they were "Mighty Fine" – exceeded the boundaries of professional norms and would probably violate the standards of professional behavior the employer had the right to expect of him. Nothing in this record suggests that A or B reciprocated or welcomed claimant's commentary. Given that at least A would make facial expressions indicating her "complete disgust" at him, claimant should have been aware or suspected that comments of that nature were unwelcome and, therefore, were in violation of the employer's anti-harassment policy. Likewise, claimant testified that he knew smacking B on the backside was inappropriate and had apologized to her; in light of that incident, it seems more likely than not that claimant knew or should have known that repeatedly looking at A's backside and then picking a piece of fuzz off her backside would probably also be considered inappropriate behavior. For the reasons explained, we conclude that claimant's conduct constituted wantonly negligent violations of the employer's anti-harassment policy.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined to include single or infrequent occurrences of wantonly negligent conduct. OAR 471-030-0038(1)(d). In this case, claimant repeatedly engaged in similar conduct towards A and B, so his conduct was not isolated and may not be excused for that reason. For conduct to be considered a good faith error, claimant must have sincerely believed that he was in the right when engaging in the conduct at issue. Although claimant testified in this case that A and B misinterpreted his intent, he did not deny that the majority of the alleged conduct occurred, nor did he argue that he thought the actual result of his conduct – that is, making two female coworkers feel uncomfortable and unsafe in the workplace – was consistent with the employer's anti-harassment policy. Claimant's conduct was not in good faith.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving

unemployment insurance benefits because of his work separation until he has requalified for benefits by earning four times his weekly benefit amount form work in subject employment.

DECISION: Hearing Decision 17-UI-74907 is affirmed.

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

DATE of Service: February 17, 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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