

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0211**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131043). Claimant filed a timely request for hearing. On February 2, 2017, ALJ Frank conducted a hearing, and on February 3, 2017 issued Hearing Decision 17-UI-76188, reversing the Department's decision. On February 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Both the employer and claimant submitted written arguments that contained information not offered during the hearing. Neither party showed that factors or circumstances beyond the party's reasonable control prevented them from presenting the information at hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that either party offered in their written argument; EAB based this decision on review of the record and arguments based on the record. ORS 657.275(2).

**FINDINGS OF FACT:** (1) J R Abbott Construction Company, Inc. employed claimant as a superintendent from approximately 2014 until November 16, 2016.

(2) The employer expected claimant to refrain from inappropriate communications, including email and other electronic communications. Claimant understood the employer's expectation as a matter of common sense.

(3) In December 2015, claimant sent an electronic holiday card to some staff that the employer considered offensive. The employer's president advised claimant that he was working in a corporate environment and should in the future avoid sending cards that that human resources department would deem "politically incorrect." Audio at ~25:04. Sometime in September 2016, claimant sent an email to some of his supervisors pointing out behaviors in a subordinate staff member that he thought were inappropriate. After sending this email, claimant was advised that he should not use email if he was communicating about "sensitive matters," like personnel matters, but should limit himself to voice communications, either by way of in-person or telephonic communications, due to liability concerns.

(4) On November 15, 2016, at around 10:00 p.m., claimant was reviewing his emails after his workday was over. Before accessing the emails, claimant had consumed some beers and was very tired since he was working long hours on a “tough” job assignment. Audio at ~29:11. Claimant opened an email from a subordinate staff member addressed to him and other staff members announcing that the staff member was resigning. Claimant respected and liked the departing staff member very much and became emotional about his departure. Claimant decided to reply to the staff member. In his reply, claimant wrote, “You have been a top-notch employee and a team member. I know this will sound gay, but I really love you as a person and as a team member.” Audio at ~12:50. Claimant intended to send the email only to the staff member, but inadvertently clicked the “reply to all” command, sending his reply to all of the original recipients of the staff member’s resignation email.

(5) After claimant’s reply was disseminated on November 15, 2016, some recipients objected to claimant’s use of the word “gay” in it. On November 16, 2016, the employer discharged claimant for using the word “gay” in the November 15, 2016 email, since it was a “slang” term which had offended many recipients of the email. Audio at ~12:38.

**CONCLUSIONS AND REASONS:** 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 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. The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While “gay” is often considered an informal colloquialism for “homosexual,” it is not generally considered to be an insult, slur or term of opprobrium when used in reference to oneself, as claimant did in the email, or when used as a neutral descriptive term for one’s sexual orientation. Claimant’s testimony that he did not intend to use the word as an insult or to offend anyone, but only to show the depth of his feelings for the departing employee in a heartfelt and sincere farewell message, is highly plausible given the context of the message. Audio at ~30:40, ~31:26. Although the employer’s witness contended that some of the unintended recipients of that message were offended by claimant’s use of the word “gay” in it, the employer did not show either that claimant intended to cause that type of affront or that, regardless of claimant’s benign intentions, all reasonable people would have considered claimant’s use of that word in the message offensive. Accordingly, the employer did not show that claimant willfully or with wanton negligence violated its expectations by sending an unreasonably inappropriate email communication on November 15, 2016. As result, the employer did not demonstrate that claimant engaged in misconduct.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-76188 is affirmed.

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

**DATE of Service: April 5, 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](http://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.