EO: 200
BYE: 201749

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
2017-EAB-0560

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131944). Claimant filed a timely request for hearing. On April 13, 2017, ALJ R. Frank conducted a hearing, and on April 21, 2017 issued Hearing Decision 17-UI-81557, concluding claimant's discharge was not for misconduct. On May 4, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same. The employer's principal argument seems to be based upon the Office of Administrative Hearings' denial of the employer's postponement request, and the employer's resultant failure to appear at the hearing to present evidence about claimant's work separation. We review denials of postponement requests for abuse of discretion.

Under OAR 471-040-0026(2) (August 1, 2004) a party's request for postponement may be allowed if:

> (a) The request is promptly made after the party becomes aware of the need for postponement; and
>
> (b) The party has good cause, as stated in the request, for not attending the hearing at the time and date set.

In this case, the employer made its request on April 6, 2017, a week after notice of the April 13th hearing was mailed to the employer, and one week prior to the hearing. The employer made no showing in its request, however, suggesting when the employer became aware of the need for a postponement, much less that the April 6th request for postponement was promptly made after the employer became aware.

The employer's request also did not show good cause. OAR 471-040-0021(3) states that good cause for purposes of requesting postponements is when:

> (a) The circumstances causing the request are beyond the reasonable control of the requesting party; and
>
> (b) Failure to grant the postponement would result in undue hardship to the requesting party.

The employer requested postponement because its first hand witness had an appointment with one of the employer's regional vice presidents. Absent a showing otherwise, the date and time of a scheduled meeting between two employees of the same business was within the employer's reasonable control.

Although the employer established that its first hand witness was not available at the scheduled time for the hearing, the employer did not assert or show that no other witness or representative was available to participate in the hearing at that time, even if the witness or representative's testimony would have been based on hearsay instead of first hand testimony. In the absence of a showing that the first hand witness was the only individual with the employer's corporation who could have attended the hearing on the employer's behalf, we cannot conclude that denial of the employer's postponement request would result in undue hardship to the employer.

Although the information about the employer's postponement request in this record is scant, and the record fails to show the basis upon which the Office of Administrative Hearings denied the employer's request, the record is sufficient to establish that denial of the employer's request did not amount to an abuse of discretion or entitle the employer to a new hearing. Accordingly, our consideration of the employer's argument would not have changed the outcome of this decision.

FINDINGS OF FACT: (1) Costco Wholesale Corporation employed claimant as a cashier from August 14, 1994 to December 14, 2016.

(2) The employer had a policy that prohibited sexual harassment. However, claimant and other long-term employees joked and "mess[ed] around" with each other. Audio recording at ~ 14:15. They "all made, you know, innuendo-type jokes with each other and comments with each other." Audio recording at ~ 14:25. As such, claimant did not think risqué jokes or comments with long-term employees were "a big issue." *Id.*

(3) In November 2016, claimant said something to the effect of, "hey, big tits" to a female coworker he had worked with for 20 years. Audio recording at ~ 9:50. It did not occur to claimant that his comment would offend her. The coworker became offended and reported claimant's comment to the employer.

(4) The employer had issued claimant a written warning in 2014 or 2015 for violating the sexual harassment policy, and, on December 14, 2016, discharged claimant for making a harassing comment to his female coworker.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 to prove misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to refrain from making sexually harassing comments to his coworkers, and claimant understood the expectation and appears to have violated it. For claimant's violation to be considered disqualifying misconduct, however, claimant must have violated the policy willfully or with wanton negligence. Here, claimant made a risqué comment to a coworker because he had worked with her for 20 years, shared "innuendo-type jokes" with her and other long-term employees, and thought she would not be offended by his comment. In other words, at the time claimant made the comment he did not believe his coworker would consider the comment offensive or consider it to constitute sexual harassment. Because claimant did not violate the employer's anti-harassment policy willfully, and the record fails to show he knew or should have known his coworker would be offended by his comment, the comment did not amount to misconduct. In the absence of evidence suggesting otherwise, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-81557 is affirmed.

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

DATE of Service: <u>May 24, 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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