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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
2017-EAB-0591

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100516). Claimant filed a timely request for hearing. On May 11, 2017, ALJ Janzen conducted a hearing, and issued Hearing Decision 17-UI-83161, reversing the Department's decision. On May 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rogue Valley Door Inc. employed claimant as a warehouse laborer from April 2, 2012 until March 26, 2017.

(2) The employer expected claimant not to engage or participate in promoting harassing or offensive behaviors in the workplace, including the use of racially derogatory language. Claimant understood the employer's expectations.

(3) The employer allowed warehouse employees to play music while at work using personal devices. The employee whose device was being used selected the music and it could be heard by other employee in the warehouse.

(4) On March 21, 2017, claimant used his phone to play music for the warehouse employees from Pandora, an application on the phone. Pandora played a randomly generated set of songs from a selected genre of music, with an occasional song from a different genre. Claimant had no control over the specific songs that were played. That day, claimant selected the genre "electronic dance music" and connected his phone to a boom box with speakers that amplified the set of songs that Pandora generated so that other employees could hear them. Sometime after, a hip hop song titled "My Nigga" was broadcast as one of out of genre songs in Pandora's random selection. The lyrics of the song repeatedly used the word "nigga." Shortly after the song "My Nigga" began playing, when claimant became aware of its lyrics, claimant interrupted the song and stopped it from continuing to play and disconnected his phone from the boom box. Claimant had to cross the warehouse from where he was working to reach his phone and the boom box. Claimant then went to lunch.

(5) Later that day, another warehouse employee who had heard the beginning of "My Nigga" reported to a supervisor that claimant had been playing music that was racially offensive. Although that employee was not offended by the song's lyrics, he thought that the one warehouse employee of African-American descent might have been offended. The African-American employee did not report that he was offended by the song, and he may not have known it was played.

(6) On March 26, 2017, the employer discharged claimant for allowing racially offensive language to be broadcast in the warehouse when the song "My Nigga" was played.

CONCLUSIONS AND REASONS: The employer did not show that it 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 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).

Despite claimant testimony that he did not believe the word "nigga" was viewed as a racial slur by African Americans, it is assumed for purposes of this decision that it had the potential to be perceived as such by a listener. While claimant voluntarily selected the genre of music that was going to be played by Pandora on March 21, 2017, it does not appear and the employer did not contend that claimant violated its standards by selecting the musical genre of "electronic dance music" for play or that he should have foreseen that an out-of-genre selection, with potentially racially derogatory lyrics, would intrude on that playlist. Nor did the employer dispute that claimant had no control over the songs that were played on the Pandora-generated playlist. While one of the employer's witnessed testified that her was "pretty sure" claimant allowed "My Nigga" to play to its conclusion when it was broadcast, claimant testified with certainty that he stopped the play of the song after he became aware that it was playing, which he stated was approximately one minute after it started. Transcript at 30, 41. The testimony of the employer's witness is insufficient to rebut that of claimant. That claimant took affirmative steps to stop "My Nigga" from continuing to play after he was aware of the contents of its lyrics strongly undercuts the contention that his behavior was either willful or wantonly negligent.

The employer's position at hearing appeared to be that it was justified in discharging claimant if racially offensive lyrics appeared on a song played in the "electronic dance music" genre playlist he had chosen, regardless of claimant's lack of control over the specific songs that were generated by Pandora. However, to disqualify claimant from benefits, the employer must show that claimant's behavior in allowing the broadcast of a song with racially offensive lyrics was accompanied by a willful or wantonly negligent state of mind. *See* OAR 471-030-0038(1)(c), OAR 471-030-0038(3)(a). Because claimant

had no control over the specific content of songs that Pandora played that day, he had no reason to foresee that "My Nigga" or a song with similar lyrics was going to be played as part of the music genre he had selected, and he took prompt steps to interrupt the song when he was aware of its content, the employer failed to demonstrate that the behavior with which it took issue was accompanied by the conscious level of awareness needed to establish that it constituted either a willful or wantonly negligent violation of its standard. Accordingly, the employer did not meet its burden to show that claimant engaged in misconduct on March 21, 2017.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-83161 is affirmed.

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

DATE of Service: June 19, 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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