EO: 200
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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-0659

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154027). Claimant filed a timely request for hearing. On May 17, 2017, ALJ Frank conducted a hearing, and on May 19, 2017 issued Hearing Decision 17-UI-83836, concluding the employer discharged claimant, but not for misconduct. On May 30, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted new information to EAB that consisted of five "employee incident reporting forms" regarding an alleged incident in January 2017, stating in its cover letter that the employer "sent certified copies of [the forms] to [claimant's attorney] . . . weeks ago involving a separate matter." Employer's Argument at 1. OAR 471-041-0080 (October 29, 2006) provides that a party's written argument will not be considered unless that party certifies that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a), which states that the written argument must include a statement that a copy has been provided to the other parties. Here, although the employer asserts it previously provided the new information to claimant's attorney regarding a separate matter, the employer did not comply with OAR 471-041-0080(2)(a) because it failed to give claimant notice that the new information was submitted to EAB, and an opportunity to respond to the argument. Nor is it permissible under the rule to assume that claimant has a copy of the new information.

In addition, the employer's argument failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Wellspring Centre for Body Balance PC employed claimant as a chiropractor from October 2016 to February 8, 2017.

(2) The employer had a policy that prohibited harassment. Claimant understood the employer's expectation that he refrain from harassing coworkers as a matter of common sense.

(3) Claimant occasionally exhibited a short temper at work. On one occasion before January 2017, claimant became frustrated with a female front office desk staff person when she stated she would assist claimant with cleaning his office, and allegedly yelled at her in an angry manner. Claimant also allegedly brushed against the same staff person in a sexual manner and hugged her from behind on separate occasions. The front office desk staff person opened the office in the mornings and kept the door locked until other staff arrived, allegedly because she was afraid of claimant arriving at work when she was alone. Claimant did not receive any warnings or counseling regarding displays of temper at work.

(4) During the first ten days of January 2017, claimant allegedy touched the same front office desk staff person on the buttocks on two occasions, and the staff person allegedly told claimant to stop. On January 31, 2017, a business consultant hired by the employer conducted an annual review of the employer's business. During that review, an employee reported to the consultant that she saw claimant touch the front desk staff person's buttocks. The consultants told the employer about the report during the first week of February 2017.

(5) On February 8, 2017, the employer discharged claimant for allegedly harassing a female coworker.

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. 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 reasonably expected claimant to refrain from harassing his coworkers. Claimant understood that expectation. The employer discharged claimant for allegedly harassing a coworker by yelling at her, and touching her in a sexual manner by brushing against her, hugging her from behind, and touching her buttocks. The employer's evidence regarding the inappropriate touching was primarily hearsay. Absent a reason in the record to doubt claimant's credibility, claimant's firsthand testimony does not have less weight than the employer's hearsay evidence, particularly where the hearsay statements are central to determining misconduct and claimant was unable to cross-examine the sources of the hearsay statements about their observations, recollection, truthfulness or potential bias. Claimant provided firsthand testimony denying that he touched a coworker's buttocks or that he brushed against or hugged a coworker in a sexual manner. Audio Record at 31:02 to 31:20, 33:47 to 33:49, 36:15 to 36:44, 37:48 to 38:37. The evidence alleging that claimant engaged in sexually harassing behavior at

work is no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To the extent the employer discharged claimant because he exhibited occasional bouts of temper at work, we conclude that the employer failed to show that claimant engaged in conduct that rose to the level of being a willful or wantonly negligent violation of a known expectation. Claimant testified that he did not lose his temper at work or express his emotions inappropriately at work, but that he occasionally expressed frustration when he believed staff worked inefficiently. Audio Record at 34:15 to 34:39. Claimant's testimony is supported by the fact that the employer never gave him any warnings or counseling regarding how he communicated at work. Because the preponderance of the evidence is no more than equally balanced between the parties, the employer did not show by a preponderance of the evidence that claimant's conduct in expressing his frustration at work was misconduct.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-83836 is affirmed.

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

DATE of Service: <u>June 19, 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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