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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-0814

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153807). The employer filed a timely request for hearing. On June 19, 2017, ALJ Amesbury conducted a hearing, and on June 22, 2017, issued Hearing Decision 17-UI-86365, affirming the Department's decision. On July 7, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Hoffman Structures, Inc. employed claimant as a carpenter from March 9, 2017 to April 6, 2017.

(2) The employer had an equal employment opportunity (EEO) policy that stated that it was the employer's policy to treat employees and applicants without regard to certain listed characteristics, including their sex, sexual orientation, gender identification or gender expression. The EEO policy further provided that a broad range of personnel decisions, including such things as benefits, assignments and training would be administered without regard to a more limited list of characteristics that did not include gender identification or expression. The EEO policy did not, by its terms, apply to non-employees who were not applicants and the policy appeared to be intended to govern management decisions rather than the non-management activities of individual employees. Exhibit 1. On February 22, 2017, claimant acknowledged receiving, and being personally responsible to be aware of and understand the employer's EEO policy.

(3) The employer also had an harassment policy that prohibited "harassment of employees by fellow employees" as well as "harassment by non-employees" on the employer's job sites based on any of several characteristics including sexual orientation, gender identity or gender expression. Exhibit 1. The policy's terms identified verbal conduct such as "jokes" related to, among other things, an individual's gender, race, or sexual orientation as harassment "when it has the purpose or effect of creating an intimidating, hostile or offensive working environment, had the purpose and effect of unreasonably interfering with an individual's work performance or otherwise adversely affected an individual's employment opportunities." The employer's harassment policy encouraged employees to "report any harassment that you witness even if it is not directed at you." Exhibit 1. On February 22, 2017, claimant acknowledged receiving, and being personally responsible to be aware of and understand the employer's harassment policy.

(4) The employer also had an unwritten expectation that its employees would behave around members of the public they encountered near work sites in ways that would not discredit the employer. Claimant was aware of that expectation as a matter of common sense.

(5) In March 2017, claimant was working on an Oregon Health Sciences University (OHSU) construction project. During breaks, employer workers, including claimant, frequently went to a cafeteria on the OHSU campus to purchase food and take their breaks.

(6) On March 29, 2017, claimant and other employees of the employer went to the OHSU cafeteria for their morning break. On the way there, claimant noticed a bearded man wearing a dress, a pink top and some high heeled shoes approaching others and requesting a light for his cigarette. Claimant continued into the cafeteria along with some coworkers, and once inside, giggled and laughed, and made a few comments about the man, basically joking and warning coworkers to be "careful" because the man outside "might have been looking for a dude." Transcript at 77. Claimant did not use any slurs or foul language in making his comments and never addressed any comment to the bearded man, who did not hear what was being said inside. At least three other coworkers were near claimant in the cafeteria, and laughed at claimant's comments. None of claimant's coworkers reported to the employer that he had witnessed any harassment by claimant that day.

(7) A nearby elderly patron of the cafeteria, not employed by the employer, joined into the conversation and began making comments about the bearded man. A short time later, a woman approached the elderly patron and claimant, identified herself as physician, and told them that she did not appreciate their comments. Claimant immediately stopped talking, sat down, began eating his food and made no further comment. However, the elderly patron argued with the doctor, told her to shut up and yelled obscenities at her. The doctor appeared angry and returned to her table where she drafted an email complaint about the incident.

(8) The doctor's complaint was routed to the OHSU administration which routed the complaint to the employer's management. The employer's management became concerned about the client's complaint and decided it was important for employee and customer relations that it demonstrate that it would enforce a "zero tolerance" policy against the employee whom the doctor complained about. Transcript at 10.

(9) Approximately a week later, the employer identified claimant as the employee that had made comments about the bearded man in the dress that day. When asked by a management employee about the March 29 incident, claimant only responded, "Maybe I should have kept my mouth shut." Transcript at 74. However, claimant did not believe that he had violated the employer's EEO and harassment policies because he "didn't harass anybody." Transcript at 68.

(10) On April 6, 2017, the employer discharged claimant for violating its EEO and harassment policies on March 29, 2017. Claimant had no previous disciplinary history with the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment, which is not 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

The employer had the right, as a matter of common sense, to expect claimant to behave around members of the public he encountered near work sites in ways that would not discredit the employer. Claimant essentially admitted that he violated that expectation by joking about the cross-dresser in the cafeteria on March 29 when he was questioned about the incident and responded, "Maybe I should have kept my mouth shut." Claimant was conscious of his conduct when making the statement and knew or should have known that his comments would likely violate the employer's expectation that he behave around members of the public near work sites in ways that would not discredit the employer. Claimant's March 29 comments were at least a wantonly negligent violation of that employer expectation. However, the ALJ concluded that claimant's conduct was excusable as an isolated instance of poor judgment. Hearing Decision 17-UI-86365 at 5. We agree.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The record fails to show that claimant had been disciplined previously for other willful or wantonly negligent behavior. His conduct on March 29, 2017, therefore, was a single or infrequent occurrence.

However, under OAR 471-030-0038(1)(d)(D) isolated acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Neither the Department's initial decision nor the ALJ's decision addressed the issue. The employer asserted in written argument that claimant's comments violated federal, state and local laws because they created a "hostile work environment"

which is prohibited by such laws. Written argument at 9-12. However, even the EEOC has stated, regarding harassment under federal law, that

> **"**[p]etty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people…When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis."[1]

Here, although the two brothers who were present on March 29 asserted at hearing that they were offended by claimant's comments, neither of them reported them to the employer as offensive on or around that day, which the employer encouraged under its harassment policy. On this record, claimant's March 29 comments concerned an isolated incident and were not so offensive to coworkers, or severe or pervasive enough, to rise to the level of illegality. Moreover, objectively considered, claimant's comments were not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after receiving a warning against making even remotely similar comments in the future. While claimant's comments showed poor judgment, they did not exceed mere poor judgment. His comments were, therefore, no more than an isolated instance of poor judgment under OAR 471-030-0038(3)(b), and not misconduct.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-86365 is affirmed.

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

DATE of Service: <u>August 15, 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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[1] https://www.eeoc.gov/laws/types/harassment.cfm