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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION 2018-EAB-0780

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 174601). The employer filed a timely request for hearing. On July 25, 2018, ALJ Amesbury conducted a hearing, and on July 27, 2018, issued Order No. 18-UI-113978, concluding the employer discharged claimant for misconduct. On August 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision. Had we considered claimant's written argument, it would not have changed the outcome of this decision.

FINDINGS OF FACT: (1) Klamath County Family YMCA employed claimant from August 22, 2016 until May 24, 2018 as a janitor at its facility that provided daycare, among other community services.

(2) The employer prohibited its employees from sexually harassing members of the public or each other while working.

(3) Beginning in September 2016, claimant often spoke with the kitchen manager about his drug use and explicit details about sexual activities involving his ex-wife. The kitchen manager's sixteen-year-old daughter also worked in the kitchen and was present during the conversations. At times, the kitchen manager told claimant that the sexual subject matter was inappropriate, but claimant continued to speak about sex at work in front of the kitchen manager and her daughter. The kitchen manager complained to human resources about the claimant speaking about sex while at work.

(4) Claimant occasionally spoke with the employer's administrative assistant while he worked. Sometime before November 2017, claimant spoke with her and told her he had "screwed" his ex-wife and "she gave him [an] infection." Transcript at 26. She told him he "deserved what [he] got," and claimant left the office. Transcript at 26. On November 20, 2017, the administrative assistant showed

claimant some photographs, and claimant commented that "people pay big money for that," about a nude photograph of her one-month-old granddaughter. She became upset and told him, "that is a horrible thing to say." Transcript at 27. Claimant apologized to the administrative assistant later that day.

(5) On November 27, 2017, claimant commented to the administrative assistant that his deceased 18 years old dog had "never got screwed once." Transcript at 30. The administrative assistant complained to the employer's executive director and human resources about the comments claimant had made to her about her granddaughter, his ex-wife, and his dog.

(6) Based on the multiple complaints the employer received about claimant making comments of a sexual nature to coworkers, on November 30, 2017, the executive director met with claimant. The director warned claimant to stop making inappropriate comments about sexual subjects at work and that the employer had "zero tolerance" for sexual, vulgar, lewd or crude comments or language. Transcript at 12.

(7) Claimant spoke with a woman or her father who lived next door to the employer's business once or twice per week throughout his employment when claimant took the garbage out at work. They would talk for five to 45 minutes. The neighbors' yard was located next to the employer's garbage can. Initially, claimant spoke mostly about his adult children, ex-wife and work history. However, beginning in April 2018, on at least two different occasions, claimant told the neighbor woman detailed "sexual stories." Transcript at 18. On at least one occasion, claimant spoke about feeling jealous when his ex-wife brought home different sexual partners and asking his ex-wife to "bring people home for him." Transcript at 18. On another occasion, claimant told the neighbor woman about having fondled a police officer's testicles when claimant was conducting physical therapy on the officer. The neighbor woman told claimant she "did not want to hear about his stories." Transcript at 20. She felt uncomfortable and began going into her house if she saw claimant, to avoid him.

(8) On May 2, 2018, the neighbor woman complained to the employer's maintenance worker about claimant having spoken to her about the sexual topics. The following week, claimant knocked on the woman's door and asked her to repeat to him what she had said to the maintenance worker. She repeated what claimant had told her about the ex-wife's partners and the police officer, and claimant told the woman he did not believe those were inappropriate topics of conversation.

(9) On May 22, 2018, the neighbor's father complained to the employer's maintenance worker about the inappropriate sexual topics claimant spoke of with his daughter. The maintenance worker reported the complaint to the director.

(10) On May 24, 2018, the employer discharged claimant for making inappropriate comments of a sexual nature to the employer's neighbor while working.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant 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) (January 11, 2018) 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 where the individual acting is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

After the director met with claimant on November 30, 2017 and warned him to refrain from making sexual, vulgar, lewd or crude comments, the employer had the right to expect claimant to refrain from making comments to employees or members of the public while he was working that could be construed as "sexual." Claimant violated that expectation by speaking to a neighbor about sexual incidents involving him and his ex-wife. Although claimant generally denied the allegations from the neighbor (Transcript at 50-51), based on the weight of testimony from claimant's coworkers alleging similar conduct and the fact that both the neighbor and her father complained to the employer on different occasions about the statements, we find it more probable than not that claimant engaged in the conduct of discussing sexually inappropriate topics with the neighbor as alleged in April 2018. Claimant's April 2018 conduct was at least wantonly negligent, because after the November 30, 2017 warning, his statements demonstrated that he was indifferent to their consequences for the employer, under circumstances where he knew or should have known the conduct would probably violate the owner's expectations.

Claimant's wantonly negligent behavior in violation of the employer's expectations may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471030-0038(3)(b). An isolated instance of poor judgment means, among other things, behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In this case, there were at least two occurrences of claimant's wantonly negligent violations of the employer's expectations during April 2018 when claimant spoke about sexual matters to the employer's neighbor. Because claimant's behavior was neither single nor infrequent, it may not be excused as an isolated instance of poor judgment.

Claimant's behavior in violation of the employer's expectations may also be excused from constituting misconduct if it was a good faith error under OAR 471-030-0038(3)(b). Claimant contended that the employer allowed employees to sexually harass each other. Transcript at 45. However, claimant also testified that on an occasion when he believed he had been sexually harassed at work, he felt it was inappropriate and reported the statements to his supervisor because he "would think that she would tell them to knock it off," showing that he knew the supervisor would probably not find it acceptable. Claimant also knew that his coworkers had complained about some of his prior sexual comments that lead to the November 2017 warning, showing that he should have known the employer would not condone his April 2018 conduct. Transcript at 46. In addition, it is implausible that an employee of a family-centered nonprofit employing and assisting minors and small children would reasonably believe that the employer permitted its employees to discuss private, sexual topics with its neighbors while working. For these reasons, claimant's behavior also may not be excused from constituting misconduct as a good faith error.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-113978 is affirmed.

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

DATE of Service: September 12, 2018

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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