

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

JESUS E SEVILLA  
Claimant-Appellant

Precedent Benefit  
Decision No. P-B-508

BERRY PLASTICS CORP  
c/o THOMAS & THORNGREN INC  
Employer

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

MICHAEL ALLEN

ELLEN CORBETT

ROBERT DRESSER

Pursuant to section 409 of the California Unemployment Insurance Code, AO-375883 is hereby designated as Precedent Decision No. P-B-508.

Adopted as Precedent: December 15, 2015

**Case No.:** AO-375883  
**Claimant:** JESUS E SEVILLA

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The claimant appealed from the decision of the administrative law judge that held the claimant disqualified for benefits under section 1256 of the Unemployment Insurance Code<sup>1</sup>. The employer's reserve account was relieved of benefit charges.

### ISSUE STATEMENT

The issues presented in this case are:

1. Whether the claimant was discharged from his most recent employment due to behavior that constituted misconduct connected with such work; and,
2. whether the employer's reserve account is subject to charges for benefits paid or payable to the claimant.

### FINDINGS OF FACT

Prior to filing his claim for unemployment insurance benefits, the claimant most recently worked for the employer as a machine operator and group leader, with a final rate of pay of \$23.31 per hour. The employer manufactures plastic bottles. The claimant's last day of work was April 19, 2015. The claimant had been employed by the employer for approximately 30 years when he was discharged under the following circumstances.

The claimant was aware of the employer's written policy against harassment, which included but was not limited to, sexual harassment. On January 31, 2007, the claimant signed for receipt of the employee handbook, which included this policy.

The employer's written policy against sexual harassment provides, in pertinent part, the following:

Sexual harassment . . . includes, sexually oriented conduct and communications which unreasonably interfere with an employee's work performance or create an intimidating, hostile or offensive environment.

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<sup>1</sup> Unless otherwise indicated, all code references are to California's Unemployment Insurance Code.

Unwarranted sexual advances violate this policy even if directed at a . . . temporary worker . . .

While not exhaustive, the following is a list of some examples of sexual harassment:

Unwanted sexual advances or propositions.

. . .

Visual conduct such as leering, making sexual gestures, displaying or distributing sexually suggestive objects or pictures, cartoons or posters. (emphasis added)

. . .

Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations.

. . . .

Even if a behavior is not sexual harassment for purposes of establishing liability, it could still be in violation of this policy. Notably, while the policy specifies that "unwanted" sexual advances or propositions are prohibited, the policy prohibits certain visual or verbal sexual behaviors at-work, regardless of whether the behavior is wanted or unwanted. For example, the policy prohibits distributing sexually suggestive pictures.

As part of its regular business, the employer hires temporary employees through a temporary services agency. The temporary services agency contacted the employer with complaints received from three female temporary employees who had worked for the employer that the claimant was sexually harassing them by texting them and continually asking them to go out, despite their lack of interest. One of these women contended that she had a text from the claimant, asking the woman to sleep with him, to meet him after work, and complimenting her breasts. Based on these complaints, the employer initiated an investigation. The claimant disputes the contentions of these three women and contends that he never sexually harassed any of the women.

After the employer received the initial complaints, a fourth female temporary employee complained regarding the claimant's behavior. The claimant and this woman initially had a consensual relationship wherein they exchanged sexually explicit texts and, on one occasion, met outside of work. According to the employer witness, this woman complained that she tried to end the consensual relationship with the claimant but he kept on insisting and texting her. According

to the claimant, the texting relationship with this woman always remained consensual.

The fourth female temporary worker showed the employer a texted photograph of the claimant's penis that he had taken at work and texted to her at work. The claimant admits that the photograph is of his penis, that he took the picture in the restroom at work, and that he texted it to the female co-worker while on duty, obviously knowing she would likely open the text while at work. Significantly, the claimant understood that his behavior would be considered inappropriate by the employer but the claimant did not believe that the woman would notify the employer of the text. The claimant agrees that the text with the penis photograph is in violation of the employer's policy. He also believes that he should have received a second chance or a warning instead of discharge because he believes discharge was too drastic. Although he received the employer's handbook that contained the policy, the claimant had not been previously warned or disciplined for violating it.

On April 23, 2015, the employer discharged the claimant for inappropriate behavior on company time and property. According to the employer, it was irrelevant whether the claimant was in a mutual relationship with the fourth female temporary worker because the claimant's admitted behavior of taking a picture of his penis on company premises and texting it to a co-worker while on duty violated the policy and warranted discharge. The discharge letter states the following:

Your dismissal is due to inappropriate behavior and transmissions of texts and pictures on Company time and property. You and I have talked in detail regarding the inappropriate behavior for which there is zero tolerance.

The claimant, thereafter, filed for unemployment insurance benefits.

### REASONS FOR DECISION

An individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work. (Unemployment Insurance Code, section 1256.)

The employer's reserve account may be relieved of benefit charges if the claimant was discharged for misconduct. (Unemployment Insurance Code, sections 1030 and 1032.)

“Misconduct connected with the work” is a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer. (Precedent Decision P-B-3, citing *Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719.) Misconduct is any wrong or improper conduct, and becomes willful if it is done intentionally, that is, purposely with knowledge, or is of such a nature as to evince a reckless disregard of consequences by him who is guilty of it.

The employer has the burden of proving misconduct. (*Prescod v. California Unemployment Insurance Appeals Board* (1976) 57 Cal.App.3d 29.)

We are not here to determine whether the employer was right or wrong in discharging the claimant. We are here to determine whether the claimant’s behavior constituted misconduct for the purposes of unemployment insurance. Moreover, for the purposes of unemployment insurance benefits, the burden of proof does not require the employer to prove that the claimant committed sexual harassment.

As set forth in more detail below, to establish misconduct for purposes of disqualification for unemployment insurance benefits, an employer need only show that a claimant, without good cause, deliberately violated a reasonable employer rule, which is designed to prevent sexual harassment and otherwise offensive behavior of a sexual nature, or that the claimant’s conduct was egregious and in disregard of the standard of behavior an employer has the right to expect.

The specific conduct at issue in the case at bar is the claimant’s taking a photograph of his penis at work and texting it to a co-worker while on duty.<sup>2</sup> As discussed in detail below, we find this behavior to be misconduct that disqualifies him from receiving unemployment insurance benefits.

I. The claimant violated a reasonable employer rule.

When an employer has discharged a claimant for violating its policy against sexual harassment, the employer does not have to prove the claimant committed sexual harassment but just that the claimant knew or should have known that he violated the reasonable employer rule, which was designed to prevent sexual

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<sup>2</sup> In this case, there are unresolved conflicts in the evidence as to whether the claimant was texting or was otherwise communicating with the initial three women who complained regarding his behavior, and as to whether the fourth woman and the claimant were in a continuing consensual relationship. Despite the failure of the administrative law judge to make credibility findings to resolve these conflicts, we find it unnecessary to remand this case because the undisputed evidence as to the claimant’s conduct is sufficient to resolve this case.

harassment. In this case, the employer met its burden of proof that the claimant committed misconduct because the employer's rule was reasonable and the claimant deliberately violated the rule.

A. The employer has a reasonable rule against sexual harassment in the work place.

"The duty of an employee is to obey the employer's lawful and reasonable orders. . . ." (Precedent Decision P-B-3.) Accordingly, an employee has the duty to follow reasonable employer rules.

In Precedent Decision P-B-3 the employer refused to employ married stewardesses. The claimant was discharged when the employer learned she had married and had not disclosed this information to the employer. This Board held neither getting married nor failing to disclose the marriage was misconduct as the employer's rule was in violation of public policy against discrimination and, as such, was not a reasonable rule.

In the context of unemployment insurance law, the code specifically provides that an employee has good cause to quit a position because of sexual harassment. (Unemployment Insurance Code, section 1265.5.) There is no similar statute pertaining to sexual harassment for discharge cases. This case involves the discharge of an employee based on behavior in violation of the employer rule, embedded in the policy designed to prevent sexual harassment at work. The employer policy prohibits the unreasonable interference with an employee's work performance or the creation of an intimidating, hostile or offensive environment and expressly prohibits distributing sexually suggestive pictures. Accordingly, it must be determined whether the employer's policy addressing sexually harassing behavior in the work place was reasonable.

Like federal law<sup>3</sup>, California law prohibits sexual harassment in the workplace. (Hughes v. Pair (2009) 46 Cal.4th 1035, 1042.) In California, employers may be liable for sexual harassment in the work place under the Fair Employment and Housing Act (FEHA)<sup>4</sup>. As part of FEHA, Government Code, section

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<sup>3</sup> Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a) (1988) provides, in pertinent part that:  
It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .

<sup>4</sup> California's Fair Employment Housing Act (FEHA), codified at Gov't Code Sections, 12900 to 122996, statutorily prohibits sexual harassment in the work place.

12940, subdivision (j)(1), specifically provides that it is unlawful for "an employer . . . because of . . . sex . . . to harass an employee . . . ."

The employer is strictly liable for acts of sexual harassment by a supervisor. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4<sup>th</sup> 1307, 1313, n. 7, citing, *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4<sup>th</sup> 1026, 1041.) The employer is liable for sexual harassment of a nonsupervisory co-worker if it knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action. (Gov. Code, section 12940, subd. (j)(1); (*Alatoree v. Mabus*, 2015 U.S.D.C. CA Lexis 60850, 5.)

In this case, the claimant, as a group leader, could potentially be viewed as an agent of the employer, such that the employer may be strictly liable for sexual harassment on his part; or, at a minimum, he is considered a co-worker whose actions can be imputed to the employer if the employer knew or should have known of the actions and permitted the sexually harassing behavior to occur.

For a civil action for sexual harassment based on a hostile work environment, the harassment "must be sufficiently severe or pervasive to alter the victim's conditions of employment and create an abusive working environment." (*Mokler v. County of Orange* (2007) 157 Cal.App.4<sup>th</sup> 121, 142 (internal citations omitted).).

Sexual conduct certainly has the potential to be disruptive to the workplace; in this case, the employer's policy against sexually inappropriate behavior served as a tool to help prevent that disruption and to protect the employer from liability for sexual harassment in the workplace. Certainly by the time the employer received the complaints, the employer had potential liability in the event that any of the temporary workers made a charge that the working environment was abusive and that the employer had tolerated sexual harassment in the workplace. For these reasons, we find that this employer's rule, prohibiting sexually explicit behavior in the workplace is reasonable and represents a legitimate business interest.

**B. The claimant deliberately violated the employer rule pertaining to sexual harassment at work.**

To establish misconduct for purposes of disqualification for unemployment benefits, "there must be 'substantial evidence of deliberate, willful, and intentional disobedience' on the part of the employee." (*Paratransit, Inc. v. Unemployment Insurance Appeals Board* (2014) 59 Cal.4<sup>th</sup> 551, 559, citing, *Robles v.*

*Employment Development Department* (2012) 207 Cal.App.4<sup>th</sup> 1029, 1035.) Thus, to determine whether there is misconduct, we must judge the “reasonableness of his act from his standpoint in the light of the circumstances facing him and the knowledge possessed by him at the time.” (*Paratransit, Inc.*, 59 Cal.4<sup>th</sup> at 559, quoting, *Amador v. Unemployment Insurance Appeals Board* (1984) 35 Cal.3d 671, 683.)

If an employee knew or should have known about the employer’s reasonable rule designed to prevent sexual harassment at work, then the employee has a duty to follow that rule. In this case, the claimant was aware of the employer policy designed to prevent sexual harassment. The employer policy prohibits the creation of a hostile or offensive environment and specifically prohibits distributing sexually suggestive pictures. The claimant took a picture of his penis at work and distributed it by texting it to a co-worker while on duty. The claimant’s behavior is in violation of the employer policy and the claimant admitted that he believed that the employer would find the behavior to be inappropriate; he nevertheless decided to engage in the behavior because he did not think he would get caught. Accordingly, when the claimant violated the employer rule, he did so deliberately.

- II. The claimant’s behavior is misconduct, regardless of any warnings or rules, as opposed to a good faith error in judgment.
  - A. A warning was not necessary because the claimant’s behavior interfered with the employer’s business and threatened the employer’s interest in a substantial manner.

A single act of disobedience, without prior reprimands or warnings for insubordination, generally is not misconduct unless the act interferes with the orderly conduct of the employer’s business or injures, or threatens to injure, the employer’s interest in a consequential or substantial manner. (*Paratransit, Inc. v. Unemployment Insurance Appeals Board* (2014) 59 Cal.4<sup>th</sup> 551, 564 (internal citations omitted).).

In *Paratransit, Inc. v. Unemployment Insurance Appeals Board, supra*, the California Supreme Court held that an employee’s refusal to sign a disciplinary warning represented only a good faith error in judgment rather than misconduct because (1) the employee reasonably believed that he was entitled to union representation before signing the warning and that signing the warning would constitute an admission of guilt concerning allegations he disputed, and (2) there was no indication that the employee’s refusal interfered with the orderly conduct of the employer’s business or injured, or threatened to injure, the employer’s interest in any consequential or substantial way. The Court noted that



insubordination amounting to misconduct generally entails cumulative acts with prior reprimands or warnings. (*Id.* at 564.)

Here, the claimant had not received any warnings regarding sexually explicit actions at work. Warnings serve to place the recipient on notice of the impropriety of an identified act. The claimant, however, admitted he knew his conduct violated the employer's policy but engaged in the conduct anyway because he did not think he would be caught. Moreover, a warning was not necessary in this case because, unlike the case in *Paratransit*, the claimant's behavior in this case did interfere with the orderly conduct of the employer's business and at least threatened to injure the employer's interest in a consequential or substantial way. (*Paratransit, Inc.*, 59 Cal.4<sup>th</sup> at 564).

Clearly the taking of the picture in the workplace bathroom of his penis and sending it to a co-worker while on duty would reasonably interfere with the work of, at a minimum, the claimant and the co-worker. The potential of other co-workers seeing the picture or hearing about it could also threaten the interests of the employer in having a harassment free working environment. The claimant's behavior had at least the potential to create an offensive working environment. Finally and most importantly, the claimant threatened the employer's interests because of the risk for potential liability for sexual harassment. For all the reasons stated above, we find that the claimant's behavior interfered with the orderly conduct of the employer's business and threatened to injure the employer's interests.

**B. Regardless of the employer policy, the claimant was discharged for misconduct due to his egregious behavior.**

In Precedent Decision P-B-221, the claimant was a hotel bell man who had two drinks during his shift with a guest in her room. The appeals board held that whether the claimant was aware of the rule against drinking on duty, such conduct was in disregard of the standard of behavior which the employer had the right to expect and not simply a good faith error in judgment or discretion. The claimant's discharge was for misconduct.

Some conduct, even in the absence of a specific employer rule, is in disregard of the standard of behavior that an employer has a right to expect. Unless simply a good faith error in judgment or discretion, such behavior is misconduct. (Precedent Decision P-B-221.)

Considering the risk of liability as well as the detrimental effect upon production and morale, incidents of sexual harassment at the workplace constitute a willful violation of the expected standards of behavior. Thus, even if the employer did

not have a policy against sexual harassment or had a policy that, as drafted, was not reasonable, certain behaviors remain egregious. Furthermore, a discharge for egregious behavior is misconduct for purposes of unemployment insurance benefits.

An employer has the right to expect that its employees will not, at work, engage in the type of inappropriate and offensive behavior engaged in by this claimant. The claimant's violation of accepted standards of behavior in the workplace is egregious and therefore constitutes misconduct for purposes of unemployment insurance benefits.

For all the reasons stated above, we find that the employer has met its burden to establish that the claimant engaged in inappropriate behavior that was in violation of the employer's reasonable policy to prevent sexual harassment. We also find that the claimant's behavior interfered with the orderly conduct of the employer's business, threatened the employer's interests, and was in disregard of the behavior an employer has the right to expect. The claimant was discharged for misconduct because his inappropriate sexually explicit at work behavior was a knowing violation of a reasonable employer rule and also because the behavior was egregious. Accordingly, the claimant was discharged for misconduct connected with his most recent work.

The claimant has not put forth an argument that would provide good cause for his misconduct. Therefore, the claimant is disqualified for benefits under code section 1256 and the employer's reserve account is relieved of benefit charges under code section 1030 or 1032.

## DECISION

The decision of the administrative law judge is affirmed. The claimant is disqualified for benefits under code section 1256. Benefits are denied. The employer's reserve account is relieved of charges.