

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0053

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 24, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 91532). The employer filed a timely request for hearing. On November 27, 2013, ALJ Monroe conducted a hearing, and on December 23, 2013 issued Hearing Decision 13-UI-07020, affirming the Department's decision. On January 10, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) PBS of America Inc. employed claimant as a caregiver in its residential home from October 8, 2012 to September 3, 2013.

(2) The employer expected employees who reported for work to complete their shifts unless they obtained a supervisor's permission to leave work. Claimant understood that expectation.

(3) On August 31, 2013, claimant arrived at work ten minutes early, and was scheduled to work with two other caregivers. Claimant did not get along with one of the other caregivers, who often teased and played practical jokes on claimant at work, despite claimant's repeated requests that he stop.

(4) Claimant mentioned to the other caregiver, who was a Notre Dame football fan, that it was the first day of the college football season, that the Notre Dame Game was televised, but they had to work. The other caregiver told claimant that he "hated" claimant, and that "we were here to take care of the clients. Clients come first. That's what I'm her for. You should be, too." Transcript at 18. Claimant replied that, "I don't need you to be telling me what to do. I know how to do my job. If I didn't I wouldn't have been her working this long." Transcript at 18.

(5) Claimant did not want to argue with the other caregiver in front of the employer's residents, and did not feel comfortable working with the other caregiver that day. He therefore left work before the start of his shift and drove to a church parking lot. At about the time his shift started, he telephoned the on-call

supervisor and left a voice message informing her that he was leaving work for the day because of the incident with the other caregiver. The supervisor did not return claimant's call. Claimant did not return to work.

(6) The employer discharged claimant for leaving work without a supervisor's permission.

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

(7) The employer had a right to expect claimant to refrain from leaving work without a supervisor's permission. Claimant understood the employer's expectation, and knew or should have known leaving work on August 31, 2013 without a supervisor's permission probably violated that expectation. His conscious decision to leave work without a supervisor's permission demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

However, claimant's conduct is excusable as an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment 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). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). In this case, claimant sincerely believed he had a legitimate reason for leaving work. He did not leave the employer's residents unattended, and notified his supervisor that he had left. Absent evidence that the supervisor ordered claimant to return to work, and claimant refused, we do not find his conduct so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible.

Claimant's conduct on August 31, 2013 therefore did not exceed mere poor judgment, and the employer did not assert or show that it was a repeated act or pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence. We therefore conclude the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 13-UI-07020 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: February 11, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.