

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0112

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 18, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #95208). Claimant filed a timely request for hearing. On December 5, 2013, ALJ Vincent conducted a hearing, and on December 30, 2013 issued Hearing Decision 13-UI-07267, concluding the employer discharged claimant, but not for misconduct. On January 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and the written argument submitted by the employer.

FINDINGS OF FACT: (1) Providence Health employed claimant from October 8, 2007 to August 21, 2013 as a surgical first assist in the orthopedic department.

(2) The employer expected claimant to assist the surgeon and to refrain from challenging the surgeon's decisions unless she felt patient care was at risk. The employer further expected claimant to refrain from making unprofessional, disrespectful comments about the surgeons. Claimant understood those expectations.

(3) On August 30, 2011, claimant worked with a surgeon on a difficult case that the surgeon felt required two assists. Claimant disagreed that the surgeon needed two assists. During the surgery, claimant stood in the surgery room, but only participated in the surgery when the other assist needed help. The employer gave claimant a written warning on September 15, 2011 for her behavior during surgery on August 30, 2011, and reviewed with claimant its expectations about acting in a respectful manner towards surgeons.

(4) On August 13, 2013, claimant and other operating room staff met to discuss the surgeries scheduled with a particular orthopedic surgeon that day. Claimant made comments to a coworker about the surgeon before she arrived. Claimant complained that the surgeon took too long to perform the

scheduled procedures, that she was incompetent, and that she made errors in selecting what type of procedures to perform. When the surgeon arrived, claimant rolled her eyes and made impatient sounds during the surgical staff meeting. The patient was not at risk of harm.

(5) On August 21, 2013, the employer discharged claimant for violating the employer's standards of behavior and professionalism.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but 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. 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 471-030-038(3)(b). 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). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer had a right to expect claimant to refrain from making disrespectful, unprofessional comments about the surgeons and from commenting on the surgeons' decisions unless patient safety was at risk. Claimant understood these expectations because the employer warned her to refrain from the same type of behavior in September 2011. At hearing, claimant did not dispute that she made disrespectful, unprofessional statements about a surgeon to her coworkers. Claimant made a conscious decision to complain about a surgeon's decisions and competence in front of her coworkers, and to behave in a frustrated, unprofessional manner in front of the surgeon, even though the patient's safety was not at risk. Claimant knew such behavior violated the employer's expectations regarding behavior and professionalism, and therefore willfully violated those expectations.

However, claimant's conduct on August 13, 2013 was an isolated instance of poor judgment. The employer asserted that claimant's behavior on August 13, 2013 was a repeated act or pattern of willful behavior because the employer gave claimant a warning in September 2011 for allegedly refusing to stand at the operating table during a surgery because she disagreed with the surgeon's decision to use two assists during the surgery. Assuming that claimant refused to stand at the operating table because she disagreed with the surgeon's decision, and that her conduct was willful or wantonly negligent violation of the employer's reasonable expectations, that incident occurred approximately two years earlier. The incident was, therefore, too remote in time to show claimant's conduct on August 13, 2013 was a repeated act or part of a pattern of willful or wantonly negligent behavior.

The next issue is whether claimant's conduct on August 13, 2013 created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. The employer testified that claimant's comments made claimant's coworker and the surgeon

“uncomfortable” and that the comments offended the surgeon. Transcript at 12 and 34. The employer asserted, and claimant denied, that claimant made some of the comments in a place where patients might have overheard her. Transcript at 25 and 32. The evidence on this issue is, at best, equally balanced. The employer therefore failed to show by a preponderance of the evidence that any patients overheard claimant’s comments. Nor does the record show that claimant’s comments adversely affected the welfare of the patients. We do not find claimant’s conduct so egregious that it created an irreparable breach of trust in the employment relationship or that it otherwise made a continued employment relationship impossible. Claimant’s conduct on August 13, 2013 therefore did not exceed mere poor judgment.

In sum, we conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on this work separation.

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

DECISION: Hearing Decision 13-UI-07267 is affirmed.

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

DATE of Service: February 19, 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.