

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0565

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #123843). The employer filed a timely request for hearing. On March 18, 2014, ALJ M. Davis conducted a hearing, and on March 20, 2014 issued Hearing Decision 14-UI-13024, affirming the Department's decision. On April 8, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Environ Metal, Inc. employed claimant from June 17, 2013 to January 31, 2014 as an administrative assistant.

(2) The employer expected claimant to complete her job duties and to refrain from engaging in outbursts at work and threatening coworkers. The employer also expected claimant to report accurate information on her timecard. Claimant understood the employer's expectations.

(3) On October 6 and 8, 2013, the controller gave claimant memos asking claimant to assign herself a portion of the office to clean each week. Claimant responded by telling the controller she would clean the bathroom and kitchen portions of the office. Claimant cleaned the bathroom and kitchen regularly.

(4) Claimant processed rebates for the employer as one of her job duties. At times, she was unable to complete the rebates at the office, so she worked on them at home.

(5) In November 2013, a driver for one of the employer's trucking providers was discussing its services with claimant and the controller. The controller became upset with claimant because she thought claimant was going to contact the trucking company.

(6) On approximately January 25, 2014, an employee told the controller that claimant was not in the office on an evening claimant had reported working late. The controller obtained alarm records showing when claimant entered and left the employer's office. Claimant reported three hours on her time card for Saturday, December 28, 2013 and six hours for December 29, 2013. Claimant did not enter the office either day. Claimant reported 2.5 hours of work on January 21, 2014 when she was out of the office. Exhibit 1.

(7) On January 29, 2014, claimant complained when the controller directed her to prepare new shipping labels for the plant when she had already prepared a different kind of labels that the plant could not use due to an error in the plant. The controller responded that she would make the labels herself. Claimant responded that she would make the labels. The controller and claimant argued about claimant's attitude at work. The controller told claimant to leave, and claimant refused, arguing that she had too much work to do. The controller returned to her office. Claimant returned to work.

(8) On January 31, 2014, the employer discharged claimant for allegedly failing to perform her job duties and falsifying her time card, and for having an outburst in the office.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude the employer discharged claimant, 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. 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 the 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). 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).

The employer discharged claimant, in part, because she allegedly did not complete her work. Specifically, the employer's controller testified that claimant failed to assist in cleaning the office and to process rebates in a timely manner. Transcript at 12-13. The preponderance of the evidence does not show claimant failed to complete those duties, or that claimant was indifferent to the employer's expectations, where claimant testified she had cleaned the bathroom and kitchen regularly, and had worked late on weekends and when she was ill to process rebates in a timely manner. Transcript at 24-25, 31. The employer therefore did not show that claimant's alleged failure to complete her job duties

was willful or wantonly negligent. Thus, we cannot find claimant's alleged failure to complete her work to be misconduct.

The employer also discharged claimant, in part, because it concluded claimant falsified her timecards. Transcript at 11-12. However, the preponderance of the evidence fails to show that claimant did not work the time she reported on her timecards. The employer showed with alarm records that claimant put hours on her timecards for time she was not present at the workplace. Exhibit 1. The employer's controller testified at hearing that claimant was not authorized to work from home during December 2013. Transcript at 31-32. However, claimant testified that she worked on rebates from home when she was sick and on weekends, and that she believed she was authorized to do so. Transcript at 24-25. Claimant testified that the employer's president allowed her to work on rebates at home on January 21, 2014 because she was sick, and the vice president, who was in charge of rebates, told her she could work on the rebates at home on weekends "if [the employer needed] to get them done." Transcript at 23-25. To the extent claimant erred in her belief that she was authorized to work on the rebates at home, her conduct was, at worst, a good faith error. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer also discharged claimant, in part, because she engaged in an outburst at work when directed to redo a printing task on January 29, 2014. Claimant conceded at hearing that she had argued with the controller and refused to leave work when the controller told her to do so. Transcript at 19-20. Claimant's insubordinate conduct on January 29, 2014 was, at best, a wantonly negligent violation of the employer's reasonable expectations regarding workplace behavior, and not a good faith error.

The employer's president asserted that claimant's conduct on January 29, 2014 was not an isolated instance of poor judgment because, in November 2013, claimant argued with the controller on another occasion. Exhibit 1. However, the record does not show claimant's conduct during that incident amounted to insubordination or other violation of the employer's standards. Claimant's unrefuted testimony was that she had been joking and unintentionally upset the controller, who then behaved in a threatening manner towards claimant. Transcript at 26-27. The weight of the evidence does not show that claimant knew or should have known through prior training, experience or warnings that joking with the controller probably violated the employer's expectations regarding workplace behavior. The employer therefore failed to establish that claimant's conduct in November 2013 was an intentional or wantonly negligent violation of the employer's reasonable expectations regarding such behavior.

The next issue is whether claimant's conduct on January 29, 2014 created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. We look to Oregon appellate courts for context to decide if claimant's outburst on January 29, 2014 was poor judgment or misconduct. In *Bunnell v. Employment Division*, 304 Or 11, 741 P2d 887, 887-888 (1987), an employee, angry at management for having reassigned her to a new task, engaged in an abusive argument with her supervisor, and told her supervisor that she had "had enough of this shit" and that she had had enough of "this damn store." The employee made the remarks in an "extremely loud tone" audible to other employees in the store. *Id.* at 888. The supervisor then left the area and the employee returned to her assigned duties. *Id.* The Supreme Court held that the employee's "isolated verbal outburst, followed by immediate job performance," was no more than an isolated instance of poor judgment. *Id.* at 890. In contrast, in *Weyerhaeuser Co. v. Employment Div.*, 103 Or App 143, 796 P2d 385, 385 (1990), an assembly line worker "became incensed" when reprimanded for a delay in his work

area, and debated with his supervisor for nearly 30 minutes, swore at him, called him obscene names, and argued with him loudly within inches of his face. *Id.* The worker returned to work, and later told a coworker he was going to “kick [the supervisor’s] fucking ass.” *Id.* The Court of Appeals distinguished *Weyerhaeuser* from *Bunnell*, and found the incident in *Weyerhaeuser* was too severe to be considered an isolated incident of poor judgment because the employee engaged in a prolonged debate, insulted and physically intimidated his supervisor, and later made an explicit threat of violence towards the supervisor. *Id.* at 386.

In the present case, it is undisputed that claimant used no foul language, and that she offered to complete the assigned task immediately after her initial complaint. The employer’s controller asserted that claimant threatened her by stating to the controller twice, “You better get away from me right now.” Transcript at 7-8. Claimant denied having made that statement or otherwise acting in a threatening manner. Transcript at 19-22. Claimant testified, in turn, that she felt threatened by the controller’s behavior during the incident. Transcript at 20-22. The evidence at hearing was balanced between the parties as to whether claimant acted in a threatening manner. Thus, the employer failed to show by a preponderance of the evidence that claimant threatened the controller. When viewed as a whole, the record does not show claimant’s conduct on January 29, 2014 was the type of conduct that, viewed objectively, created an irreparable breach of trust or otherwise made a continued employment relationship impossible. Claimant’s conduct on January 29, 2014 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 benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-13024 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J.S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 7, 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.