

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0676

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #115140). The employer filed a timely request for hearing. On March 31, 2014, ALJ Triana conducted a hearing, and on April 4, 2014 issued Hearing Decision 14-UI-14387, affirming the Department's decision. On April 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's argument.

FINDINGS OF FACT: (1) Oregon Fine Foods, Inc. employed claimant from September 11, 2012 to January 24, 2014 as a banquet server.

(2) The employer expected claimant to treat her coworkers and supervisor in a respectful manner, and to refrain from disobeying the reasonable instructions of her supervisor. Claimant understood the employer's expectations.

(3) In February 2013, claimant's coworker was putting napkins on tables improperly. Claimant asked him to place the napkins in the center of the tables. He continued to put the napkins on the tables improperly. Claimant asked him again to place the napkins in the center of the tables, and showed him where to place the napkins by placing a napkin in the center of a table. The coworker complained to the supervisor that claimant had treated him in a disrespectful manner.

(4) One day later, in February 2013, claimant asked a coworker to prepare ice water because nobody had prepared it. When the coworker did not prepare the ice water, claimant asked him again to prepare the ice water. The coworker complained to the supervisor that claimant had treated him in a disrespectful manner.

(5) In approximately March 2013, claimant's supervisor asked claimant to remove a partially-consumed fruit tray from a buffet. Claimant told her supervisor that, on the previous day, the same group of customers had eaten all the food served in the buffet, so there might not be sufficient fruit for the customers if claimant removed the tray at that time. Claimant then removed the fruit tray.

(6) On April 9, 2013, claimant's supervisor told claimant's coworker to change the cloths on some tables. Claimant began to assist the coworker, but misunderstood the supervisor's instructions and did not put the cloths on the tables in the manner the supervisor intended. The supervisor asked claimant why she had changed the cloths. Claimant stated, in an elevated voice from approximately 25 feet away on the other side of the room, that she changed the cloths because the supervisor had told her to change the cloths.

(7) On January 15, 2014, claimant began folding packets of napkins with silverware. Claimant's supervisor arrived, told her she was folding the napkins incorrectly, and instructed her to fold them in a different manner. Claimant responded, "It's ridiculous," smacked her hands on the table, and got up. She left the table and did not finish folding the napkins. Claimant returned to the table several minutes later, and the supervisor told her to leave.

(8) On January 24, 2014, the employer discharged claimant for disobeying and being disrespectful to her supervisor.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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 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).

The employer discharged claimant for being disrespectful and insubordinate toward her supervisor. Because the employer did not discharge claimant until the final incident on January 15, 2014, that incident was the proximate cause of the work separation, and the focus of the initial misconduct analysis. At hearing, it was undisputed that, during the final incident, claimant disagreed with the supervisor's directions about how to fold the napkins, and that she stopped folding napkins after stating, "It's ridiculous." The supervisor who was present at the final incident testified that claimant also smacked the table before she walked away, which was corroborated by testimony from another employee present at the final incident. Claimant knew or should have known that saying, "It's ridiculous," in response to directions from her supervisor, smacking the table, and leaving the

assignment, probably violated the employer's expectations. Claimant's conscious decision to engage in such conduct, demonstrated indifference to the consequences of her actions and was, at best, wantonly negligent, and not a good faith error.

The remaining issue is whether claimant's conduct on January 15, 2014 was an isolated instance of poor judgment, and not misconduct. 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).

At hearing, the employer alleged that claimant acted in a disrespectful or insubordinate manner towards her coworkers and supervisor on several prior occasions. However, for each of the alleged incidents, the record fails to show claimant's conduct amounted to insubordination or that she was disrespectful toward her coworkers. While the employer's supervisor characterized claimant's conduct as "smarting off" or disagreeing with her, claimant testified that she was merely trying to communicate her concerns with the supervisor. Transcript at 9 to 10, 29 to 34, 35. For the two incidents in February 2013, the employer's witness conceded she could not remember and did not witness first-hand what occurred during those incidents. Transcript at 12 to 13. Claimant testified that she told her coworker "very nicely" to put the napkins in the center of the tables, and that she then showed him how to do it. Transcript at 32-33. Claimant testified that the next day, she was not being disrespectful, and was "just trying to communicate that we needed to have the ice waters done." Transcript at 34. At best, for each prior instance, the weight of the evidence is equally balanced between the parties. The employer therefore failed to show by a preponderance of evidence that claimant was insubordinate or disrespectful on prior occasions. Absent such a showing, the employer failed to establish that claimant's exercise of poor judgment during the final incident was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence.

The employer argued in its written argument that "having an employee, in front of three co-workers, treat a supervisor in [an insubordinate] manner" made a continued employment relationship impossible, and the supervisor "cannot count on the claimant to do as she was instructed," and could not allow claimant to undermine her authority. Employer's Argument; *See* OAR 471-030-0038(1)(d)(D). Given that claimant's conduct did not include name-calling, foul language, violence or threats of violence, and given that claimant's conduct was brief and followed by claimant's attempt to perform her job, the employer has not shown that claimant's conduct caused a breach of trust in the employment relationship or otherwise made a future employment relationship impossible such that claimant's conduct exceeded mere poor judgment. Nor was claimant's mild outburst on January 15, 2013 unlawful or tantamount to unlawful conduct. Claimant's January 15, 2014 conduct is thus excused as an isolated instance of poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-14387 is affirmed.

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

DATE of Service: May 28, 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>.

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