

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0683

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134259). Claimant filed a timely request for hearing. On March 5, 2014, ALJ Lohr conducted a hearing, and on April 17, 2014 issued Hearing Decision 14-UI-15367, reversing the Department's decision. On April 25, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Northwest Administrators, Inc. employed claimant as a switchboard and counter clerk from September 10, 2007 until December 4, 2014. One of claimant's duties was to sort the mail that was delivered to the employer and to direct that mail to the appropriate person or department.

(2) The employer expected claimant to follow its instructions and to perform her work adequately. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On November 11, 2011, January 11, 2012 and February 7, 2013, the employer spoke to claimant or issued written warnings to her advising her that her work performance was unacceptable and it needed to improve.

(4) In June 2013, claimant's mother, who also worked for the employer, was going to retire. During that month, claimant's supervisor and claimant's mother met with claimant and told claimant that if any mail directed to her mother's attention came to the workplace after the mother had retired, claimant should deliver that mail to her supervisor. Claimant's mother retired in or shortly after June 2013.

(5) On September 17, 2013 and September 19, 2013, the employer warned claimant that her work performance was still deficient and needed to improve. On approximately September 20, 2013, claimant

experienced a panic attack while at work and went to a hospital emergency department. Claimant did not clock out of the employer's timekeeping system before she left the workplace for the hospital.

(6) On October 3, 2013, the employer issued a written warning to claimant for continuing unacceptable job performance. The warning advised claimant that the employer expected her, among other things, to "[s]ort mail and direct [it] to the correct internal person for processing." Exhibit 2 at 7. The warning also stated that it was a "final written warning," and that if claimant's performance did not improve claimant would be discharged. *Id.* On October 28, 2013, the employer issued another written warning to claimant telling claimant that the "type and volume" of her work errors had not improved, and that "[i]f those errors continue at the same level you will be immediately terminated." Exhibit 2 at 5.

(7) On approximately November 25, 2013, claimant sorted the workplace mail and saw that a letter had been received from an insurance company that was directed to her mother's attention. Claimant took the letter from the workplace to personally deliver it to her mother over the Thanksgiving holiday. When claimant gave the letter to her mother, the mother told her to take it back to her supervisor at the workplace because it contained a bill that the employer needed to pay on behalf of one of its clients. On December 2, 2013, when she returned to work after the Thanksgiving holiday, claimant returned the letter to her supervisor. Claimant told the supervisor she had taken the letter to her mother because she had thought the letter contained a personal holiday greeting for her mother.

(8) On December 4, 2013, the employer discharged claimant for removing from the workplace the letter received her mother on November 25, 2013.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Assuming *arguendo* that it was at least wantonly negligent for claimant to remove from the workplace the letter directed to her mother's attention after claimant's supervisor told her to bring all such mail to her, the employer failed to demonstrate that claimant's behavior was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and does not include behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). In this case, the employer had issued several past warnings to claimant for her deficient work performance, but did not demonstrate that any of the behaviors underlying those warnings involved claimant's willful or wantonly negligent violations of the employer's standards. A mere failure to perform adequately, without more, does not show the type of willful or wantonly negligent past behavior that disqualifies the final occurrence from

being an isolated act. The only past warning that claimant received that did not principally involve the quality of her work was when she left work without clocking out on September 20, 2013. The employer did not dispute claimant's explanation that she left work due to a panic attack, and that, in the resulting confusion, claimant inadvertently failed to clock out. Transcript at 30, 32, 33. On the undisputed facts in this record, claimant's failure to clock out on September 20, 2013 was, more likely than not, neither willful nor wantonly negligent. Because the employer did not demonstrate that any of claimant's alleged violations of the employer's standards that occurred before the incident for which she was discharged were willful or wantonly negligent, claimant's final violation of the employer's standards was necessarily an isolated act of misconduct. Nor was the behavior for which claimant was discharged the sort of behavior that would cause an employer to objectively conclude that it was an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant's behavior in removing the letter to her mother, while contrary to her supervisor's express instructions, was understandable since she thought the letter contained a personal holiday greeting for her mother. Transcript at 20. Given claimant's undisputed motivation, the fact that claimant had removed a piece of mail from the workplace was unlikely to recur in the future after the employer warned her that its prohibition covered all mail received for her mother whatever she thought it contained. The employer failed to demonstrate that, on these facts, claimant's behavior fundamentally ruptured the employment relationship. Because claimant's behavior in removing from the workplace the piece of mail addressed to her recently retired month met all the criteria required for an isolated act of poor judgment, that behavior was excused from constituting misconduct under OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-15367 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>.

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.