EO: 300
BYE: 201508

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0723

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #14720). Claimant filed a timely request for hearing. On April 24, 2014, ALJ Murdock conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16098, concluding the employer discharged claimant, but not for misconduct. On April 29, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Grocery Outlet of Albany employed claimant from February 2, 2013 to March 4, 2014 as a manager.

(2) The employer's written policy prohibited insubordination, such as behaving in an improper and disrespectful manner toward a supervisor. Claimant understood the employer's policy.

(3) On March 4, 2014, the employer's owner left a written warning in the employer's office for claimant for allegedly behaving in a disrespectful manner toward a customer. Claimant responded to the written warning by sending a text message to the owner stating, "I signed your write-up even though everything in it is a complete lie. It's absolutely disgusting. I can't believe that you would do that and you weren't even here to give it to me yourself. Excuse me for defending myself." Audio Record ~ 16:00 to 16:20. The owner was offended by the tone of claimant's text message.

(4) Claimant had not engaged in prior incidents of insubordination.

(5) On March 4, 2014, the employer discharged claimant for insubordination.

CONCLUSIONS AND REASONS: We agree with 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, claimant and the employer agreed on the content of claimant's text message to the owner on March 4, 2014. However, claimant testified that he thought the text message was appropriate "at the time," and not rude or insulting. Audio Record ~ 16:24 to 17:03. We, however, are persuaded that claimant knew or should have known that the content and insulting tone of his text message probably violated the employer's expectation that he not behave in an insubordinate manner towards a supervisor. Claimant's conscious decision to send a text message that the owner could reasonably find confrontational demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

However, claimant's conduct on March 4, 2014 was 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 part of a pattern of willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). An isolated act exceeds mere poor judgment only if it violates the law, is tantamount to unlawful conduct, creates an irreparable breach of trust in the employment relationship, or otherwise makes a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer alleged claimant engaged in two prior incidents of poor judgment. The employer's owner testified that claimant engaged in unlawful drug use at work in September 2013, and threatened a subordinate employee in November 2013. Audio Record ~ 9:16 to 10:55. Claimant denied having engaged in unlawful drug use at work. Audio Record ~ 17:13 to 17:35. Thus, absent a reason to disbelieve claimant's testimony, the evidence is, at best, equally balanced between the parties, and thus does not show by a preponderance of the evidence that claimant engaged in unlawful drug use at work. The ALJ did not ask claimant about the alleged November 2013 incident. However, even assuming the incident occurred as alleged by the employer's owner at hearing, the final incident was not a repeated act, because the November 2013 incident did not involve insubordination, and two incidents during claimant's thirteen-month period of employment are insufficient to establish a pattern of other willful or wantonly negligent behavior. Thus, the record does not show claimant's insubordinate text message on March 4, 2014 was a repeated act or part of a pattern of willful or wantonly negligent behavior. Claimant's exercise of poor judgment on March 4, 2014 therefore was an infrequent occurrence, and his conduct isolated. Claimant's conduct on March 4, 2014 did not violate the law, and it was not tantamount to unlawful conduct. Nor does the record show that claimant's text message would reasonably create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

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

DECISION: Hearing Decision 14-UI-16098 is affirmed.

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

DATE of Service: June 3, 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.