EO: 700
BYE: 201444

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-0735

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 130515). The employer filed a timely request for hearing. On April 22 and 24, 2014, ALJ Han conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16174, affirming the Department's decision. On May 2, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sharis Management Inc. employed claimant as a dishwasher from October 8, 2013 to February 7, 2014.

(2) The employer's written policy regarding workplace behavior stated that employees were expected to exercise good judgment and conduct themselves in an appropriate and professional manner while on duty. The employer's written guidelines regarding workplace behavior stated that employees were expected to treat each other with respect, and prohibited rude, insulting, obscene or vulgar comments, jokes or slurs, including personal verbal attacks on coworkers. Claimant was aware of the employer's policy and guidelines.

(3) On November 18, 2013, while claimant and a coworker were discussing video games, the coworker asked how someone could kill anyone one from one mile away. Claimant, who was a military veteran, responded that he could make that shot. During the conversation, claimant asked his coworker where he lived and how he got to work. On November 21, 2013, claimant's coworker reported the incident to the employer, stating that he felt threatened by claimant's behavior. The employer's general manager

investigated the incident and determined that claimant did not intend to threaten his coworker, but warned claimant against talking at work about shooting and killing people.

(4) On February 1, 2014, claimant's supervisor overheard claimant complaining that he was behind in his work, and asking a server to help him take out the trash. The assistant manager told claimant he would not be behind in his work if he was not being lazy. Claimant had a trash bag in his hand and replied that he could put the bag over his supervisor's head, tie it off, and duct-tape it to make sure it had a good seal. Although claimant was joking, his supervisor felt threatened. Approximately five minutes later, the relief dishwasher arrived fifteen minutes before the end of claimant's shift. Claimant's supervisor ordered claimant to leave work early, and claimant complied.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was for an isolated instance of poor judgment, and not 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 are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from telling his supervisor he could put a trash bag over her head, tie it off, and duct-tape it to make sure it had a good seal. Claimant knew or should have known from the employer's policy and guidelines regarding workplace behavior, the warning he received after the November21, 2013 incident, and as a matter of common sense, that making that statement probably violated the employer's expectations regarding workplace behavior. Claimant's conscious decision to make the statement demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

However, claimant's conduct on February 1, 2014 was an isolated instance of instance of poor judgment, and not misconduct. An act is isolated if the exercise of poor judgment must 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 employment relationship. OAR 471-030-0038(1)(d)(D).

In this case, the employer did not assert or show that claimant's conduct on February 1, 2014 violated the law or was tantamount to unlawful conduct. Nor do we find claimant's statement to his supervisor so egregious that created an irreparable breach of trust in the employment relationship, given that claimant intended the statement as a joke, and complied with his supervisor's order to leave work early.

The employer did not assert or show that claimant's conduct otherwise made a continued employment relationship impossible, and therefore failed to establish that it exceeded mere poor judgment.

The employer also did not assert or show that claimant intended to threaten his coworker on November 18, 2013. The record fails to show claimant knew or should have known through prior training, experience or warnings that telling his coworker he could "make that shot," during a discussion of video games, and later asking his coworker where he lived and how he got to work, probably violated the employer's policy, guidelines or expectations regarding workplace behavior. Nor was claimant's statement so egregious that we infer he knew or should have known as a matter of common sense. Absent a showing that claimant exercised poor judgment on November 18, 2013, the employer failed to establish that his exercise of poor judgment on February 1, 2014 was a repeated act or part of a pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

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

DECISION: Hearing Decision 14-UI-16174 is affirmed.

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

DATE of Service: <u>June 5, 2014</u>

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.