

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0837

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 115722). Claimant filed a timely request for hearing. On May 2, 2014, ALJ S. Smith conducted a hearing, and on May 9, 2014, issued Hearing Decision 14-UI-17343, affirming the administrative decision. On May 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From June 21, 2010 to March 3, 2014, Seven Feathers Hotel and Casino employed claimant as a beverage server. The employer expected that claimant would courteously and promptly serve casino guests, maintain good working relationships with her coworkers, and avoid arguing with her coworkers. Claimant knew and understood the employer's expectations.

(2) On January 9, 2014, the employer gave claimant a final written warning for arguing with her coworkers about taking breaks. Claimant again argued with a coworker on January 14, 2014.

(3) On February 6, 2014, a guest approached claimant and told claimant that she should not have addressed the guest's husband as "hon." Claimant apologized. The guest continued to criticize claimant, and claimant said that she "wasn't after her man." (Transcript at 19). The guest walked away from claimant, but later apologized to claimant. Claimant told the guest she would never do "that again." (Transcript at 19). The employer suspended claimant for two days for this incident.

(4) On March 2, 2014, claimant was standing at the door of the room beverages were kept, picking up a beverage to deliver to a guest. A guest approached the door of the beverage room and asked claimant for a beverage. Claimant told the guest "Excuse me, we'll be right with you." (Transcript at 43 and 46).

(5) Also on March 2, 2014, a few minutes before claimant was scheduled to take a break, claimant prepared a list of beverage orders and gave it to a co-worker so that the co-worker could serve the guests during claimant's break. The co-worker told claimant that the list was not legible. Claimant insisted that it was, and told the co-worker that *her* lists were not legible. The co-worker accused claimant of lying and said that claimant was a "bullshit liar." (Transcript at 55). This argument occurred in the beverage room when no guests were present. Claimant believed the argument was petty, and wanted to stop it. She told her co-worker that she was going to get their supervisor.

(6) On March 12, 2014, the employer discharged claimant for failing serve a customer and for arguing with a co-worker on March 2, 2014.

CONCLUSIONS AND REAONS: We disagree with the ALJ and conclude 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 that 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).

In Hearing Decision 14-UI - 17343, the ALJ concluded that the employer met its burden to prove misconduct because the testimony of the employer's witnesses and claimant established that "on March 2, 2014, [claimant] willfully engaged in behavior which violated a reasonable expectation of the employer."¹ The ALJ noted that the employer expected claimant to refrain from arguing with coworkers, and that claimant was aware of this expectation after receiving "prior warnings and formal discipline for engaging in similar behavior two or more times in the recent past."²

The employer provided only hearsay testimony regarding the events of the incident with the guest on March 2, 2014. Absent a basis to conclude that claimant was not a credible witness, her sworn, firsthand testimony had more weight than the hearsay testimony of the employer's witnesses. Claimant denied that she refused service to a guest. Instead, because she was busy serving another guest, claimant politely assured the guest that the guest would promptly be served.

In regard to the argument with her coworker, claimant admitted that it occurred. Accordingly, we next consider whether claimant's behavior with her coworker constituted a wilful or wantonly negligent violation of the employer's expectations. Both as a matter of common sense and as a result of warnings

¹ Hearing Decision 14-UI-17343 at 2.

² *Id.*

she received from the employer, claimant knew that the employer expected her to maintain good relationships with her coworkers and refrain from arguing with them. Claimant consciously engaged in an argument with her coworker on March 2, despite her knowledge that doing so violated the employer's expectations. Claimant's conduct was, at the least, wantonly negligent.

Claimant's actions on March 2 are excusable as an isolated instance of poor judgment, however. An isolated instance of poor judgment is defined as a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct that does not exceed mere poor judgment. OAR 471-030-0038(1)(d)(A and (D). The employer provided only hearsay testimony regarding claimant's February 9, 2014 interaction with a guest. Because we have no basis to conclude that claimant was not a credible witness, her sworn, firsthand testimony has more weight than the hearsay testimony of the employer's witness. Based on claimant's testimony, we conclude that claimant did not behave inappropriately or discourteously in her interactions with a casino guest on February 9, 2014. Although the employer's witness testified that claimant received a final written warning on January 9, 2014, for arguing with a coworker, and that claimant again argued with a coworker on January 14, 2014, the employer provided no firsthand testimony regarding any details of these arguments or claimant's role in them. Accordingly, the employer failed to meet its burden of proof to demonstrate that claimant's conduct on March 2, 2014, was either a repeated act or part of a pattern of other wantonly negligent conduct. Claimant's behavior on March 2 did not exceed mere poor judgment because it was not unlawful or tantamount to unlawful conduct, and her conduct was not so egregious as to cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

Accordingly, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 14-UI-17343 is set aside, as outlined above.

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

DATE of Service: June 24, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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