

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0961

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155425). Claimant filed a timely request for hearing. On May 13, 2014, ALJ Seideman conducted a hearing, and on May 20, 2014 issued Hearing Decision 14-UI-18008, affirming the Department's decision. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) West Valley Hospital employed claimant as an environmental services assistant from May 17, 1984 to March 28, 2014.

(2) During the last two years of claimant's employment, she sometimes yelled, used foul language and made comments the employer considered unprofessional. The employer warned claimant that such behavior was unacceptable.

(3) In September 2013, claimant made several derogatory statements to her manager about other employees, including that a human resources employee was a "fucking back stabber." Exhibit 2. On October 3, 2013, an employee reported to claimant's manager that claimant had made derogatory comments about the night shift staff. When questioned about those comments, claimant told her manager to "quit fucking picking on me." Exhibit 2. The employer gave claimant a written warning for inappropriate workplace behavior.

(4) During a staff meeting on Friday, March 14, 2014, claimant criticized an employee who was absent due to illness. Claimant's manager told her that if she was concerned about another employee's behavior or performance, she should tell him in private, and not in front of other employees. Claimant yelled at her manager, asserting that he "never listens to her ideas or opinions" and "doesn't give a crap about the department." Exhibit 1. Claimant's manager told her that the ideas, observations and opinions of claimant and other employees were important, but they had to be presented in an appropriate manner

that did not demean other employees. Claimant continued to argue with her manager, who ended the staff meeting, and attempted to continue their discussion privately in a conference room. Claimant twice loudly refused to accompany her manager to the conference room before ultimately agreeing to do so. On the way to the conference room, claimant again yelled at her manager, asserting that he was a “horrible manager,” that he did not manage his department “for shit,” that he was always “picking on” claimant, and that “this is bullshit.” Exhibit 1. Claimant’s manager told claimant that he was going to postpone their meeting until she calmed down and a human resources representative could be present.

(5) During their meeting on Monday, March 17, 2014, claimant again yelled at her manager, asserting that the meeting was “stupid,” and that she had a “right to say what she wanted.” Exhibit 1. Claimant’s manager told claimant to stop yelling at him or any other employee and to behave professionally with staff at all times. Claimant continued to yell at her manager and use foul language, asserting that he did not manage his department “for shit,” that he did not “give a fuck” about the department, and that “this is fucking bullshit.” Exhibit 1. When claimant was told that she was being placed on administrative leave and instructed to leave her employee identification, pager and keys, she threw her keys across the table onto the floor, threw her employee identification and pager at her manager, and threatened to “get back” at the employer if she was discharged.

(6) The employer discharged claimant for her behavior on March 14 and 17, 2014.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant’s discharge was 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 had a right to expect claimant to refrain from her abusive behavior toward her manager on March 14 and 17, 2014. Claimant knew or should have known from prior experience, warnings and as a matter of common sense that such behavior violated the employer’s expectations, and her conscious decisions to engage in such behavior demonstrated indifference to the consequences of her actions. Claimant’s conduct therefore was, at best, wantonly negligent.

Claimant’s conduct was not an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be 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). Claimant exercised poor judgment during her meeting with her manager and a human resources representative on March 17, 2014. She

also exercised poor judgment during and after the staff meeting on March 14, 2014. She also exercised poor judgment in telling her manager on October 3, 2013 to stop “fucking” picking on her. She also exercised poor judgment in telling her manager in September 2013 that a human resources employee was a “fucking back stabber.” Claimant repeatedly exercised poor judgment during the last two years of her employment. Her exercise of poor judgment therefore was a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant’s abusive behavior toward her manager on March 14 and 17 cannot be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that the employer would condone such behavior.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-18008 is affirmed.

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

DATE of Service: July 9, 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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