

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1159

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 28, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 165449). Claimant filed a timely request for hearing. On June 16, 2014, ALJ Seideman conducted a hearing, and on June 20, 2014 issued Hearing Decision 14-UI-20021, affirming the Department's decision. On July 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) The Reflector employed claimant as a newspaper designer from September 2006 until April 3, 2014. The employer operated a newspaper.

(2) The employer expected claimant to behave with courtesy and respect in the workplace and to refrain from disruptive actions. Claimant was aware of the employer's expectations.

(3) Sometime in 2013, the employer's lead designer left work. At that time, the editor, the office manager and claimant's supervisor made some comments to claimant that led claimant to think that she was promoted to the position of lead designer. However, the employer had not formally promoted claimant and did not document any such promotion in claimant's employment file.

(4) Beginning in approximately February 2014, the employer's management changed and new policies were implemented. The employer held a series of staff meetings to introduce these changes to the employees. The employer perceived that claimant reacted negatively to the changes. Claimant expressed disagreement with the changes at some staff meetings and in conversations with other employees.

(5) On Friday, March 28, 2014, claimant attended a staff meeting in which it was announced that one of her coworkers was promoted to the position of lead designer. By this promotion, the coworker became claimant's supervisor. The staff meeting was the first notice to claimant that she had not actually been promoted to lead designer. Claimant was very upset. After work that day, claimant met separately with the general manager and the administrative assistant to discuss the coworker's promotion. Claimant told them that she was under the impression that she had been promoted to lead designer based on the comments made to her by the editor, the office manager and her supervisor. Claimant was still upset when she spoke to both of them and she was crying. The general manager apologized to claimant for the misunderstanding about the promotion. The general manager and the administrative assistant told claimant that she had not been demoted and advised her to accept management's decision about the new lead designer.

(6) On Monday, March 31, 2014, claimant reported for work early and spoke with the administrative assistant. Claimant repeated much of what she had said on March 28, 2014 and again expressed her unhappiness with the promotion of the coworker to lead designer. Claimant remained upset about the coworker's promotion and that she had not been given notice of it before the general announcement at the March 28, 2014 staff meeting. After meeting with the administrative assistant, claimant returned to work. In the afternoon, claimant had a conversation with the coworker who had been promoted to lead designer about her difficulty in using the employer's new advertising system. The employer received reports on the conversation that characterized claimant as making "snippy remarks" and "growling" at the coworker. Transcript at 8, 11, 13; Exhibit 5 at 1. Claimant then returned to work.

(7) At the end of the workday on March 31, 2014, claimant went to the editor's office and spoke to him about the coworker's promotion. After claimant left the editor's office, the administrative assistant observed her asked her to come into a conference room. Claimant was upset and again crying. Claimant told the administrative assistant that she did not like the way the new lead designer treated her and spoke to her. The administrative assistant told claimant that she needed to stop complaining and to accept management's decision about the promotion. Transcript at 13, Exhibit 5 at 1. Claimant left that conversation, returned to her desk and prepared to leave for the day. As claimant walked toward the exit doors she stated in a raised voice, "I guess we should all just put a smile on our face, pretend we're happy and act like nothing's wrong." Transcript at 8. Other employees heard claimant's comment and asked questions such as "Is she okay?" and "What is going on?" Transcript at 33.

(8) Before April 3, 2014, the employer had not reprimanded claimant or issued to her any disciplinary warnings.

(9) On April 3, 2014, the employer discharged claimant for the comment she made on March 31, 2014 as she left the workplace.

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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-20021, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant willfully violated the employer's standards when she made "unkind" comments to the new lead designer on March 31, 2014 and when she made her parting comment as she left the workplace on March 31, 2014. Hearing Decision 14-UI-20021 at 4. The ALJ further concluded that claimant's comments were not excused as an isolated instance of poor judgment because she "had been making the bad comments over a period of time" and also because "her attitude as it developed made a continued employment relationship impossible." Hearing Decision 14-UI-20021 at 4. We disagree.

From the testimony of the employer's witness, it was plain that the employer discharged claimant for the comment that she made on March 31, 2014 as she departed from the workplace. Transcript at 5, 34. For purposes of this decision, we assume that claimant was aware, if only as a matter of common sense, that the employer expected her to refrain from disrespectful or disruptive behavior in the workplace. We also assume, *arguendo*, that claimant's parting comment on March 31, 2014 was at least a wantonly negligent violation of the employer's reasonable standards.

Although claimant's behavior on March 31, 2014 might have been wantonly negligent, it is excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) if it meets certain requirements. Those requirements are that claimant's behavior on March 31, 2014 must have been a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and must not have exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). In this case, it is not disputed that claimant had received no reprimands or disciplinary warnings from the employer before her discharge. While the employer's witness referred to certain comments claimant made on or before March 31, 2014 as being critical of the employer's corporate decisions, disruptive to the workplace, "snippy," "snarling," "growling" and "not very pleasant," the witness did not sufficiently describe them or their context to support a conclusion that claimant's behavior in making them was a wantonly negligent violation of the employer's standards. Transcript at 5, 8, 9, 10, 13, 34. Taking the record as a whole, the employer failed to demonstrate that, before the incident for which she was discharged, claimant had violated the employer's standards by making the "bad comments" to which the ALJ referred, or, if she did, it was with a willful or wantonly negligent state of mind. *See* Hearing Decision 14-UI-20021 at 4. Absent this demonstration, claimant's behavior on March 31, 2014 was isolated.

Viewed objectively, claimant's parting comment as she left the workplace on March 31, 2014 did not reasonably cause an irreparable breach of trust in the employment relationship. Assuming that the employer's description of claimant's comment and behavior were accurate, claimant's alleged outburst was of extremely short duration, and could not reasonably have lasted longer than the few seconds required to state a single sentence as she walked out the workplace. As described, claimant's comment did not include any foul language, did not contain threats or intimidating words, was not accompanied by overtly intimidating physical gestures and was not apparently directed at any particular employee or

group of employees. Although the employer's witness contended that claimant's parting comment caused other employees to experience discomfort and to become "visibly upset," it does not reasonably appear from the type of statements that they made after the incident that they believed that their safety was jeopardized or that they were apprehensive about claimant's future behavior in the workplace. Transcript at 5, 8, 33. At worst, it reasonably appears only that the employees were surprised by claimant's behavior and uncertain about what had caused it. The employer's witness also contended that the employer had concerns about claimant's future behavior because it perceived that claimant was becoming "more upset and agitated as time went by" over the ongoing changes in the workplace. Transcript at 36. The behavior of claimant that is at issue was precipitated by the single incident of a staff-wide announcement that another employee had been promoted to a position into which claimant believed that she had already been promoted. Claimant's disappointment was understandable, as well as was her belief that the employer's management had not kept its promise to promote her. It does not appear unreasonable that claimant pursued discussions with management about the promotion on the workday that she learned of it and the following workday, nor does it appear that, by initiating these discussions, claimant evidenced an unwillingness to ultimately accept management's decision on the promotion. Given its very particularized emotional and factual underpinnings, it does not appear on these facts that claimant's extremely brief outburst on March 31, 2014 was reasonably emblematic of future behaviors or other outbursts that would violate the employer's reasonable expectations. An objective employer would not have concluded that claimant's behavior caused an irreparable breach of trust in the employment relationship. Because claimant's behavior on March 31, 2014 satisfied the requirements of OAR 471-030-0038(1)(d)(A) and OAR 471-030-0038(1)(d)(D), it is excused from constituting misconduct under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 14-UI-20021 is set aside, as outlined above.

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

DATE of Service: August 4, 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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