EO: 200
BYE: 201518

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-1186

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131652). Claimant filed a timely request for hearing. On June 20, 2014, ALJ Shoemake conducted a hearing, and on July 1, 2014 issued Hearing Decision 14-UI-20704, concluding the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. On July 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rose City Nursing Home employed claimant from June 2, 2005 until May 12, 2014, last as its dietary manager.

(2) On January 24, 2014, the employer gave claimant a copy of the eighteen dietary standards that the employer expected her to follow. On February 19, 2014, the employer gave claimant a warning for failing to follow seven of the dietary standards. Claimant disagreed with the employer's findings, asserting that the employer was unfairly asking her to adhere to expectations that other kitchen staff were not held accountable for.

(3) On April 15, 2014, the employer held a meeting with claimant because it was concerned that her work performance and attitude had declined over the past year. The employer believed claimant had not been active in her role as dietary supervisor. Claimant stated that she would give up her management position if that's what the employer wanted. The employer placed claimant on a performance improvement plan that was to begin on May 1, 2014. The employer informed claimant that she would no longer be the dietary manager, and that her new position would be food service assistant. The performance improvement plan outlined six expected standards and required claimant to train her replacement. Claimant disagreed with the employer's decision to demote her, but agreed to meet the standards set forth in the performance improvement plan to the best of her ability. The employer also gave claimant a copy of her new position description and twenty dietary standards the employer expected her to follow. Claimant signed the document outlining the dietary standards, indicating that she would try to meet them to the best of her ability.

(4) On April 21, 2014, the employer met with claimant to discuss her new role and schedule as the food service assistant. During the meeting, the employer noted more work performance concerns. Claimant became argumentative and called the employer's administrator a liar. The administrator told claimant that she would be given a written warning for insubordination if her behavior continued. Claimant continued to speak loudly and behave unprofessionally. The administrator instructed claimant to leave the meeting, and claimant did so.

(5) On April 22, 2014, claimant served chicken alfredo with chicken legs, although the recipe called for boneless chicken. Claimant did so because there was not boneless chicken available to serve that day. As dietary manager, claimant was responsible for ordering food, and had not ordered enough boneless chicken for that week.

(6) Claimant worked from April 22, 2014 and trained her replacement until she was suspended on May 1, 2014. The employer informed claimant that she was suspended while the employer decided whether to discharge claimant. On May 12, 2014, the employer discharged claimant for her behavior and conduct on April 21 and 22, 2014.

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 or mere inefficiency resulting from lack of job skills are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant for her behavior and conduct on April 21 and 22, 2014. On April 21, claimant became argumentative and called the employer's administrator a liar, and continued to speak loudly and behave unprofessionally after the administrator warned her that she was being insubordinate. Claimant knew or should have known her conduct probably violated the employer's expectations regarding workplace behavior, and her conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions. Claimant's conduct was wantonly negligent.

However, claimant's conduct on April 21 was an isolated instance of poor judgment, and not misconduct. An act is isolated if 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). Only acts that violate the law, are tantamount to unlawful conduct, create

irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

On April 22, 2014, claimant served chicken alfredo with chicken legs, although the recipe called for boneless chicken. However, claimant did so because there was no boneless chicken available to serve that day. Although claimant was responsible for ordering food, the employer failed to show she consciously neglected to order enough boneless chicken that week, or consciously engaged in other conduct she knew or should have known would probably result in there not being enough boneless chicken that week. Absent such showings, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence. As for claimant's prior failures to comply with the employer's performance expectations, the employer similarly failed to show that claimant consciously violated those expectations, or consciously engaged in other conduct she knew or should have known would probably result in her doing so. The employer also failed to show that claimant's conduct was the result of indifference to the consequences of her actions, and not mere inefficiency resulting from lack of job skills . Absent such showings, the employer again failed to show that claimant violated its expectations willfully or with wanton negligence. Claimant's conduct on April 22 therefore was not a repeated act or part of a pattern of willful or wantonly negligent behavior.

Claimant's conduct on April 22 did not violate the law, and was not tantamount to unlawful conduct. Nor was it so egregious that it created an irreparable breach of trust in the employment relationship. The employer did not assert or show that claimant's conduct otherwise made a continued relationship impossible. The employer therefore failed to establish that claimant's conduct exceeded mere poor judgment.

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

DECISION: Hearing Decision 14-UI-20704 is affirmed.

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

DATE of Service: <u>August 11, 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 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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