EO: 700
BYE: 201537

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

763
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1837

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 73036). The employer filed a timely request for hearing. On November 13, 2014, ALJ Clink conducted a hearing, and on November 14, 2014 issued Hearing Decision 14-UI-28767, affirming the Department's decision. On December 2, 2014, the employer 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) Roadrunner Courier, Inc. employed claimant as a driver from April 12, 2013 until September 9, 2014.

(2) The employer expected claimant to refrain from displaying openly aggressive or insubordinate behavior toward his supervisors. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On July 7, 2013, claimant's supervisor issued a written warning to claimant after it was reported to the supervisor that the driver on claimant's route had been "rude" to a customer on an unspecified day. Transcript at 9. When claimant discussed the customer's report with his supervisor, he told the supervisor that he had not been at work on the day the alleged rudeness occurred and was not the driver to whom the customer referred. The supervisor verified that claimant had not been working that day and he agreed that the warning was not merited. Claimant thought that the warning was removed from his personnel file.

(4) Sometime before July 9, 2014, the employer hired a new chief executive officer (CEO). The new CEO heard "rumblings" from some employees that claimant's manager was not strictly enforcing the employer's attendance policies. Transcript at 11-12. Although the employer's written attendance policy

required employees who were going to be absent from work to call in and speak personally with their manager to report their absence, and prohibited such communications by text message, claimant's immediate manager permitted employees, including claimant, to send text messages reporting absences. On July 9, 2014, the CEO was told that claimant had reported his absence that day to his manager by text message. It was also reported to the CEO that claimant had missed an unacceptable number of days during the last month due to an injury. Exhibit 1 at 10. On July 10, 2014, the CEO issued a warning to claimant for reporting his absence from work on July 9, 2014 by sending a text message to his manager. *Id.* Claimant was placed on probation for 60 days. *Id.*

(5) Sometime before Saturday, August 13, 2014, the CEO distributed a notice to all employees stating that on August 13, 2014 the employer was going to hold a mandatory training on transporting hazardous materials (hazmat) for its drivers to enable them to maintain their hazmat certification. The notice stated that the hazmat training was going to start at 1:00 p.m. at a local park, was expected to last approximately 45 minutes to an hour, and was going to be immediately followed by a company-wide barbeque to which employees and their families were invited. Claimant did not usually work on Saturdays. Claimant had paid a fee that allowed him to drive race cars on a near-by race track each Saturday during the summer starting at 2:30 p.m. Claimant thought that he was going to be able to attend the mandatory training part of the company-wide event and still have enough time to appear at the race track on that Saturday.

(6) On Saturday, August 13, 2014, claimant arrived at the mandatory training sometime before 1:00 p.m. The training did not start at the scheduled time because some of the employer's drivers were tied-up in traffic and their arrivals were delayed. At 2:00 p.m., the time when the training should have been over, claimant went up to his immediate manager and told her that he needed to leave. Claimant's manager did not forbid him from leaving, and claimant asked her if he needed to submit any documentation for his recertification as a hazmat driver. Claimant's manager told him that he needed to do nothing other than to complete a previously distributed "knowledge test" about the training. Transcript at 35. Claimant left the company-wide event and did not ask for the CEO's permission to do so. Claimant completed the knowledge test before August 15, 2014 and gave it to his manager sometime after.

(7) On September 4, 2014, when claimant arrived at work, the CEO approached him in the warehouse and said she had not received a completed knowledge test from him. Claimant retrieved the graded test that he had received back from his manager and showed it to the CEO. The CEO then told claimant that she had heard he left the training early on August 13, 2014. Claimant told the CEO that the training had started late and that he needed to leave before it was completed because of a prior commitment. Claimant showed the CEO the notice announcing the training and the company-wide barbeque as justification for leaving early because the training was not over at the anticipated time. Claimant was "upset" and "angry" that the CEO wanted to discuss behavior occurring three weeks earlier and the conversation became "heated." Transcript at 42, 43. During the conversation, claimant was "kind of waving" his arms. Transcript at 43. The conversation concluded and claimant went back to work. The CEO did not issue a disciplinary warning to claimant for leaving the August 13, 2014 training early.

(8) On September 4, 5, 8, 9, 2014, claimant reported for work as scheduled. On September 9, 2014, the employer discharged claimant for insubordinate behavior toward the CEO on September 4, 2014.

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).

The employer's witness, the CEO, and claimant disagreed on claimant's behavior and demeanor during their September 4, 2014 interaction. The CEO asserted that claimant "yelled," refused to "take ownership or responsibility" for leaving the August 13, 2014 meeting early, was "aggressive" toward her in his behavior and body language, "leaned in" to her, pointed his finger in her face, made "threatening gestures" and might have used foul language. Transcript at 17, 18, 19, 23. Claimant generally denied these contentions, but agreed the conversation became a "little bit heated" and that he might have raised his voice to the CEO. Transcript at 35, 36, 37. Both parties are interested witnesses to the August 4, 2014 conversation, and, for this reason, the unbiased accuracy of their descriptions is subject to question. However, the employer's dock supervisor was present in the warehouse and within fifty to seventy-five feet of claimant and the CEO when their conversation occurred. Transcript at 43. Because he is a relatively disinterested witness to the conversation, his testimony about his observations is entitled to significant weight. Rather than corroborating the testimony of either of the parties, he stated that he could not make out the exact words of the conversation, which suggests that claimant was not shouting and does not corroborate that claimant used any foul language. Transcript at 42. The dock supervisor concluded claimant was "angry" during the conversation due to his tone of voice, his body language and that he was "kind of waving" his arms. Transcript at 43. The dock supervisor did not mention that claimant made any gestures that he considered objectively threatening or physically aggressive toward the CEO and further stated that he "felt no need to intervene" in the conversation to protect either party. Transcript at 43. On this record, the most reliable conclusion that can be drawn about claimant's demeanor during the September 4, 2014 conversation is that claimant's voice was elevated above a normal speaking level and that claimant appeared upset and angry.

For purposes of this decision, it is assumed that claimant's behavior during the September 4, 2014 conversation was a wantonly negligent violation of the employer's expectation. Even so, it still was not misconduct if it was excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an "isolated instance of poor judgment" if, among other things, it 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). To constitute an isolated instance of poor judgment, claimant's behavior on September 4, 2014 must also not have been the type that causes an irreparable breach of trust in the employment relationship or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, the employer cited only two specific examples of claimant's past willful or wantonly negligent violations of the employer's expectations, the behaviors underlying the July 7, 2013 and July 10, 2014 warnings, to support the conclusion that claimant's behavior on September 4, 2014 was not isolated. The employer did not rebut claimant's testimony that his manager at the time incorrectly issued the July 7, 2013 warning based on inaccurate information about claimant's involvement in the underlying incident and had agreed that the warning was unfounded. As result, the

employer did not demonstrate that any willful or wantonly negligent behaviors on the part of claimant gave rise to the July 7, 2014 warning. In connection with the July 10, 2014 warning, the employer did not rebut claimant's contention that his manager at that time condoned his practice, as well as that of other employees, in notifying their manager of absences via text messages. Transcript at 37. While the employer's policy, as written, prohibited text message notifications of absences, the employer did not demonstrate that, based on the practices of claimant's manager, claimant did not make a good faith mistake in believing that the employer, through claimant's manager, condoned this variation from its written policy. Since a good faith error is excused from constituting misconduct under OAR 471-030-0038(3)(b), claimant's behavior in sending a text message to his supervisor was not a past willful or wantonly negligent violation of the employer's expectations. Based on the only specific evidence that the employer presented to establish claimant's past alleged violations of its expectations, claimant's behavior on September 4, 2014 was an isolated wantonly negligent violation of the employer's standards.

Claimant's behavior on September 4, 2014, if wantonly negligent, was also understandable. Claimant was obviously upset that the CEO was belatedly questioning him about behavior that his immediate manager had allowed more than three weeks earlier. We infer that claimant was attempting to show the CEO that, based on the language of the notice for the August 13, 2014 meeting and his manager's apparent approval, he had been justified in leaving the training early, and that he had taken the required test on his own time to complete the employer's objective of achieving his hazmat recertification. We also infer that, when the CEO did not accept his explanations, claimant became frustrated and irritated with her. That claimant might have shown those emotions in his interaction with the CEO was an understandable human reaction. Moreover, it appears that the interaction at issue was relatively brief in duration and that claimant worked, without incident, for the next few days after it. The CEO agreed that claimant had never before, to her knowledge, shown disrespect for any supervisor. Transcript at 19. Nothing in the facts, as found, suggests that claimant was intentionally defying the CEO's authority on September 4, 2014, that claimant personally insulted her, engaged in invective, used foul language, or said or did anything that reasonably indicated that he was going to challenge the CEO's authority in the future. It further appears that the CEO was inexperienced in her position when she had the conversation with claimant, and we infer that she might not have yet developed the perspective to evaluate whether the behavior of an employee was, viewed objectively, insubordinate or whether it was more reasonably interpreted as only an expression of the employee's temporary frustration and annoyance. Transcript at 26-27. While claimant might have better controlled his reactions during the September 4, 2014 conversation with the CEO, there is nothing in the facts as we have found them that can be interpreted as a basis for the CEO having reasonable fears about her future interactions with claimant. On these facts, an objective employer would not reasonably conclude that, by the nature of his brief interaction with the CEO on September 4, 2014 and his frustration, claimant had so fundamentally ruptured the employment relationship that he could not be trusted in the workplace in the future. Assuming claimant's behavior on September 4, 2014 was a wantonly negligent violation of the employer's standards, it was an isolated act and, viewed objectively, did not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Because claimant's behavior on September 4, 2014 meets all the applicable requirements, it is excused from constituting misconduct under OAR 471-030-0038(3)(b) 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-28767 is affirmed.

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

DATE of Service: January 20, 2015

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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