

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1964

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120919). Claimant filed a timely request for hearing. On December 12, 2014, ALJ Shoemake conducted a hearing, and on December 16, 2014 issued Hearing Decision 14-UI-30416, concluding the employer discharged claimant, but not for misconduct. On December 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Energyneering Solutions, Inc. employed claimant from November 6, 2013 to September 15, 2014 as an accounting assistant.

(2) The employer had a written policy requiring claimant to treat all employees with dignity and respect and prohibiting harassment, bullying, and threats of violence in the course of employment. Claimant was aware of the employer's policies.

(3) On February 4, 2014, claimant made a reference to a coworker's sexual orientation while talking with a different coworker. The coworker who heard the statement reported the incident to claimant's manager. The manager met with claimant and told her that references to any coworker's sexual orientation were unacceptable and violated the employer's anti-harassment policy. Claimant did not make any more references to coworkers' sexual orientation.

(4) On or about June 2014, claimant became frustrated with a coworker's work performance and told him she would "beat his ass." Transcript at 18-19. She apologized to the coworker and made no other threatening statements to him. Claimant and the coworker discussed the incident and continued to work together for three months.

(5) On September 2, 2014, an employee told claimant's manager that she feared for her safety at work because claimant had stated that the coworker who was the subject of the June 2014 incident was going to "go postal" at work. Transcript at 10. The manager told claimant to refrain from discussing the coworker's mental health and inciting fear at work. Claimant denied having made comments about her coworker's mental health.

(6) On September 12, 2014, the same coworker who was the subject of the June and September 2, 2014 incidents told the employer that claimant had spoken to him repeatedly in a condescending manner and had pointed her finger at him, and said she would "beat his ass" in June 2014. Exhibit 1.

(7) On September 15, 2014, the employer discharged claimant for violating its anti-harassment and anti-bullying policy.

CONCLUSIONS AND REASONING: We agree with the ALJ and conclude that claimant's discharge was 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 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 are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she told a coworker she would "beat his ass," allegedly pointed her finger in his face, and talked to him in a condescending manner. The employer had a right to expect employees to refrain from bullying and threatening coworkers. Claimant understood the employer's expectation as a matter of common sense. Claimant testified that she did not point her finger at the coworker or speak to him in a condescending manner, but that she did tell him she would "beat his ass" on one occasion during an emotional outburst in June 2014. Transcript at 19-20. Claimant was the only witness to the incident to testify at hearing, and absent a reasonable basis for concluding that claimant was not a credible witness, we find her testimony regarding what occurred during that incident more persuasive than the employer's hearsay evidence that claimant pointed her finger at the coworker or spoke to him in a condescending manner. The preponderance of the evidence shows claimant's conduct in telling a coworker she would "beat his ass" was, at best, a wantonly negligent violation of the employer's reasonable expectations regarding workplace behavior.

However, claimant's conduct was an isolated instance of poor judgment. For an act 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). Acts that create

irreparable breaches of trust in the employment relationship or otherwise make a continued employment 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).

The employer failed to show by a preponderance of evidence that claimant violated the employer's anti-harassment and bullying policy before the final incident, or that her conduct in the final incident was part of a pattern of other willful or wantonly negligent behavior. With respect to the client's February 4, 2014 reference to a coworker's sexual orientation, the record fails to show that claimant's statement was derogatory in nature or that claimant knew or should have known her conduct violated the employer's anti-harassment policy. Once claimant was warned that any reference to a coworker's sexual orientation was prohibited by the employer, claimant did not repeat the conduct. Regarding the September 2, 2014 incident, when claimant allegedly discussed a coworker's mental health with other employees, the employer's hearsay evidence does not outweigh claimant's firsthand testimony denying she discussed the coworker's mental health with coworkers. The employer therefore failed to show that claimant's exercise of poor judgment in making the threatening remark to her coworker was a repeated act or pattern of other willful or wantonly negligent behavior, and not a single occurrence.

Nor does the record show that claimant's threatening statement to her coworker created an irreparable breach of trust in the employment relationship. Claimant made the statement out of frustration during an isolated emotional outburst, and apologized thereafter. Claimant's coworker discussed the incident with claimant, continued to interact with claimant, and waited three months before disclosing the incident to the employer. We therefore do not find claimant's conduct, viewed objectively, so egregious that it alone created an irreparable breach of trust in the employment relationship that made a continued relationship impossible. The employer therefore failed to establish that claimant's conduct exceeded mere poor judgment. Absent such a showing, we cannot find misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-30416 is affirmed.

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

DATE of Service: February 17, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.