

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0026

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 84519). The employer filed a timely request for hearing. On January 6, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI-31336, concluding that the employer discharged claimant for misconduct. On January 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the parties' written arguments. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) McGraths Publick Fish House LLC employed claimant as a server from September 14, 2013 to November 2, 2014.

(2) The employer had a written policy stating that employees were prohibited from asking customers for gratuities. Claimant was aware of the employer's policy.

(3) On or about May 20, 2014, assuming a customer left a gratuity, claimant asked the customer if he left it at his table or the host stand. The customer told claimant he did not leave a gratuity. The employer warned claimant not to discuss gratuities with customers.

(4) On or about August 15, 2014, a customer paid his bill with a credit card, including a \$1 gratuity. Claimant mistakenly entered a \$10 gratuity when processing the transaction. The employer gave claimant a warning for entering the wrong gratuity amount.

(5) On or about November 2, 2014, noticed that a large group of customers did not leave a gratuity. Claimant asked the customers if they were satisfied with her service. The customers asked claimant why she was inquiring. Claimant initially replied that she just wanted to know if the customers were dissatisfied with her service. The customers persisted in asking claimant why she was inquiring. Claimant decided to be honest with the customers, and told them it was because they did not leave a gratuity. The employer discharged claimant for discussing a gratuity with the customers.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, 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). 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). Isolated acts exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3) only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer had a right to expect claimant to refrain from discussing gratuities with customers. Claimant understood that expectation from the warning she received on May 20, 2014. In discussing a gratuity with customers on November 2, 2014, claimant consciously engaged in conduct she knew or should have known probably violated the employer's expectations. Her conscious decision to discuss the gratuity demonstrated indifference to the consequences of her actions, and therefore was wantonly negligent.

The next issue is whether claimant's conduct can be excused as an isolated instance of poor judgment. Claimant's conduct did not violate the law and was not tantamount to unlawful conduct. In Hearing Decision 15-UI-31336, the ALJ summarily concluded that her conduct could not be considered an isolated instance of poor judgment because claimant "knew very well that she should not be doing that, and her act made a continuing employment relationship impossible."¹ However, claimant mentioned the lack of gratuity only after the customers repeatedly asked her why she was inquiring about whether they were satisfied with her service. Claimant's decision to answer honestly was not so egregious that it

¹ Hearing Decision 15-UI-31336 at 3.

created irreparable breach of trust in the employment relationship. Nor did the employer assert or show that claimant's conduct otherwise made a continued employment relationship impossible. The employer therefore failed to establish that claimant's conduct on November 2, 2014 exceeded mere poor judgment.

The remaining issue is whether claimant's exercise of poor judgment on November 2, 2014 was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. On May 20, 2014, assuming a customer had left a gratuity, claimant asked the customer if he left it at his table or the host stand. However, the employer's policy only prohibited employees from asking customers for gratuities. The employer failed to show that claimant knew or should have known from the policy, or prior training, experience or warnings that asking the customer where he left the gratuity probably violated the employer's expectations. The employer therefore failed to establish that claimant violated its expectations willfully or with wantonly negligence.

On August 15, 2014, claimant entered in the wrong gratuity amount when processing a credit card transaction. However, the employer failed to show claimant consciously entered the wrong amount, or that she consciously engaged in other conduct she knew or should have known would probably result in her doing so. The employer again failed to establish that claimant violated its expectations willfully or with wanton negligence, and therefore failed to establish that claimant's conduct on November 2, 2014 was a repeated act or pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence.

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

DECISION: Hearing Decision 15-UI-31336 is set aside, as outlined above.

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

DATE of Service: February 24, 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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