

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0039

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75431). Claimant filed a timely request for hearing. On December 15, 2014, ALJ S. Lee conducted a hearing, and on December 18, 2014 issued Hearing Decision 14-UI-30657, concluding the employer discharged claimant, but not for misconduct. On January 7, 2015, 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. However, the employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it 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) Premier Living Center employed claimant from June 5, 2014 to October 17, 2014 as a caregiver.

(2) The employer's code of conduct required claimant to act professionally at all times and to refrain from engaging in insubordination, abusive or unprofessional language and conduct, and aggressive language and conduct. Claimant understood the employer's expectations.

(3) On October 10, 2014, claimant told the employer's administrator and nurse that the med aide did not complete a portion of the shift report during their shift change. The administrator and nurse misunderstood claimant's statement to mean that the med aide failed to complete any shift report duties, and the administrator told the med aide about claimant's complaint.

(4) On or about October 13, 2014, the med aide asked claimant about the complaint, and claimant denied having told the administrator that the med aide did not complete any shift report duties. Claimant was upset that the administrator gave the med aide misinformation. The administrator learned of the discussion, and was upset that claimant told the med aide she did not make the statement.

(5) On October 15, 2014, claimant met with the administrator and the nurse to discuss claimant's dissatisfaction about how the employer handled her complaint. Claimant became angry during the conversation, yelled and used foul language. When the administrator tried to speak, claimant yelled at the administrator to stop speaking so claimant could speak. The administrator told claimant to stop yelling. Claimant continued to yell and told the administrator to "check [her own] attitude and body language." Exhibit 1. A resident came to the office door while claimant was yelling. The administrator again told claimant to stop yelling, and to leave the facility. Claimant stated that she would continue to yell as she left the building, and did so. Residents were able to hear claimant yelling.

(6) Claimant had not violated the employer's code of conduct prior to October 15, 2014.

(7) On October 17, 2014, claimant met with the administrator and discussed the October 15 incident. The employer then discharged claimant for insubordination and using unprofessional and abusive language at work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (November 1, 2009) 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for insubordination, and for using unprofessional and abusive language toward the employer's administrator, and within earshot of residents. The employer had a right to expect claimant to follow the administrator's instructions and to refrain from engaging in unprofessional, abusive, or aggressive language at work. Claimant understood the employer's expectations. That claimant refused to stop yelling, was disrespectful, and used foul language toward the administrator on October 15, 2014, is undisputed. In doing so, claimant consciously engaged in conduct she knew violated the employer's expectations, and therefore willfully violated those expectations.¹

¹ The administrator also alleged claimant used aggressive language during the final incident, asserting that when she told claimant to stop yelling, claimant stated, "Come over here and make me do that." Transcript at 7. Claimant denied the allegation and the employer's nurse was unable to corroborate the administrator's testimony. Transcript at 24, 34. The evidence on that issue is equally balanced, and the employer therefore failed to show by a preponderance of evidence that claimant made the alleged statement.

However, claimant's conduct on October 15 was an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment 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). Isolated acts exceed mere poor judgment 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).

In written argument, the employer asserted that claimant's conduct was not isolated because she committed multiple violations of the employer's standard of conduct during the October 15 incident. However, although claimant violated more than one employer expectation by disobeying and arguing with the administrator and using unprofessional and abusive language, her violations comprised a single incident in the employment relationship. *See, Perez v. Employment Dept.*, 164 Or App 356, 992 P2d 460 (1999) ("isolated instance" of poor judgment may consist of a series of acts arising from the same episode). Absent evidence that claimant had engaged in willful or wantonly negligent behavior on prior occasions, we conclude that her conduct on October 15, 2014 was an isolated act.

Although the employer alleged claimant acted in an "aggressive" manner during the final incident, the employer did not show claimant's conduct included violence or threats of violence. Employer's Argument. Given that claimant's conduct did not continue for an extended period of time or into her next meeting with the administrator on October 17, 2014, the employer has not shown that claimant's conduct caused a breach of trust in the employment relationship or otherwise made a future employment relationship impossible such that claimant's conduct exceeded mere poor judgment. Nor was claimant's behavior on October 15, 2014 unlawful or tantamount to unlawful conduct. Claimant's conduct is thus excused as an isolated instance of poor judgment.

We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-30657 is affirmed.

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

DATE of Service: February 23, 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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