

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0206

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104011). Claimant filed a timely request for hearing. On February 6, 2015, ALJ Wyatt conducted a hearing, and on February 11, 2015, issued Hearing Decision 15-UI-33364, affirming the Department's decision. On February 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also 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 as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Grayback Forestry, Inc. employed claimant as a payroll administrator from June 4, 2007 to December 18, 2014.

(2) The employer had a written policy that prohibited employee harassment and expected its employees to refrain from "[m]alicious gossip and/or spreading rumors [or] engaging in behavior designed to create discord and lack of harmony [or] interfering with another employee on the job..." Transcript at 7. Claimant was aware of the employer's policy and expectations.

(3) Claimant and the employer's human resources officer (Sells) had offices very near to each other and interacted with each other daily regarding work tasks. Prior to 2014, Sells put her hands on claimant and was disciplined by the employer for her conduct. The incident created bad feelings in claimant toward Sells that lingered. On September 24, 2014, Sells decided to listen to a webinar and shut the door to her office, which angered claimant because it caused employees entering their joint work area to walk through claimant's office door exclusively. Claimant walked into Sells' office, pounded her fist on

Sells' desk, and yelled, "who the "f" do you think you are?" for shutting her door. Transcript at 18-19. Sells felt threatened by claimant's conduct, reported it to the employer and on September 25, 2014, the employer warned claimant in writing that "any [further] action, verbal or physical, that is demeaning and/or would not be considered that which is acceptable in the normal course of interaction with others, that hinders [Sells] in the performance of her assigned duties is strictly prohibited" and would result in "immediate termination." Exhibit 1. Claimant did not dispute the reported conduct and acknowledged the employer's disciplinary warning in writing.

(4) Between September 25 and December 18, 2014, claimant made derogatory comments about Sells and her work performance to coworkers that reported the comments to Sells. When Sells confronted claimant she admitted she made such comments and apologized. On December 18, 2014, Sells, claimant and the employer's business manager met regarding the reported derogatory comments and claimant admitted that she made them and could no longer work with Sells. That day the employer discharged claimant for violating its September 25, 2014 warning to claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant 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 the employer's interest. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its September 25 warning by making negative and derogatory comments about Sells to others between that date and December 18, 2014. Claimant admitted to Sells that she made such comments about her and also admitted that conduct at hearing. Transcript at 23, 28-29. When asked by the ALJ why she made the comments, knowing that they could perpetuate the ongoing problem between her and Sells, claimant responded, "I don't know." Transcript at 23, 28-29. More likely than not, claimant's violation of the employer's September 25, 2014 warning was willful.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or good faith error. 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). Claimant's conduct was not isolated. Claimant made multiple derogatory comments about Sells between September 25 and December 18, 2014 and her September 24 conduct was at least wantonly negligent because it was conscious and engaged in to aggravate Sells for shutting her office door. Nor can claimant's conduct be excused as a good faith error. The record fails to show that she sincerely believed, or had a rational basis for believing, the employer would condone making derogatory comments about Sells after having given her an explicit warning against such conduct.

The employer discharged claimant for misconduct under ORS 657.176(2) and claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-33364 is affirmed.

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

DATE of Service: April 9, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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