EO: 700
BYE: 201548

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

248
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0306

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 131458). The employer filed a timely request for hearing. On February 25, 2015, ALJ R. Davis conducted a hearing, and on March 3, 2015, issued Hearing Decision 15-UI-34406, affirming the Department's decision. On March 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Tumalo Feed Co Steak House & Saloon employed claimant as a banquet captain from May 5, 2012 to December 8, 2014.

(2) The employer expected its employees to treat coworkers and supervisors with respect and courtesy and conduct themselves in a professional manner while at work. Claimant understood the employer's expectations as a matter of common sense.

(3) In December 2013, claimant asked one of the employer's co-proprietors (Holley), who was working as the carver at a banquet, to let another employee do the carving because his interaction in that position with a server had been intimidating and made the server cry. After the banquet, the co-proprietors told claimant they considered her request to be "overstepping her bounds" and warned her against such behavior in the future. Audio Record ~ 16:30 to 17:15.

(4) On December 5, 2014, claimant worked as banquet captain at an event at Eagle Crest Resort. Holley instructed another employee to use a certain number of heat lamps at the event to pass on to claimant, which she did. However, because the employer was short one heat lamp, claimant and the Eagle Crest banquet manager mutually agreed to use another food heating system suggested by the Eagle Crest manager. When Holley arrived at the event, he saw that his instruction had not been followed, and "belittled" claimant by loudly telling her in front of her crew that he was "fuckin pissed off" at her for

not using the lamps and angrily asked the other employee if she had given claimant his instruction after claimant had admitted she had. Audio Record ~ 22:30 to 25:00. Claimant felt humiliated by Holley's conduct and around midnight, sent Holley an email from home that incorporated his comment to her at the banquet,

"Subject: Your treatment of me tonight

Robert, I would appreciate very much if, when you have an issue with me, that you discuss your fucking pissed off attitude, between you and me. You have no excuse for the way you treat me! I do everything I can to make our banquets go smooth. There is no excuse for your behavior towards me or my crew that warrants your [behavior] tonight. I would appreciate you to work with me and understand my reasons too. I get that you don't like me, it's quite clear, so maybe we need to have a talk. I don't treat you like shit, and I'd appreciate the same from you."

Exhibit 1.

(5) The next morning, Holley read the email, made the decision to terminate claimant's employment and told her to meet with him before her next shift. At that meeting on December 8, 2014, Holley discharged claimant for the "insubordination" he believed she exhibited in her December 6 email. Audio Record ~ 8:00 to 12:30.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

Holley discharged claimant for her December 6 email he considered insubordinate and not claimant's failure to use the heat lamps at the December 5 banquet. Audio Record ~ 11:30 to 12:35. However, we agree with the ALJ that on this record, the employer failed to show that claimant consciously violated the employer's expectation by sending the email in question. Hearing Decision 15-UI-34406 at 3. Holley did not dispute at hearing that he told claimant in front of her crew that he was "fuckin pissed off" at her for not using the heat lamps. Claimant plausibly testified that she used those words in her email to make the point that she wanted him to talk to her outside the presence of her crew when he was that upset with her because being openly criticized by the employer in that manner made it more difficult for her to supervise her crew. Audio Record ~ 24:00 to 25:30.

Moreover, we agree with the Department that even if claimant violated an employer expectation on December 5, it was no more than an isolated instance of poor judgment. Decision # 131458. An exercise of poor judgment is isolated if 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). The only other incident of claimant's conduct of which the employer disapproved occurred in December 2013 when claimant asked Holley to let someone else replace Holley as carver. This incident took place over a year before the incident for which the employer discharged claimant, and the employer failed to show that by asking Holley to have someone else act as carver because Holley's manner upset another employee, claimant knowingly engaged in conduct she knew would be considered disrespectful by the employer. However, assuming that claimant exercised poor judgment during that incident, it occurred approximately twelve months before the incident for which claimant was discharged; for that reason the record fails to show that claimant's December 5 conduct was a "repeated act or pattern of other willful or wantonly negligent behavior."

Some acts, even if isolated, such as those that that create irreparable breaches of trust in the employment relationship 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). In *Weyerhaeuser Co. v. Employment Division*, 103 Or App 143 (1990), the Court of Appeals held that the claimant's conduct exceeded mere poor judgment where he argued with his supervisor for almost 30 minutes, swore at him and called him obscene names, at times within inches of his face, and later threatened to harm him. In *Columbia Plywood v. Employment Division*, 36 Or App 469 (1978), the Court held that the claimant's verbal outburst toward his foreman exceeded mere poor judgment where it was part of a larger incident in which he knowingly disregarded his foreman's instructions, engaged in a loud, extended argument with him, and insulted him. In *Double K Cleaning Service, Inc. v. Employment Department*, 191 Or App 374 (2004), however, the Court held that a male claimant's heated argument with the employer's female owner could be excused as mere poor judgment where he used only mild profanity, did not persist in prolonging the argument, and did not insult or curse the supervisor after being told to stop. Here, the record fails to show that claimant threatened to harm her supervisor or knowingly disregarded his instructions. Nor is there evidence that she persisted in prolonging the incident, or continued her behavior after being told to stop. Although she used the term "fuckin pissed off" in her email, the employer's witness did not dispute claimant's testimony that she was quoting his statement to her earlier that evening to make the point that she wanted him to treat her with respect in front of her crew. Viewed objectively, the record fails to show that claimant's conduct on December 5, 2014 was so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Accordingly, we conclude claimant's conduct on December 5, 2014 did not exceed mere poor judgment.

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). It failed to meet its burden here. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-34406 is affirmed.

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

DATE of Service: May 6, 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.

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.