

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0410

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153729). The employer filed a timely request for hearing.¹ On March 31, 2015, ALJ Wipperman conducted a hearing, and on April 1, 2015, issued Hearing Decision 15-UI-36147, concluding the employer discharged claimant for misconduct. On April 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Danati Inc. employed claimant as a document manager and administrative staff member from November 13, 2006 to November 6, 2014.

(2) The employer expected its employees to treat 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 May 2014, claimant and the owner (Thompson), who considered themselves to be friends, met to discuss claimant's compensation based upon the owner's desire to reward claimant for years of diligent service. Claimant declined the owner's offer of an ownership interest in the employer and instead requested a \$5.00 increase in his hourly wage and a third week of paid vacation. Thompson told

¹ In Hearing Decision 15-UI-36147, the ALJ addressed the validity of the employer's request for hearing and concluded that the owner's faxed handwritten memo criticizing decision # 153729 constituted a valid hearing request. However, because we concluded that claimant's conduct for which he was discharged constituted an isolated instance of poor judgment, rather than misconduct under ORS 657.176(2)(a), as described below, we need not, and do not, address that procedural issue.

claimant he could have either the wage increase or the additional vacation, but not both. Claimant objected and told Thompson that he needed both to continue working for the employer. Thompson left the meeting with the understanding that claimant had chosen the wage increase; claimant left the meeting with the understanding that he would receive both the wage increase and the additional paid vacation. The agreement was not reduced to writing.

(4) Claimant received his wage increase, and months later, scheduled and took a third week of vacation for the year during the pay period October 16 through 31, 2014. Claimant expected his week of vacation to be paid. Thompson understood, but did not say, that claimant's paid vacation for the year had been exhausted.

(5) On November 5, 2014, claimant received his paycheck for the October 16-31 pay period. The check did not include payment for his time away from the office during his third week of vacation. Claimant was personally offended, became irate, intruded upon Thompson who was involved in a meeting, and "screamed... at a very loud decibel level his displeasure that he was not paid for [another] week of vacation." Audio Record ~ 8:15 to 8:45. Claimant threw his paycheck against the wall, but not in Thompson's direction, and did not step into Thompson's personal space. Claimant did not verbally or physically threaten Thompson. Audio Record ~ 24:45 to 25:30. Thompson initially tried to calm claimant down, without success, and after 4 to 5 minutes, screamed at claimant to leave the office for the day, which claimant did.

(6) When claimant returned to work on November 6, Thompson terminated his employment for his November 5 outburst. Claimant had never been disciplined for his behavior in the past.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment, and not 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.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercised 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). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued 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).

In Hearing Decision Hearing Decision 15-UI-36147, the ALJ concluded that claimant's conduct on November 5, 2014 was a wantonly negligent violation of the employer's reasonable expectation

regarding workplace behavior, and not a good faith error. Hearing Decision 15-UI-36147 at 4, 5. The ALJ further concluded that claimant's conduct on November 6 was not an isolated instance of poor judgment, reasoning,

...[The owner] testified that claimant's outburst caused him to fear a physical confrontation due to the volume, intensity, and duration of claimant's angry response. I am persuaded that due to these factors and claimant's disregard for the employer's interest in providing a safe work environment, claimant conduct created an irreparable breach of trust and made a continued employment relationship impossible.

Hearing Decision 15-UI-36147 at 5. We agree with the ALJ that claimant's conduct on November 5, 2014 was a wantonly negligent violation of the employer's reasonable expectations regarding workplace behavior, and not a good faith error. However, we disagree with the ALJ's conclusion that claimant's conduct was not an isolated instance of poor judgment because, viewed objectively and considering prior appellate court decisions, it failed to create an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. In *Weyerhaeuser Co. v. Employment Division*, 103 Or App 143 (1990), the Court of Appeals concluded 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 was excusable as mere poor judgment where he used mild profanity, did not persist in prolonging the argument for an extended period and did not insult or curse the supervisor after being told to stop.

At hearing, after being asked by the ALJ to provide details regarding claimant's behavior during his outburst, Thompson failed to show what, if any, foul language claimant used, or that claimant insulted him after being told to stop. Although he asserted that he felt "very threatened" by claimant's outburst, he failed to provide any details about claimant's behavior that caused him to feel threatened and did not dispute claimant's assertions that he did not throw his paycheck in Thompson's direction or step into his personal space. Audio Record ~ 15:00 to 15:30. Although Thompson asserted "other people in the office said that they were very uncomfortable as well", he failed to corroborate his assertions with their testimony. *Id.* And, on this record, claimant's behavior was not part of a larger incident in which he knowingly disregarded the owner's instructions. Thus, we do not find claimant's conduct so egregious, when viewed objectively, it created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible. Accordingly, under OAR 471-030-0038(1)(d)(D), claimant's conduct on November 5, 2014, therefore 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. The employer discharged claimant for an isolated instance of poor judgment, and not misconduct under ORS 657.176(2)(a). Claimant therefore is not disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Hearing Decision 15-UI-36147 is set aside, as outlined above.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: June 12, 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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