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BYE: 201326

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

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0433

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 26, 2012, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120034). Claimant filed a timely request for hearing. On August 28, 2012, ALJ D. Hall conducted a hearing, and on September 4, 2012 issued Hearing Decision 12-UIB-21252, reversing the Department's decision and concluding that the employer discharged claimant, but not for misconduct, because the actions upon which claimant's discharge was based constituted an isolated instance of poor judgment under OAR 471-030-0038(3)(b). On September 12, 2012, the employer filed an application for review with the Employment Appeals Board (EAB).

On October 12, 2012, EAB issued Appeals Board Decision 12-AB-2594 concluding that the employer discharged claimant for misconduct because the actions upon which the discharge was based did not constitute an isolated instance of poor judgment. Claimant filed a timely petition for judicial review with the Oregon Court of Appeals. On November 13, 2014,the Court of Appeals issued an opinion, *Isayeva v. Employment Department*, 266 Or App 806 (2014) in which it reversed and remanded the case "to allow the [Employment] department to construe it rule concerning isolated instances of poor judgment in the first instance and then to reconsider its decision on a full factual record." On February 12, 2015, the Court issued the appellate judgment. *See* ORAP 14.05(2)(b).

On February 19, 2015, the Department served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct. The employer filed a timely request for hearing. On March 30, 2015, ALJ Holmes-Swanson conducted a hearing, and on April 7, 2015, issued Hearing Decision 15-UI-36464, affirming the administrative decision. On April 15, 2015, the employer filed a timely application for review with EAB.

EAB considered the written arguments submitted by the employer and claimant to the extent they were relevant and based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Check Cash Pacific employed claimant from February 2, 2001 to July 5, 2012, last as a teller/loan officer.

(2) Claimant understood that she was expected to obey the orders of her supervisor as a matter of common sense. Transcript at 9.

(3) Claimant's job duties included greeting customers, accepting checks for cashing and obtaining her supervisor's approval to cash some checks, processing Western Union money orders and loans, and preparing and making deposits. Transcript at 5 and 36. On her own initiative, claimant reviewed the documents and files she prepared for errors. If she found an error, she brought it to the attention of a supervisor. Transcript at 36.

(4) The employer last raised claimant's wage rate in 2008. Some time prior to her discharge, claimant spoke with the employer's chief executive officer (CEO) about getting another raise. The CEO told claimant that she would only receive another raise if she performed extra work. Transcript at 48.

(5) On June 18, 2012, claimant found an error on a deposit she was preparing. She showed the error to her supervisor, and the supervisor told her that she would need to review all loan files processed by her coworkers. Claimant told him that she wanted a raise for performing this work. The supervisor did not reply to claimant and walked away. Transcript at 37. When claimant's supervisor left, she was uncertain whether he expected her to perform the loan review work or was just thinking about her request for a raise. Transcript at 40.

(6) If claimant had agreed to review her coworkers' loan files, it would have resulted in extra work for her because supervisors customarily performed this task. Transcript at 47. Claimant believed it was acceptable to ask for a raise in exchange for performing extra work because of her conversation with the CEO about a raise. Transcript at 48.

(7) Claimant's supervisor and the employer's CEO met monthly. At the regularly scheduled July meeting, claimant's supervisor told the CEO that claimant had asked for a raise when he told her to review her coworkers' loan files. Transcript at 8. On July 5, 2012, the CEO met with claimant and confirmed that she wanted a raise to review loan files prepared by her coworkers. Transcript at 9. The CEO then discharged claimant because he believed she was conditioning performance of appropriately assigned duties on receiving a raise.

CONCLUSION AND REASONS: The employer discharged claimant, but 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 her conduct would probably result in a violation of the standards of behavior that an employer has the right to expect of an employee. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). Under the Department's interpretation of the applicable rule, "poor judgment" is "a decision to willfully violate an employer's reasonable standard of behavior" or "[a] conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior judgment." OAR 471-030-0038(1)(d)(C).

In Hearing Decision 15-UI-37474, the ALJ concluded that claimant's conduct on June 18 was not a willful or wantonly negligent act because it was not a conscious or knowing violation of the employer's standards. Hearing Decision 15-UI-37474 at 3. The ALJ found that by telling the employer she wanted a raise to perform the loan review work, claimant "was trying to increase her salary by doing more valuable work for the employer," and did not intend to violate the employer's standards of behavior. *Id.* The ALJ also concluded, however, that claimant's conduct was an isolated instance of poor judgment. Hearing Decision 15-UI-37474 at 4.

We disagree with the ALJ's conclusion that claimant's behavior was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Under the Department's interpretation, the "poor judgment" referred to in OAR 471-030-0038(3)(b) is "a decision to willfully violate an employer's reasonable standard of behavior" or "[a] conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior. " OAR 471-030-0038(1)(d)(C). If, as the ALJ found, claimant's behavior on June 18 was not a willful or wantonly negligent violation of the employer's expectations, it does not involve "poor judgment" and cannot constitute an isolated incident of poor judgment. For the reasons explained below, we agree with the ALJ's conclusion that claimant's conduct was not willful or wantonly negligent.

The employer discharged claimant based on the owner's belief that on June 18, 2012, she refused to follow her supervisor's orders to review loan files prepared by her coworkers. The employer reasonably expected that claimant would obey her supervisor's directives. Claimant understood this expectation as a matter of common sense. Based on this record, however, we cannot find that the supervisor's statement to claimant on June 18 – to review the loan files of her coworkers – was the sort of directive that claimant knew or should have known she was expected to obey. When claimant responded to the supervisor's statement by telling him she wanted a raise to perform additional work, the supervisor said nothing and walked away. The supervisor never clarified that his statement was a directive by warning claimant that she must perform the work without additional salary or face disciplinary action. Her supervisor's behavior left claimant uncertain about what he wanted; she did not know if he was directing her to perform the loan review work or was simply thinking about her request for a raise. Transcript at 40. Claimant's behavior on June 18 thus resulted from her lack of certainty about the supervisor's less than clearly expressed expectations, and not from a conscious decision to violate the employer's standards of behavior by disobeying her supervisor. Claimant's behavior was therefore not willful or wantonly negligent.

Even had we concluded otherwise, the record also shows that claimant thought her request for a raise was entirely appropriate. When claimant asked the employer's CEO how she could increase her salary, the CEO told her that she would only get a raise if she performed extra work. Claimant believed that her supervisor's June 18 statement regarding review of her coworkers' loan files involved extra work, because supervisors customarily performed this task. Consistent with what the CEO told her, claimant thought she would be entitled to a raise if she took on this assignment. Although claimant may have been mistaken in this assumption, claimant's actions were thus, at most, the result of a good faith error. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-36464 is affirmed.

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

DATE of Service: <u>May 13, 2015</u>

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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