EO: 070
BYE: 201605

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0914

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83955). Claimant filed a timely request for hearing. On July 1, 2015, ALJ Triana conducted a hearing, continued on July 20, 2015, and on July 23, 2015, issued Hearing Decision 15-UI-41906, concluding the employer discharged claimant, but not for misconduct. On July 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer requested EAB to take official notice of the administrative decision in this case dated June 4, 2015 as well as an administrative decision concerning claimant that was issued on July 28, 2015. We construe the employer's submission as a request to have EAB consider new evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows that it was material and the party was prevented by factors or circumstances beyond its reasonable control from presenting the information at the hearing. The June 4 administrative decision already is included in the record and the July 28 administrative decision is not material to our decision because it concerns actions of claimant that occurred after the work separation. Because the employer did not make the required showing, its request that EAB consider new evidence is denied.

EAB considered the parties' written arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Ganz Pollard LLC employed claimant as senior patent paralegal from June 1, 2014 to February 10, 2015. Claimant worked for the predecessor firm of the employer, Ganz Law, P.C., as a paralegal from July 2005 to June 1, 2014.

(2) The employer expected its employees to obey their supervisors' reasonable instructions and conduct themselves in a professional manner while at work. Claimant was aware of and understood the employer's expectations.

(3) In 2010, a new attorney joined the predecessor firm and brought a client with him. The attorney instructed claimant to complete necessary documentation related to the new client. When the attorney learned that the required paperwork had not been completed by claimant in a timely fashion, he brought the matter to her attention and a heated discussion ensued. One of the employer's owners, Ganz, counseled claimant to refrain from "shouting" if an office matter made her angry, and to instead discuss the matter directly with him. Claimant agreed. Exhibit 3.

(4) The employer's office environment was driven by deadlines based on patent law and often was "contentious" with "raised voices" by the attorneys and staff alike. Transcript at 19-20. In November 2014, claimant and another staff member engaged in a loud exchange after the staff member blamed claimant for mistakenly having them stay late to meet a deadline. The incident created hard feelings between them for several weeks, and after Ganz spoke to both staff members about the need for them to get along, they resolved their differences. Although Ganz occasionally discussed professionalism and office decorum with claimant, claimant was never disciplined for unprofessional conduct.

(5) On February 10, 2015, Ganz learned that a report a significant client had requested from claimant had not been completed and asked claimant for the emails the client had sent to her. Claimant requested time to gather the emails and the opportunity to confer with Ganz before he reviewed the emails; Ganz refused to confer with her before reviewing the emails. A few hours later Ganz entered claimant's office, observed the stack of emails claimant had gathered and asked claimant for them. Claimant again requested the opportunity to confer with Ganz before he reviewed the emails, which Ganz again refused. Claimant tossed the emails toward Ganz, and after the emails ended up on the floor, began in an "emotional outburst" to complain about being overworked and not allowed to explain. Transcript at 41-42. When the outburst continued after claimant was asked to "settle down", Ganz terminated her employment for insubordination.

CONCLUSIONS AND REASONS: We agree with the 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).

The employer had the right to expect claimant to obey her supervisors' reasonable instructions and conduct herself in a professional manner while at work. Claimant was aware of and understood the

employer's expectation and probably violated it on February 10 when she did not immediately hand the emails to Ganz and then, in an emotional outburst, complained that she was overworked and that he had refused to confer with her before he reviewed the emails. Assuming, *arguendo,* that her behavior in each respect was at least wantonly negligent, we conclude that her conduct was no more than an isolated instance of poor judgment and not misconduct.

For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Although the employer asserted that "leading up to [February 10] [there had been] several months at least of declining performance and unpredictability . . . in terms of completion of work product" and that "her [work] performance was starting to degrade", it failed to establish, with evidence, that claimant's actions during that period were *conscious* violations of reasonable employer expectations. Although claimant's conduct on February 10 arguably involved two acts of insubordination in not immediately handing over the emails to Ganz and in not ending her emotional outburst when told to "settle down", her conduct involved a single episode, and under Oregon case law interpreting OAR 471-030-0038(1)(d)(A), was an isolated instance. *See, e.g., 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); *Bunnell v. Employment Division*, 304 Or 11, 741 P2d 887 (1987) (refusal to comply with supervisor's directive and subsequent vulgar response to second request constituted a single instance of poor judgment).

Some acts, such as those that violate law, are tantamount to unlawful conduct, create an irreparable breach of trust, or make a continued employment relationship impossible, are so serious that they exceed mere poor judgment and cannot be excused. OAR 471-030-0038(1)(d)(D). Claimant's conduct was not unlawful or tantamount to a law violation, and, viewed objectively, was not so egregious that it created an irreparable breach of trust or made a continued employment relationship impossible.

In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because claimant engaged in a single wantonly negligent act on February 10, and that act did not exceed mere poor judgment, the employer failed to satisfy its evidentiary burden. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not subject to disqualification from unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-41906 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>September 16, 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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