

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1102

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #91322). The employer filed a timely request for hearing. On September 10, 2015, ALJ Messecar conducted a hearing, and on September 11, 2015 issued Hearing Decision 15-UI-44263, concluding the employer discharged claimant for misconduct. On September 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Baxter Auto Parts Inc. employed claimant as an accounts receivable clerk from October 13, 1997 to July 14, 2015.

(2) The employer expected claimant to be respectful, cooperative, polite and positive in relations with her coworkers and supervisors. Claimant understood the employer's expectations.

(3) In August 2013, the employer suspended claimant from work for one day because claimant had a confrontation with a coworker and used a disrespectful tone of voice toward her. Exhibit 1 at 10.

(4) In December 2014, the employer gave claimant a verbal warning because claimant's coworker alleged that claimant had yelled at her and "kinda tossed her work" at her. Audio Record at 21:39 to 21:49.

(5) On July 7, 2015, claimant returned to work from a vacation. There were piles of unsorted documents on her desk that had accumulated during her absence. A coworker came in and asked claimant for a document. Claimant told him she was busy and did not know where anything was, and asked him in a frustrated tone, "Is there blood involved? Can it wait?" Audio Record at 35:18 to 35:20. Claimant did not use foul language toward the coworker. Claimant delivered the document to the coworker fifteen minutes later. The employer did not mention the incident to claimant.

(6) Other employer locations sent work to the employees at claimant's office in work pouches delivered to one area of claimant's office. Claimant routinely picked up all the pouches for her office and

distributed them to her coworkers. Claimant's supervisor learned that, during July 2015, claimant continued to pick up her own work pouches, but had stopped retrieving her coworkers' work pouches. On July 13, 2015, claimant's supervisor met with claimant in her office to ask claimant about the matter. Claimant admitted she was not picking up other employees' work, and argued with the supervisor that it was not her duty to do so. Claimant then angrily admitted it was her job duty, and raised her voice and used foul language to complain about having to pick up her coworkers' work pouches. Claimant told her supervisor, "I'm so tired of all these fucking lazy people that can't pick up their own work." Audio Record at 33:16 to 33:20. Claimant told the supervisor that claimant should "maybe" start looking for another job, but that "what [she] really want[ed]" was for the employer to discharge her so she could receive unemployment benefits. Audio Record at 32:01 to 32:14. The discussion ended, and claimant returned to work and finished her shift.

(7) Claimant's supervisor met with the department head after she left claimant's office. The department head told claimant's supervisor that claimant had been rude to a coworker on July 7, 2015. The department head told the supervisor that claimant allegedly stated, "I don't fucking know and I've been on vacation – I don't care," to the coworker when he asked claimant if she had a document he needed. Audio Record at 19:18 to 19:26. The supervisor then decided to discharge claimant.

(8) On July 14, 2015, the employer discharged claimant for failing to behave in a cooperative, respectful manner toward her coworker on July 7 and her supervisor on July 13, 2015.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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).

Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise 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 violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment 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 15-UI-44263, the ALJ concluded that claimant understood the employer's reasonable expectation that she speak and behave in a respectful, courteous and professional manner

toward coworkers and her supervisor, and that she was wantonly negligent when she violated those expectations during the discussion with her supervisor on July 13, 2015.¹ The ALJ also implicitly concluded that the July 7, 2015 incident, when claimant asked a coworker impatiently if he could wait for claimant to locate a document, was a prior incident of poor judgment, making the July 13, 2015 incident part of a pattern of wantonly negligent behavior, and thus not excusable as an isolated instance of poor judgment.²

We agree with the ALJ that claimant's conduct on July 13, 2015 was a wantonly negligent violation of the employer's reasonable expectations. Claimant knew the employer expected her to refrain from behaving in a disrespectful manner toward her supervisor, and therefore knew her conduct, including raising her voice, arguing and using foul language to complain about her work, other employees' "laziness" and her dissatisfaction with working for the employer, probably violated the employer's expectations. Her conscious decision to engage in such conduct showed indifference to the consequences of her actions. Although claimant asserted that she spoke openly to the supervisor because the supervisor was her friend, she acknowledged that she understood the employer would not condone her conduct. Audio Record at 32:52 to 33:47. The weight of the evidence shows claimant did not sincerely believe or have a rational basis for believing her conduct complied with the employer's expectations. Thus, claimant's conduct on July 13 was, at best, a wantonly negligent violation of the employer's reasonable expectations, which cannot be excused as good faith error.

However, we disagree with the ALJ's conclusion that claimant's conduct was not an isolated instance of poor judgment. The employer's witness testified that claimant used foul language and told a coworker, "I don't care," when the coworker asked for a document from claimant on July 7, 2015. However, neither the coworker nor the manager who told the employer's witness about the incident testified at hearing. Claimant's firsthand testimony, that she asked the coworker if it "could wait" in a frustrated tone, but did not use foul language, outweighs the employer's double hearsay about the incident. Claimant's act of replying in a frustrated tone to a coworker, then bringing the coworker the requested document 15 minutes later, does not rise to the level of a willful or wantonly negligent disregard of the employer's expectations. Moreover, although the employer warned claimant regarding her alleged rude behavior toward a coworker in December 2014, at hearing, claimant provided the only firsthand testimony about that incident and denied that she was the "bully" during that incident. Audio Record at 39:42 to 40:39. Thus, the record fails to show that claimant violated the employer's expectations at that time. Finally, although the employer suspended claimant from work for being disrespectful to a coworker in August 2013, because that incident occurred almost two years earlier, it does not show that claimant's conduct on July 13, 2015 was a repeated act or pattern of willful or wantonly negligent behavior, and not an infrequent occurrence.

The next issue is whether claimant's conduct on July 13 created 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 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 *Double K Cleaning Service, Inc. v. Employment Department*, 191 Or App

¹ Hearing Decision 15-UI-44263 at 3.

² *Id.*

374 (2004), however, the Court held that the claimant's heated argument with the employer's 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 owner after being told to stop.

In the present case, claimant did not call her supervisor obscene names, did not threaten to harm her, and was not otherwise physically threatening. Nor does the record show claimant persisted in prolonging the incident, or continued her behavior after being told to stop. On the contrary, it was a discussion initiated by the supervisor, and claimant returned to work and completed her shift when the discussion ended. Thus, we do not find claimant's conduct so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible. Claimant's conduct on July 13, 2015 therefore did not exceed mere poor judgment.

In sum, we conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-44263 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 13, 2015

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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