

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1196

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 113529). The employer filed a timely request for hearing. On September 14, 2015, ALJ Shoemake conducted a hearing, and on September 18, 2015, issued Hearing Decision 15-UI-44530, reversing the administrative decision and concluding that the employer discharged claimant for misconduct. On October 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores employed claimant from February 1, 2008 to July 9, 2015, last as a produce clerk.

(2) The employer's disciplinary policy provided that certain types of conduct would result in immediate termination of employment without prior warning. Among the behaviors for which an employee could be immediately discharged was "[i]subordination, such as willfully disobeying the instructions of an authorized person-in-charge, or disrespectful conduct toward a supervisor or person-in-charge." Exhibit 1 at 11. On March 22, 2015, claimant received a copy of this policy and signed an acknowledgement that she had read and understood the policy.

(3) A manager gave produce clerks a list of daily tasks they were expected to perform; these tasks included "culling" produce, *i.e.*, removing items from the produce displays that were spoiled and could not be sold; "conditioning" lettuce, *i.e.*, refreshing the lettuce with cold water; and cleaning an area of the store referred to as the kiosk. On July 2, 2015, at approximately 9:30 p.m., the person-in-charge (PIC) was walking through the produce section of the employer's store; he stopped to talk to claimant. Claimant was busy "culling" produce and told the PIC she was not going to clean the kiosk. The PIC

told claimant she needed to clean the kiosk, and she replied that she would not do so. Claimant then walked away from the PIC, who followed her and asked why she was refusing to clean the kiosk. Claimant responded that the employees who worked during the morning had not cleaned the kiosk and she was not going to clean up “after the morning people.” Exhibit 1 at 5. The PIC then took claimant and another employee, whom claimant asked to serve as a witness, to an office to discuss claimant’s refusal to clean the kiosk. Claimant told the PIC that employees should be responsible for cleaning up any mess they made; the PIC agreed with her, but said that she still needed to clean the kiosk. Claimant again refused to do so. The manager told claimant that she was insubordinate, and sent her home. *Id.*

(4) The employer suspended claimant until July 9, 2015, pending investigation into her July 2 conduct. On July 9, the employer discharged claimant for insubordinate behavior in refusing the PIC’s July 2 directive to clean the kiosk.

(5) Prior to her suspension on July 2 and discharge on July 9, 2015, the employer had never disciplined claimant.

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 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

By informing employees that an act of insubordination – which it defined as failure to obey the order of a manager or PIC – would result in immediate discharge, the employer made it abundantly clear that employees were expected to comply with the orders of a superior. Claimant knew and understood these employer expectations because she received a read a copy of its disciplinary policy on March 22, 2015. When claimant refused to comply with a PIC’s directive to clean the kiosk on July 2, 2015, she consciously engaged in conduct that she knew violated the employer’s expectations regarding insubordinate behavior. Claimant’s conduct was at least wantonly negligent.

Claimant’s conduct must be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b), however. Conduct is considered an isolated instance of poor judgment if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent –

disciplined by the employer. Here, the record shows that the only time claimant violated the employer's disciplinary policies occurred on July 2, 2015.

The ALJ concluded that claimant's conduct on July 2 was not an isolated instance of poor judgment "because she was given multiple opportunities to complete the task as asked of her and continued to refuse the request multiple times. Claimant continued to refuse even after knowing that her conduct would be considered insubordinate. Claimant's repeated insubordinate conduct caused an irreparable breach of trust in the employment relationship." Hearing Decision 15-UI-44530 at 5. We disagree. Although claimant repeatedly refused to comply with the PIC's directive to clean the kiosk, these refusals were not separate and discrete acts. Instead, her behavior on July 2 involved a single, continuing refusal to clean the kiosk. *See Perez v. Employment Division*, 164 Or App 356, 992 P2d 460 (1999) (claimant's violation of an employer policy on June 23 and a derogatory comment about the incident to his supervisor on June 24 constituted an isolated instance of poor judgment; the June 24 incident was a continuance of and precipitated by the June 23 incident).

Nor do we agree with the ALJ's conclusion that claimant's July 2 behavior caused an irreparable breach of trust in the employment relationship. Under OAR 471-030-0038(1)(d)(D), acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible do not fall within the exculpatory provisions of OAR 471-030-0038(3)(b). An act creates an irreparable breach in the employment relationship if it would cause a reasonable employer to be unable to trust that the individual could continue performing assigned job duties. Claimant worked for the employer for over seven years with no violations of its disciplinary policies. A one-time refusal to perform a single task her supervisor directed her to perform is not behavior that would cause a reasonable employer to lose trust in her ability to perform her job.

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

DECISION: Hearing Decision 15-UI-44530 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 27, 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.