EO: 200
BYE: 201629

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-1229

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 135811). Claimant filed a timely request for hearing. On October 6, 2015, ALJ DeLuga conducted a hearing, and on October 10, 2015 issued Hearing Decision 15-UI-45656, reversing the Department's decision and concluding claimant voluntarily left work without good cause. On October 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, but claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant as a pharmacy technician from October 13, 2008 until July 2, 2015.

(2) The employer expected that claimant would not leave the workplace during her shift without permission. The employer also expected that claimant would call in and notify it if she was going to be absent from work. Claimant understood the employer's expectations as a matter of common sense.

(3) Claimant and her coworker, another pharmacy technician, had a poor working relationship. Claimant's coworker repeatedly and openly criticized claimant's work ethic, often in front of customers, the pharmacist and the pharmacy manager. The coworker told claimant on many occasions that she was not working hard enough and the coworker often unfavorably compared claimant's work efforts to her own. Claimant complained to the regional pharmacy manager and the manager of her own pharmacy

that she could not tolerate the coworker's treatment of her. The coworker's behavior toward claimant did not change. In April or May 2015, after the coworker again criticized claimant for "slacking off," claimant met with the coworker and the pharmacy manager to explain the extent to which the coworker's behavior upset her and to try to have the manager curb it. Transcript at 24. The coworker's behavior still did not change.

(4) On July 1, 2015, claimant and the pharmacist were talking while they were filling and dispensing some prescriptions and the coworker told them both to stop. When they spoke to each other again, the coworker told claimant to "work with [her] hands and not with [her] mouth." Transcript at 19. Claimant became very upset about the coworker's remarks because the coworker was issuing orders to claimant, who was her workplace equal, and to the pharmacist, who was her superior. Claimant suddenly told the pharmacist, "Consider this my two weeks' notice." Transcript at 19. The pharmacist told claimant, "Just take a break" while the coworker commented, "Thank God. It's about time." Transcript at 20, 21. The coworker's statement offended claimant and made her more upset. Wanting to get away from the coworker, claimant then left the workplace during her shift without permission. At the time she left, claimant wanted to be transferred away from the pharmacy at which she was working with the coworker back to the "float pool," a group of pharmacy technicians who were on call and worked at different pharmacies. Claimant did not intend to quit working for the employer completely.

(5) On July 2, 2015, claimant was scheduled to work. That day, claimant sent a text message to the pharmacist apologizing for leaving the workplace on July 1, 2015 and asking "what was going on." Transcript at 21. At that time, claimant intended to return to work. Transcript at 26. The pharmacist sent a reply text to claimant in which he stated the store director had told him that claimant had been discharged. Transcript at 21, 22, 26. Believing that she was discharged, claimant did not report for work on July 3, 2015 and did not call in to report an absence.

(6) On July 5, 2015, the employer discharged claimant because she had left work early on July 1, 2015, and did not report for scheduled work on July 2 and 3, 2015 and did not notify the employer that she was going to be absent.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

In Hearing Decision 15-UI-45656, the ALJ concluded that claimant's work separation was a voluntary leaving on July 1, 2015, principally due to the testimony of the employer's witness that the employer was willing to allow claimant to continue working after July 1, 2015 and because claimant did not report for work after that day. Hearing Decision 15-UI-45656 at 3. The ALJ further determined that, since claimant voluntarily left work without good cause, she was disqualified from benefits under OAR 471-030-0038(4) (August 3, 2011). We disagree with the ALJ about the nature of the work separation and claimant's disqualification from benefits.

The Work Separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If the employee was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant agreed that she left work without permission on July 1, 2015, but her testimony was clear that she was going to return to work for at least some period of time, after which she would try to arrange for a transfer to the "float pool" of pharmacy technicians. Transcript at 20, 26, 27. Regardless of claimant's statement to the pharmacist about giving a two weeks' notice, claimant likely did not mean to completely sever the work relationship; she only wanted to get out of that particular pharmacy. The ALJ's implicit conclusion that claimant was unwilling to work for the employer after July 1, 2015 was not supported by the evidence. As well, the response of the pharmacist to claimant's statement about giving notice suggests that he did not take it seriously as a resignation. Transcript at 4-12, 15. The employer's witness never referred to claimant's July 1 statement as a reason for concluding that claimant quit her job. Instead, the sole stated ground for the employer's inference that claimant had left work was claimant's failure to report for work on July 2 and 3, 2015 and failure to notify the employer of her absences. *Id.*

Although the employer's witness, the store director, contended that two different employees tried to reach claimant on July 1, 2015 to inquire about her intentions and left messages for her, claimant testified that none did and she received no messages. Transcript at 9, 17, 21. Claimant's first-hand evidence on whether or not calls were made to her or she received any messages is entitled to greater weight that the second-hand hearsay statements the employer presented. We accept that the employer did not contact claimant after she left the workplace on July 1, 2015. In addition, the employer did not directly dispute claimant's testimony that on July 2, 2015 the pharmacist sent her a text message telling her that she was discharged. While the store manager testified that only personnel in the employer's human resources department had the authority to discharge pharmacy employees and she did not, there was no evidence in the record suggesting that claimant knew or should have known of this organizational distinction. Under the circumstances in the record, it was reasonable for claimant to assume that a message from the pharmacist telling her that she had been discharged by the store manager was legitimate and contained accurate information about what the employer had done. Claimant's failure to report for work or to call in absences on July 2 and 3, 2015, was therefore explained by her assumption that she was discharged, and did not evidence an unwillingness to continue working for the employer if she was permitted to do so. Transcript at 21, 26. Viewing the sum of the evidence, claimant was willing to work for the employer after July 1, 2015, but did not do so because a representative of the employer told her that the employer would not allow her to do so. Based on the text message from the pharmacist, which claimant reasonably relied on as manifesting the employer's intention, the work separation was a discharge on July 2, 2015, the date claimant received the text message.

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

carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As matter of common sense, claimant reasonably should have known that the employer would not allow her to leave the workplace as she did in the middle of her shift on July 1, 2015 without having the employer's permission, or at least notifying the employer that she was doing so. Claimant knew what she was doing when she walked out on her shift. Claimant's behavior that day was at least a wantonly negligent violation of the employer's expectation. The employer did not demonstrate that claimant's behavior on July 2, 2015 violated its attendance standards, since she did initiate a communication that day with the pharmacist about her absence. The employer did not present any evidence that sending a text message to the pharmacist was not an acceptable way to notify the employer of an absence in lieu of reporting for work, or that claimant reasonably should have known that. The employer also did not demonstrate that claimant's failure to report or to call about her shift on July 3, 2015 was a willful or wantonly negligent violation of the employer's standards. When claimant failed to comply with the attendance policy on that day, she reasonably believed the employer had discharged her, and there was no reason to abide by that policy. Claimant's behavior that day did not evidence a conscious indifference to the employer's standards under circumstances when she knew or reasonably should have known that she was likely to violate the employer's expectations.

While claimant's behavior on July 1, 2015 was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that 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). To be excused, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, the employer did not assert that claimant had engaged in any willful or wantonly negligent behavior that violated the employer's standards other than for her alleged behavior on July 2 and 3, 2015. However, this decision has found that claimant's behavior on those two days was not willful or wantonly negligent. Claimant's behavior on July 1, 2015 meets the first prong of the test for an isolated instance of poor judgment since it was a single occurrence. As well, claimant's behavior on July 1, 2015 did not exceed mere poor judgment. Claimant's behavior was understandable in view of her distress about the coworker's treatment of her, and was not emblematic of a disregard for the employer's interests since she tried to contact the pharmacist the next day to apologize for walking off the job. Under these circumstances, an employer would not objectively conclude that, based on her behavior on July 1, 2015, it could not trust that claimant would in the future conform her behavior to the employer's standards. Because it meets both prongs of the standard, claimant's behavior on July 1, 2015, while it was wantonly negligent, it is excused from being disqualifying misconduct as an isolated instance of poor judgment.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-45656 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 10, 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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