

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1528

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged but not for misconduct (decision # 101420). The employer filed a timely request for hearing. On December 14, 2015, ALJ Micheletti conducted a hearing, and on December 16, 2015 issued Hearing Decision 15-UI-49491, concluding the employer discharged claimant for misconduct. On December 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Emeritus Senior Living employed claimant from October 9, 2006 to October 9, 2015 as a dietary clerk at a senior living facility.

(2) The employer expected its employees to cover food containers put into the employer's refrigerators, and to label them with their contents and expiration dates. The employer also expected employees who handled food to comply with food handler and food sanitation rules. Claimant understood the employer's expectations.

(3) On January 9, 2014, the employer gave claimant a warning for allegedly failing to give the correct diet and utensils to a resident, and serving a food item to a resident after it had been given to another resident.

(4) On January 22, 2015, the employer gave claimant a warning for allegedly "spreading gossip" about a resident when she allegedly spoke about a resident's health condition in a context not related to work. Audio 12:19 to 12:40.

(5) On October 6, 2015, the employer had a food safety inspection. Prior to the inspection, claimant had not seen uncovered or unlabeled food items in the refrigerators. The inspector found food containers stored in a refrigerator that were not covered and labeled, and other containers with food that was past its expiration dates. The employer did not know during which shift the unlabeled, uncovered, or expired food items were put in the refrigerator, but held all the food handlers responsible for the errors. On the morning of October 9, 2015, the employer gave a warning to claimant and the other food handlers, and reminded them that food in the refrigerators must be covered and labeled with its contents and expiration dates.

(6) Lunch was served at noon at the senior living facility. Shortly before noon on October 9, 2015, the lunch server called claimant and told claimant she was on her way to claimant's kitchen to pick up the residents' dessert for lunch. Claimant quickly scooped gelatin she had prepared into 14 dishes for the residents. At the same time, a nurse arrived at the kitchen and told claimant to immediately go get a lunch order from a resident who had just finished therapy so her lunch would be served with the others' lunches at noon. Without covering or labeling the tray of gelatin dishes, claimant put them in the refrigerator while she went to get the resident's lunch order. Claimant expected the server to arrive momentarily to retrieve the gelatin from the refrigerator to serve it for lunch.

(7) Before the server arrived, claimant's supervisor inspected the kitchen where claimant was working, and found the uncovered dishes of gelatin in the refrigerator. The supervisor left the gelatin in the refrigerator, and did not tell claimant to cover it or to refrain from serving it to the residents. After having been in the refrigerator for approximately ten minutes, the server gave the gelatin to the residents for lunch.

(8) The employer discharged claimant on October 9, 2015 for putting uncovered food in the refrigerator after being warned not to do so.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-49491, the ALJ determined that claimant's failure to cover and label the gelatin she put in the refrigerator was misconduct, concluding it was a willful violation of the employer's food handling expectations because claimant knew the employer expected her to cover and

label food she put in the refrigerator, but made a conscious decision to take a resident's food order without first covering the food.¹ We agree claimant's conduct violated the employer's expectations.

The employer had the right to expect claimant to cover food containers put in the employer's refrigerators, and to comply with food handler and food sanitation rules. Claimant knew and understood the employer's expectations. We conclude that claimant's failure to cover the gelatin in the refrigerator was wantonly negligent because she demonstrated an indifference to the employer's interest in preventing cross contamination of food. Nor was claimant's failure to cover the food a result of a good faith error in her understanding of the employer's expectations, having been warned the earlier the same day to cover food put in the refrigerator.

In Hearing Decision 15-UI-49491, however, the ALJ further concluded that claimant's conduct could not be excused as an isolated instance of poor judgment because claimant's conduct violated state food safety rules and thus exceeded mere poor judgment.² We disagree with the ALJ and conclude claimant's conduct on October 9 was an isolated instance of poor judgment. OAR 471-030-0038(1)(d) provides that the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) 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).

The conduct for which claimant was discharged met all the criteria for an isolated instance of poor judgment. Claimant's failure to cover the gelatin involved poor judgment because it involved a conscious decision not to take action to ensure she complied with the employer's food safety policies. Her exercise of poor judgment was a single occurrence. The record contains evidence of two prior

¹ Hearing Decision 15-UI-49491 at 3.

² *Id.*

incidents of alleged misconduct by claimant. Claimant received a warning for “gossiping” in January 2015 because she allegedly spoke about a resident’s health condition in a context not related to work. Claimant did not deny the allegations at hearing. However, to show that the conduct constituted misconduct, the employer must show that claimant’s conduct was the result of willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). The record does not show claimant consciously made statements that were overheard about a resident’s health condition, or that claimant knew or should have known the employer’s “no gossip” policy included such statements. The preponderance of evidence does not show claimant consciously engaged in conduct she knew or should have known would probably violate the employer’s expectations by discussing a resident’s health condition in January 2015. The other discipline claimant received was administered in January 2014 for making errors when serving food to a resident. This conduct was too remote in time and different in nature from the conduct for which claimant was discharged to constitute a repeated act or pattern of wantonly negligent behavior.

Claimant’s conduct was not unlawful or tantamount to unlawful conduct. Without evidence that the gelatin was placed in the refrigerator in a position where it was susceptible to cross contamination, the ten minutes of refrigeration without a cover does not, on this record, violate state rules for food safety. Moreover, had the supervisor who found the uncovered gelatin genuinely believed the food had been susceptible to cross contamination while in the refrigerator, it is unlikely he would have permitted the gelatin to be served to the residents. Nor does the record show claimant’s conduct created an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

Because the conduct for which claimant was discharged was an isolated instance of poor judgment, it did not constitute misconduct. Claimant is not disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-49491 is set aside, as outlined above.³

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 21, 2016

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.

³ 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.