EO: 200
BYE: 201641

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

053
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0025

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 105021). The employer filed a timely request for hearing. On December 15, 2015, ALJ S. Lee conducted a hearing, and on December 21, 2015 issued Hearing Decision 15-UI-49752, affirming the Department's decision. On January 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, comprised of several documents that contained information not offered during the hearing. However, the employer did not certify that it provided a copy of its argument to the other parties as require by OAR 471-041-0080(2) (October 29, 2006). The employer also did not explain why it was unable to present its new information at the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to offer. EAB considered only information entered as evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) North Lancaster Dairy Queen employed claimant from May 1, 2009 until October 21, 2015, last as the assistant manager of its restaurant in Stayton, Oregon.

(2) The employer expected claimant to follow the reasonable instructions of supervisors and managers. Claimant understood this expectation as a matter of common sense.

(3) On a few occasions before October 11, 2015, the employer's general manager or the manager of claimant's restaurant orally discussed with claimant customer complaints that had been made about her "speed of service." Audio at ~23:29, ~27:12, ~29:56. The employer never issued a written warning to claimant for failing to follow the instructions of management.

(4) On October 11, 2015, a customer wrote a letter to the employer complaining that a particular crew member had left the cash register as the customer approached, ignored the customer and turned and began talking with claimant about "personal stuff." Audio at ~33:30. On October 12, 2015, after having received and read the letter, the manager of claimant's restaurant told claimant and the crew member to write a letter of apology to the customer. Claimant did not think the complaint was legitimate and thought many of the facts alleged in it were inaccurate. Claimant was offended and upset because the manager did not ask for her account of the incident or seek information from other crew members who had witnessed the interaction with the customer, but told her write an apology for her behavior. Although the coworker wrote an apology to the customer, claimant did not. Claimant's restaurant manager told her that if she did not write an apology to the customer the employer would discharge her.

(5) On October 18, 2015, claimant worked a scheduled shift. The employer's schedule for the upcoming work week was posted and claimant saw that she was scheduled to work only four days, on Wednesday, October 21, 2015, and on Friday, October 23, 2015 through Sunday, October 25, 2015. Claimant called the manager to inform her that Wednesday was her regularly scheduled day off, she had made two medical appointments for that day, and she needed Wednesday October 21, 2015 off. The manager allowed claimant to take that day off. Claimant also asked the manager why her hours were less than usually scheduled. The manager told claimant that the schedule was what the general manager wanted until "they [the employer] can figure what they're going to do." Audio at ~13:50.

(6) On Wednesday, October 21, 2015, claimant did not report for work due to the medical appointment. On that day, the manager of the restaurant called claimant, told claimant not to come into work on Friday because the general manager intended to lay her off and the she did not want claimant to make the trip to work only for the purpose of learning that she had been discharged. The manager told claimant that she was being let go because she had not written the apology letter to the customer as instructed. The manager told claimant to bring in her workplace keys and pick up her final check. As a result of this call, claimant did not report for her scheduled shift on Friday October 23, 2015. The employer discharged claimant on October 23, 2015.

(7) On Saturday, October 24, 2015, as instructed, claimant took her workplace keys in and gave them to a supervisor. Claimant picked up two paychecks, one from the previous payday and one for the hours she had worked in the current pay period through October 18, 2015. The employer's regularly scheduled paydays in October 2015 were October 10 and October 25, 2015.

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

The first issue this case presents is the nature of the work separation. The employer contended claimant quit work, and claimant contended she was discharged by her manager, effective October 23, 2015. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining if a work was a voluntary leaving or a discharge. If claimant could have continued to work for employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the 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).

While the employer's witness, the general manager, testified the employer inferred claimant had left work when she failed to call in or report to work for scheduled shifts on October 22 and 23, 2015, the

witness readily conceded that she "had no idea" if the information she had about claimant's scheduled work days and her alleged failure to report as scheduled was correct or incorrect. Audio at ~7:05, ~20:42, 21:05. However, claimant testified with certainty that she was not scheduled to work on October 22, 2015. Audio at~14:26, ~15:56. The general manager also stated that she "didn't know if it was true or not" if the restaurant manager told claimant on October 21, 2015 not to report for work on October 23, 2015 because it would be a pointless trip since the general manager was only going to discharge her. Audio at ~20:00. In contrast, claimant's testimony was very definite and specific that the manager advised her not to report for work on October 23, 2015 because she would only be present so the general manager could fire her. Audio at 14:26. That the employer had claimant's final paycheck available by October 24, 2015 further suggests that the employer intended to discharge her on October 23, 2015, since in the usual course of a discharge an employer is lawfully required to have an employee's check available by the end of the business day following the discharge, but may defer paying an employee who has quit. *See* ORS 652.140(1); ORS 652.140(2). Weighing the evidence, including the employer's failure to effectively challenge claimant's version of events, we considered claimant's testimony more reliable. The preponderance of the evidence shows that the employer discharged claimant on October 23, 2015.

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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's general manager testified that the employer's business ethic was that "the customer is always right" and it was not unreasonable for claimant to have been instructed to write the apology letter to the customer even if she thought she had done nothing wrong in the interaction she had with the customer. Audio at ~33:43. For purposes of this decision, it is assumed that claimant's refusal to write the apology letter the employer wanted was a willful or wantonly negligent violation of the employer's expectations. The remaining issue is whether claimant's wantonly negligent behavior was excused from constituting misconduct under one of the exculpatory provisions in OAR 471-020-0038(3)(b).

Claimant's willful or wantonly negligent behavior may be excused from otherwise constituting disqualifying misconduct if it was an isolated instance of poor judgment. OAR 471-030-0039(3)(b). An isolated instance 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). Behavior that exceeds "mere poor judgment" may not be excused. OAR 471-030-0038(1)(d)(C). Behavior exceeds mere poor judgment if it was of a type that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Although the general manager suggested that claimant may have been rude to the customer who made the complaint on October 11, 2015, nothing indicated that the general manager was relying on anything other than the customer's characterization of claimant's behavior as stated in the customer's complaint. This evidence is insufficient is insufficient to establish that claimant's behavior on October 11, 2015 was a willful or wantonly negligent violation of the employer's standards. The general manager also cited past instances when claimant was warned about a lack of "speed of service,"

"customer service" and her "attitude." Audio at ~23:29. The general manager did not further describe the alleged incidents about which claimant was cautioned and could not remember the dates on which any of them occurred. Audio at ~23:29. The employer did not present sufficient, specific evidence from which an inference could be reliably drawn that any alleged behavior that occurred before claimant failed to draft the apology letter to the customer involved her willful or wantonly negligent violations of the employer's standards. On this record, the employer has not established that claimant's wantonly negligent behavior on after October 11, 2015 was not isolated or infrequent. It therefore meets the first prong to be excused as an isolated instance of poor judgment.

Nor does it appear that claimant's behavior in not drafting the apology letter was the type of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant's testimony at hearing about the customer complaint was emotional and, at times, teary. Audio at ~31:59, ~32:03. Claimant appeared sincere that she was upset, offended, hurt and felt betrayed when her manager and other employer representatives never inquired to obtain her side of the interaction with the customer, appeared not to believe her when she tried to defend what she had done, and instructed her to draft an apology. Audio at ~31:59, ~32:03. While claimant's emotional reaction does not exempt her from complying with the employer's reasonable standards, it did explain her reluctance to write the apology. Objectively considered, on this record, an employer would not have concluded that the isolated failure of a somewhat distraught employee to write an apology to a customer had caused such a fundamental rupture in the employment relationship that the employer could not trust the employee to comply with its reasonable standards in the future. As such, claimant's willful or wantonly negligent behavior in failing to write the apology letter meets both prongs of the test to be excused from constituting disqualifying misconduct as an isolated instance of poor judgment.

Although claimant's behavior in failing to write the apology letter was willful or wantonly negligent, it was not misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-49752 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: <u>February 2, 2016</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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