

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0092

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81900). Claimant filed a timely request for hearing. On January 6, 2016, ALJ Frank conducted a hearing, and on January 14, 2016 issued Hearing Decision 16-UI-51123, reversing the Department's decision. On January 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented facts not offered into evidence during the hearing. The employer did not explain why it was unable to offer those facts 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 facts that the employer sought to present. EAB considered only facts and information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Coos County employed claimant as a corrections officer from October 1, 2010 until September 29, 2015.

(2) The employer expected claimant to follow the instructions of supervisors, and to refrain from insubordination and failing to perform assigned duties. Claimant understood the employer's expectations.

(3) Before June 9, 2015, the employer had not issued any warnings or taken any disciplinary actions against claimant for failing to follow his supervisors' instructions, for neglecting his duties or for insubordination. Transcript at 12-13.

(4) On June 9, 2015 at 4:00 p.m., claimant's eight-hour shift ended, but he was unable to leave because the swing shift employee who was to relieve him had not arrived. At approximately 4:10 p.m., the sergeant who was supervising the day shift told claimant to "hold over" until the swing shift employee

arrived. Transcript at 5. Claimant told the sergeant that he had already accumulated twenty hours of overtime during the pay period and thought the sergeant should require another employee to stay until the missing shift employee arrived. In a low voice, claimant commented, "This is BS." Transcript at 17-18. Claimant did not refuse to stay and work the overtime. Claimant went into an adjacent room and continued working.

(5) The sergeant who had instructed claimant to remain on duty followed claimant into the adjacent room. He yelled at claimant to stop "acting like a child" and to behave better. Transcript at 18. Claimant became "frustrated" and both he and the sergeant yelled at each other. Transcript at 19. Claimant still did not refuse to work until a swing shift employee arrived to relieve him. The sergeant left the room, both because his work day was over and because he was trying to contact the missing swing shift employee. A deputy who witnessed the interaction between claimant and the sergeant offered to stay in claimant's place. Claimant accepted the offer, and the deputy and claimant made their arrangements while they were less than two feet away from the sergeant who had come on duty to supervise the swing shift and replace the departing sergeant. Because informal trading of shifts between corrections officers sometimes occurred without a supervisor's permission and because claimant assumed the swing shift sergeant coming on duty had overhead the arrangement between him and the deputy, claimant did not formally request permission from the sergeant to trade shifts with the deputy. The deputy also did not ask either supervisor if he or she approved the trade. The deputy proceeded to work in claimant's place on June 9, 2015 and claimant left the workplace.

(6) On September 29, 2015, the employer discharged claimant for trading shifts with the deputy on June 9, 2015. The employer considered claimant's actions to have been insubordinate and a dereliction of duties because he did not have formal permission from a supervisor to trade shifts.

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

For purposes of this decision, it is assumed that claimant's behavior in trading his shift with the deputy after the sergeant had assigned him to stay and without the approval of the sergeant or another supervisor was at least a wantonly negligent violation of the employer's expectations. The issue that remains is whether claimant's behavior, although it was wantonly negligent, it is excused from constituting disqualifying misconduct under the exculpatory provisions of OAR 471-030-0038(3)(b).

Claimant's behavior on June 9, 2015 may be excused if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior that would otherwise constitute misconduct may be excused as an "isolated instance of poor judgment" if it was 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).

However, the behavior also must not have exceeded “mere poor judgment” by causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). Here, the employer conceded claimant had not previously engaged in willful or wantonly negligent behavior like that on June 9, 2015. Transcript at 12, 13. Claimant’s behavior was, therefore, isolated.

In its written argument, the employer asserted that the ALJ improperly substituted his judgment for that of the employer “with regard to the interpretation and implementation of the Sherriff’s Office/Correction Division internal employment policy” when he determined that claimant’s behavior on June 9, 2015 did not cause an irreparable breach of trust in the employment relationship, and, consequently, did not exceed mere poor judgment. Employer’s Written Argument at 3. In support, the employer cited to several cases holding that county agencies’ interpretations of their own rules are entitled to deference. *Id.* However, the county rules to which the employer referred are not at issue in this case. We make no judgment on or interpretation of the employer’s policies or rules, or whether the employer was justified in discharging claimant. Rather, the sole focus of this decision is whether, considering the application of ORS 657.176 and OAR 471-030-0038 to the facts of claimant’s discharge, his discharge should be considered disqualifying “misconduct” under Employment Department Law for purposes of claimant’s claim for unemployment insurance benefits.

To the extent that the employer also argued that, since the employer concluded it was appropriate to discharge claimant for his policy violation, EAB must necessarily conclude that claimant’s behavior caused an irreparable breach of trust, we disagree. Whether an individual’s conduct has caused an irreparable breach of trust, and is therefore inexcusable as an isolated instance of poor judgment, is not a subjective determination based only on the employer’s opinion of claimant’s conduct, it is an objective determination based on whether a reasonable employer under similar circumstances would also conclude that an irreparable breach of trust had occurred. *See accord Isayeva v. Employment Department*, 266 Or App 806, 340 P3d 82 (2014) (an irreparable breach is an objective determination); *see also Callaway v. Employment Department*, 225 Or App 650, 654, 202 P3d 196 (“an employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not do so”). The fact that claimant did not want to work overtime and argued with the sergeant on June 9, 2015 is not dispositive of whether claimant’s behavior breached the employer’s trust, considering that he did not refuse to continue working, the employer did not contend that claimant used foul language, was offensive, or flagrantly defied the sergeant’s authority in any way, he thought he could trade shifts without permission, claimant traded shifts with another employee before leaving, and he had grounds to think the swing shift sergeant was aware that he had traded his shift and had not objected. While the employer may have had staffing imperatives that caused it to want claimant, and only claimant, to be the one who stayed on duty, there was no evidence showing that claimant was or should have been aware of them at the time he traded shifts. On these substantially mitigating facts, a reasonable employer in the same situation would not have concluded that an employee like claimant with no prior relevant disciplinary history had caused an irreparable breach of trust by engaging in a mutual argument and trading his shift without permission on June 9, 2015, or that it could not trust claimant in the future to conform his behavior to the employer’s standards. We therefore conclude that, objectively considered, claimant’s behavior did not exceed mere poor judgment. Since claimant’s behavior was isolated and did not exceed mere poor judgment, it is excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not do so for behavior that constituted misconduct. Claimant is not disqualified from unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-51123 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 17, 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.

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