

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0103

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 82057). The employer filed a timely request for hearing. On January 4, 2016, ALJ Holmes-Swanson conducted a hearing, and on January 8, 2016 issued Hearing Decision 16-UI-50731, concluding claimant voluntarily left work without good cause. On January 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant 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 did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) NPC International, Inc. employed claimant from May 9, 2014 to September 19, 2015.

(2) Claimant last worked for the employer as a shift manager at a Pizza Hut. Shift managers' job duties included making sure employees reported for their scheduled shifts and that the restaurant had adequate coverage.

(3) Claimant last worked for the employer on September 19, 2015. That day, another shift manager told claimant to stop slamming dishes while she washed them. Claimant disagreed that she was slamming dishes, and she did not think the shift manager had the authority to direct her work activities. Claimant and the shift manager became upset and had a heated conversation. Another employee intervened to stop the argument. Claimant felt the shift manager was bullying her and using a threatening tone that day. She said she would "rather not be here today." Audio recording at ~11:40. Claimant thought the shift manager told her to "go ahead." Audio recording at ~26:50. Claimant did not indicate to the shift manager that she was not going to return, and she kept her keys to the employer's business when she left.

(4) Claimant and the shift manager both immediately reported to the employer's manager that claimant left work early. Claimant asked the manager to find someone to close for her that night. The manager told her he would. She also told the manager that the shift manager was bullying her (yelling at her), she did not feel like reporting to work the next day and said "Fuck Pizza Hut." Audio recording at ~19:23.

(5) On September 20, 2015, claimant sent a text message to the manager asking, "Do I still have a job." Audio recording at ~27:45. She also reported to work for her scheduled shift and was told by the shift manager that she was not allowed to work until she spoke with the manager. Claimant repeatedly tried to call the manager and sent text messages to him. The manager did not answer until claimant called him from the restaurant phone. He told her that she could not work on September 20th, because he could not have managers walking off the job.

(6) On September 21, 2015, claimant repeatedly tried to call the manager to see if she should report to work for her September 22, 2015 shift. On September 22, 2015, claimant reported to work for her shift, but when she tried to clock in, discovered that her credentials had been deactivated. Claimant asked the manager if he wanted her to return her key to the restaurant, and he told her to return the key and leave because she did not work there anymore.

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

As a preliminary matter, the ALJ concluded that the employer's evidence was more persuasive than claimant's because the employer's witnesses were "consistent with one another and the employer's contemporaneous notes in Exhibit 1." Hearing Decision 16-UI-50731 at 3. We disagree. Neither of the employer's witnesses was present during the other's interactions with claimant, so the lack of inconsistencies is not remarkable. The ALJ did not explain how claimant's testimony contradicted the employer's, or why claimant's testimony, which she also based on contemporaneous notes, was unreliable. We did not discern any material contradictions between claimant's testimony and the employer's version of events, only a number of instances in which one party's evidence complemented the other's.¹ Because neither party materially contradicted the other or provided implausible evidence, we did not consider either party more or less credible or persuasive than the other.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

¹ For example, claimant said she asked the manager to find someone to work claimant's September 19th shift and he said he would. The manager did not confirm or refute claimant's testimony about that issue. In another instance, the manager and Exhibit 1 both stated that claimant "made it clear" that she was not going to report to work on September 20th, although neither specified exactly what claimant said to cause the manager to form a clear understanding of claimant's intent with respect to working that shift. Claimant did not dispute that she said she did not want to work on September 20th, and offered details the manager had not about what she said during that conversation, which the manager did not rebut. In a third instance, the manager said claimant had ended the September 19th call by hanging up on him, and claimant did not mention, or dispute, that she had done so. In that manner, the parties' evidence was complementary, not contradictory.

The ALJ concluded that claimant quit work, reasoning that the “balance of the evidence shows that the claimant could have continued working for the employer for an additional period of time but instead chose to end the employment relationship,” and that she “manifested a present intent to end her employment” by leaving work on September 19th and then “contacting the supervisor in the manner which she did.” Hearing Decision 16-UI-50731 at 3. We disagree.

When claimant left work on September 19th, she said that she did not want to work “today” and thought she was told to “go ahead” and leave. She told the manager she did not want to work on September 20th, but did not indicate that she never wanted to return or would not work her September 22nd shift. She did not return her keys until the manager told her to return them and leave on September 22nd. Despite making a negative comment about the employer, between September 19th and September 22nd she made numerous attempts to contact the manager and reported to work in uniform and ready to work for two scheduled shifts. The preponderance of the evidence is that claimant was willing to continue to work for the employer for an additional period of time despite her comments and leaving early on September 19th.

The first unequivocal indication that the employment relationship had ended was when the employer did not allow claimant to work when she reported to work on September 20th and told her she could not work until she spoke with the manager. When claimant next spoke with a manager, her credentials had been disabled so she could not clock in to work, and the manager told her she did not work for the employer anymore and needed to return her key and leave. Because claimant was willing to continue working and the employer would not allow her to do so, the work separation was a 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden of persuasion in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant based on the events of September 19th, when claimant left work early and subsequently told the manager that she did not want to work her shift on September 20th and said “Fuck Pizza Hut.” The employer reasonably expected claimant to work her scheduled shifts unless she had permission to leave. The employer alleged that claimant left work on September 19th by walking off the job without permission after an argument she had with another shift manager. However, it is undisputed that she told the shift manager she would “rather not be here today” before she left. At worst, claimant may have sincerely but mistakenly believed that the shift manager told her to “go ahead.” Claimant therefore left because of a good faith error, which is not misconduct.

The employer next alleged that claimant refused to work her September 20th shift. Claimant agreed during the hearing that she told the manager she did not feel like working on September 20th. However, in the absence of a response from the manager, she sent text messages asking to verify that she still had a job and reported to work for that scheduled shift and the next. The employer did not prove that claimant refused to work her September 20th shift or failed to report to work for a scheduled shift that day, so to the extent the discharge was related to that issue, it was not for misconduct.

The employer had the right to expect claimant from using foul language, and claimant knew or should have known that expectation as a matter of common sense. On September 19th, claimant violated it by telling the manager “Fuck Pizza Hut.” Claimant was conscious of her conduct and indifferent to the consequences of it, making her conduct wantonly negligent at best. However, her conduct is excusable as an isolated instance of poor judgment.

An isolated instance of poor judgment is a single or infrequent exercise of willful or wantonly negligent poor judgment that cannot exceed mere poor judgment by causing a breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d). The record fails to show that claimant had previous willful or wantonly negligent violations of the employer’s standards, so the conduct was isolated. Claimant made this remark one time while she was upset over an argument with a coworker, was away from the employer’s business, and was on the phone to a manager. In addition, the record fails to show that the remark was or might have been overheard by a customer or a coworker. Given these circumstances, the employer failed to show that claimant’s conduct was the type of behavior that any reasonable employer would conclude caused an irreparable breach of trust or made it impossible for claimant to continue working for the employer. Claimant’s conduct therefore did not exceed mere poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-50731 is set aside.

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

DATE of Service: March 8, 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.