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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
2016-EAB-0130

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 83189). The employer filed a timely request for hearing. On January 13, 2016, ALJ Frank conducted a hearing, and on January 29, 2016, issued Hearing Decision 16-UI-52004, concluding that the employer discharged claimant for misconduct. On February 3, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if it is relevant and material to EAB's determination and if the party demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. The information claimant asked EAB to consider consists of documentation of his participation in a union organizing campaign. It is unclear why this information is relevant to the reasons for claimant's discharge, and claimant provided no reason why he did not offer this information at the hearing. We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) World Duty Free Group North America employed claimant as a store room runner and cashier from June 5, 2012 until September 18, 2015.

(2) The employer's handbook listed examples of "serious misconduct" that would result immediate discharge; one of the examples listed was "use of profanity, vulgar or rude language, obscenities or obscene gestures in customer service or public areas." Claimant knew and understood this policy as a matter of common sense and because on April 23, 2015, he signed a form acknowledging that he had read and understood the employer's handbook.

(3) On April 15, 2013, the employer warned claimant in writing for violating its attendance policy on two occasions. On January 20, 2014, the employer again warned claimant in writing for violating its attendance policy on four occasions.

(4) On September 13, 2015, claimant reported for work at the employer's store at 6:30 a.m. At approximately 7 a.m., he left the store and went to the employer's warehouse, where he became upset with a supervisor over taking product to the store; he yelled at the supervisor and used foul language. At approximately 7:15 a.m., claimant returned to the employer's store and engaged in an altercation with two supervisors because he was upset about the warehouse, his work schedule, his manager and the employer. Claimant yelled at the supervisors and used foul language in an area where customers were present. Claimant knew that his behavior violated the employer's policy prohibiting the use of profane, vulgar, or rude language. Audio Recording at 31:42. One of the supervisors took claimant outside of the store, and calmed him down. Claimant then returned to the store and worked the rest of his scheduled shift.

(5) On September 18, 2015, the employer discharged claimant for violating its policy regarding the use of inappropriate language on September 13.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer expected that employees would refrain from the use of rude, vulgar or obscene language or gestures in customer service or public areas, and warned employees that they would be immediately discharged if they failed to comply with this policy. Claimant knew and understood the employer's policy, partly as a matter of common sense and also because on April 23, 2015, he signed an acknowledgement that he had read and understood the employer's handbook, which included the policy regarding use of inappropriate language. On September 13, 2015, claimant engaged in angry altercations with supervisors, one of which occurred in an area where customers were present. Although claimant asserted that he did not remember exactly what he said during these altercations, he admitted that "some parts" of the statements in which witnesses reported that he used foul language were correct, and also admitted that he used "vulgar" language on September 13 that he knew violated the employer's policy. Audio Recording at 31:42, 33:01, and 42:54. Based on this record, we conclude it more likely than not that claimant's behavior on September 13, 2015, constituted at least a wantonly negligent

violation of the employer's expectations regarding the use of inappropriate language in an area where customers were present.

Claimant's willful or wantonly negligent behavior on September 13 may be excused from misconduct that disqualifies him from unemployment benefits if it was an isolated instance of poor judgment. OAR 471-030-0038(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)(D). An act exceeds mere poor judgment if it was unlawful, tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship possible. OAR 471-030-0038(1)(d)(D).

The ALJ concluded that claimant's behavior on September 13 was not a single or isolated occurrence of misconduct because it was "comprised of a tirade, during which claimant went from place to place, encountering multiple staff members." Hearing Decision 16-UI-52004 at 4. We disagree. Claimant's September 13 conduct consisted of a single incident: his angry altercation began in the employer's store, continued when he went to the warehouse, and ended when he returned to the store. *See accord Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (claimant's violation of the employer's disciplinary policy on two consecutive days was an isolated instance of poor judgment; it was a "single occurrence in the employment relationship" because the incident on the second day was a continuance of the incident on the previous day). The record fails to show that claimant engaged in any willful or wantonly negligent violation of the employer's policies prior to September 13, 2015. Although the employer's representative testified that a few weeks prior to his discharge, claimant arrived at work angry and upset, she also testified that claimant did not use inappropriate language on that occasion or otherwise violate any of the employer's policies. Audio Recording at 20:45. We therefore conclude that claimant's conduct on September 13, 2015 was an isolated instance of wantonly negligent conduct.[1]

Claimant's isolated behavior can be excused as an isolated instance of poor judgment if it did not exceed "mere poor judgment." Claimant's conduct was neither unlawful nor tantamount to unlawful conduct. Claimant's angry outburst, although upsetting to the employees who witnessed it, involved no threats of physical harm. There is no indication that claimant was attempting to harass his supervisors; he appears to have been angry about his working conditions. Claimant was responsive to a supervisor's attempt to calm him down, and, once he was calm, he completed his scheduled shift without incident. As discussed above, the record contains no evidence that claimant engaged in any angry altercations prior to September 2015, and reviews of his performance, prepared in June 2013, June 2014 and August 2015, all rated claimant's performance as "solid." Exhibit 1. Based on this record, we conclude that his conduct on September 13 was not the type of behavior that would cause a reasonable employer to lose trust that claimant could continue to effectively perform his job duties; it therefore did not create an irreparable breach of trust in the employment relationship. Finally, the record does not demonstrate that claimant's actions directly affected the operation of the employer's business and therefore made a continued employment relationship impossible. Although customers witnessed a portion of claimant's

[1]The employer provided no proof that claimant's violations of its attendance policy in 2013 and 2014 resulted from any willful or wantonly negligent disregard of the employer's expectations. Even if any of these attendance violations constituted misconduct, they occurred too far in advance of the September 13, 2015 incident to establish a pattern of willful or wantonly negligent behavior.

outburst, the employer presented little evidence that claimant's behavior unduly disrupted its business or otherwise negatively affected the employer's operations. Claimant's conduct did not exceed mere poor judgment and was, therefore, excusable as an isolated instance of poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-52004 is set aside.

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

DATE of Service: February 25, 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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