

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0145

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135143). Claimant filed a timely request for hearing. On February 1, 2016, ALJ M. Davis conducted a hearing, and on February 4, 2016 issued Hearing Decision 16-UI-52337, affirming the Department's decision. On February 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Oregon Department of Transportation employed claimant as a parts specialist 2 from July 5, 2005 to December 2, 2015.

(2) The employer has a policy requiring employees to treat coworkers with respect, and prohibits abuse and harassment. Claimant understood the employer's policy.

(3) Claimant thought that one coworker, B. C., did poor work, had a poor work ethic, and engaged in inappropriate and childish behavior at work.¹ Claimant felt as though she had to perform more work than B. C. and her coworkers, and she felt it was unfair that B. C. appeared not to get in trouble at work for her performance deficiencies and behavior. Claimant complained to her supervisor about B. C.

(4) The employer was concerned about the way claimant treated coworkers. On February 27, 2013, the employer gave claimant a letter of concern for, among other things, her conduct toward B. C.² The letter stated that disparaging or showing disrespect to others was inappropriate.

¹ B. C. is a pseudonym used to protect the anonymity of the coworker involved in this matter.

² It is unclear from Exhibit 1 whether or not B.C. was the coworker involved in claimant's 2013-2015 letters and warnings. However, claimant testified that B. C. began working for the employer in 2013 and that claimant had trouble with her behavior from the beginning. We infer from claimant's testimony that B. C. was the coworker involved in all of the prior incidents.

(5) On September 18, 2013, the employer gave claimant a letter of expectation based on her use of derogatory comments to coworkers in a meeting. The letter instructed claimant that she was expected to establish and maintain professional and collaborative working relationships.

(6) On October 28, 2014, the employer gave claimant a letter of reprimand for making derogatory comments about B. C. and another employee to other coworkers. The comments included referring to B. C. as behaving like “trash” and saying she “gives men a ‘daily peep show’” and “rubs herself up against men that aren’t her husband.” Exhibit 1. She said a second coworker was “juvenile,” and had “a childish mentality,” and called a supervisor “delusional.” *Id.* Claimant did not deny making the comments, but denied that they contributed to a negative work environment. Claimant said, “If people don’t like the truth then maybe they should change their ways,” “I don’t cater to people’s feelings,” and “If I say something and it hurts their feelings obviously I’m right.” *Id.* The letter of reprimand instructed again stated that claimant was expected to treat others with respect and professionalism.

(7) On August 1, 2015, the employer gave claimant a one-step salary reduction for stating that B. C. “needed to use her head,” “is a married woman who talks too often to married men,” and she “has to be the center of male attention,” and commenting that B. C. was “juvenile.” Exhibit 1.

(8) On September 11, 2015, claimant told a coworker that B. C. took too long to do her job and accused B. C. of looking up a watch on the internet and staging a picture of her child on her computer screen in order to get attention. Later the same day, claimant accused B. C. of not working.

(9) On September 11, 2015, claimant reported B. C. to her supervisor, alleging that B. C. was not working and became defensive when accused of not working because she was “guilty,” was spending work time and the employer’s equipment to look at watches and a tractor on the internet, was regularly spending a large amount of time on the internet for personal reasons during her work day, all while claimant was “doing the majority” of the work. Exhibit 1.

(10) On September 15, 2015, claimant made a derogatory comment about a coworker other than B. C. for misspelling a word. When B. C. commented that she misspelled words, too, claimant commented to another employee that B. C. was “sensitive at the moment.” Exhibit 1. The same day, claimant made a comment to B. C. and another employee implying that B. C. and the other employee spent a lot of time talking and not working.

(11) B. C. reported claimant’s September 11th and September 15th conduct to the employer. The employer investigated claimant’s and B. C.’s allegations about each other, and, after concluding claimant had violated its policies, held a pre-disciplinary meeting to allow claimant to respond to the employer’s findings. Claimant did not deny making the comments. She accused B. C. of illegally recording her in the office and misusing the internet and work time for personal reasons, and she claimed that her September 15th comment had been meant as a joke even though she said it sarcastically and later told the other employee involved that she had intended it to apply only to B. C. During the investigation and pre-disciplinary meeting, claimant also continued to voice disparaging opinions about B. C. to the employer, stating that B. C. was “childish” and “juvenile,” needed to be the center of attention from male coworkers, was “moody with a capital M-O-O-D-Y like an alcoholic,” and that everything she had said about B. C. was true. In the process of investigating claimant’s reports about B. C., the employer investigated B. C.’s internet use and not only determined it was appropriate, but also

determined that claimant was the one who had used the internet during work time to send B. C. a link to the Apple watch website.

(12) On December 2, 2015, the employer discharged claimant for her disparaging comments about B. C.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant 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.

The employer reasonably expected claimant to treat her coworkers, including B. C. with respect. Claimant should have understood that expectation based on her two-year history of discipline for disrespectful behavior and the four times she received letters or warnings based on her comments about her coworkers, including B. C. Nevertheless, on September 11 and September 15, 2015, claimant violated the policy by making derogatory comments about B.C. to coworkers and unfounded allegations that B. C. was engaging in inappropriate use of the internet.

At the hearing, claimant agreed that she made the comments about B. C. that were attributed to her in Exhibit 1. Claimant's primary argument was that her conduct toward B. C. was not misconduct because B. C. was a bad employee, had poor attendance, did not perform her work well, wasted time by talking with coworkers, illegally recorded claimant without her knowledge, did not behave appropriately with men in the workplace, and misused the internet for personal reasons. Claimant also argued that other employees behaved badly toward her or B. C., and that she was under the mistaken impression that her statements about B. C. on September 11, 2015 were made in private, presumably because he believed that making disparaging comments about B. C. at work to another employee while B. C. was not in the room did not violate the employer's prohibitions against making disparaging comments. Claimant did not show, however, that the employer had separate policies for private disparaging comments and public ones. Nor was claimant's testimony about B. C.'s work ethic, performance and behavior persuasive, because, under OAR 471-030-0038, it is claimant's conduct that is the focus of the misconduct analysis.

Claimant also argued that her September 11th email to her supervisor did not violate the employer's expectations. We agree that, under certain circumstances, complaining to a supervisor about a coworker's conduct might be considered appropriate behavior. However, in this case it was not appropriate because it consisted of fabricated complaints about B. C. Specifically, claimant complained that B. C. wasted time on the internet looking at a watch and a tractor, even though claimant was the one who had used work time to forward a link to B. C. so she could look at the watch and the employer's records show that B. C. had not inappropriately used work time or the employer's equipment to look at the watch or tractor. Had claimant personally witnessed the coworker's alleged misuse of work time

and the employer's equipment for personal reasons before reporting she had, it is more likely than not that the employer's records would have supported claimant's allegation. Because there was no evidence in the employer's records substantiating claimant's claim, the only conclusion the evidence allows is that claimant did not actually witness B. C. misusing the internet to look at the watch or tractor, and that her report to her supervisor that B. C. had done so was an attempt to disparage or discredit B. C. to their supervisor.

Claimant's testimony that there was, to a certain extent, a workplace culture in which employees conversed about each other, and that many of her coworkers shared her low opinion of B. C., is unrefuted. *See e.g.* Audio recording at ~22:35. Likewise, it is unrefuted that claimant was warned or disciplined at least once based on her response to another employee's comments about B. C., indicating that the employee with whom claimant was speaking was also conversing about or disparaging B. C. *See e.g.* Audio recording at ~31:00. Claimant's testimony did not establish the existence of a workplace culture that allowed employees to disparage each other, however. There no evidence in the record showing that claimant knew that the employer was aware others were disparaging B. C. and overlooked it. Nor is there evidence in the record that the employer knew that other employees disparaged B. C. and disciplined other employees for these remarks. We also note that the employer had repeatedly and specifically warned claimant that her conduct toward B. C. and comments about B. C. to others were unacceptable. The employer even disciplined claimant for her behavior toward B. C. and others at work by reducing her salary. Although under certain circumstances a workplace culture might form the basis of an individual's reasonable belief that the employer condoned the conduct at issue, this record fails to show that claimant sincerely or reasonably believed it was acceptable for her to make disparaging comments about B. C. in the workplace, regardless of what her coworkers did.

It is clear from this record that claimant did not respect B. C. personally or professionally, and that she was unwilling to refrain from making disparaging comments to or about B.C. at work. Claimant had the choice to voice her negative opinions about B. C. to B. C. and others or to keep silent, and repeatedly chose to voice them even though she should have known she was violating the employer's expectations by doing so. Claimant's comments about B. C. during the September 11th phone call with her coworker, her disparaging and ill-founded accusations about claimant's internet use to her supervisor the same day, her accusation that B. C. was not working, and her September 15th comments to and about B. C. all constituted separate willful violations of the employer's expectations that she treat B. C. with respect.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered isolated, it must involve only a single or infrequent exercise of poor judgment rather than involve repeated acts or a pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). In this case, claimant repeatedly, over two years, knowingly violated the employer's expectation that she treat coworkers with respect by intentionally making disparaging comments to and about B. C. and others. In each instance, claimant made a separate decision to voice her negative opinions and suspicions about the conduct of B. C. and others instead of keeping them to herself, thereby engaging in a pattern of making poor judgments that cannot be considered "isolated" or excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Although claimant claimed at the hearing that she did not believe her comments about B. C. were disrespectful, it is not plausible or credible that claimant's belief was sincerely. As we have previously stated, the record

shows that claimant repeatedly and intentionally voiced negative opinions and suspicions about B. C., disparaging her to coworkers and making false accusations in an attempt to discredit B. C. to her supervisor. Repeated coaching and discipline, which included a salary reduction for that exact conduct involving B. C., shows that claimant did not sincerely or plausibly believe that she could continue to engage in the same conduct without violating the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-52337 is affirmed.

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

DATE of Service: February 29, 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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