

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0358

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 71958). The employer filed a timely request for hearing. On March 3, 2016, ALJ Monroe conducted a hearing, and on March 22, 2016, issued Hearing Decision 16-UI-55594, affirming the administrative decision. On March 30, 2016 claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered written arguments submitted by the employer and claimant in reaching this decision.

EVIDENTIARY MATTER: At the March 3, 2016 hearing, the ALJ admitted documents submitted by the employer into the record as Exhibits 1 and 2. However, the exhibits admitted were not marked. We have therefore marked Exhibits 1 and 2, based on the ALJ's descriptions. Exhibit 1 consists of: letters dated July 22, 2015 (10 pages), September 30, 2015 (2 pages), and October 21, 2015 (1 page) from the employer's chief human resources officer to claimant; and a letter dated September 30, 2015 (1 page) from the employer's superintendent to claimant. Exhibit 2 consists of: a July 22, 2015 "Investigation Report" (4 pages) prepared by the employer's chief human resources officer; a July 22, 2015 Memorandum (4 pages) from the employer's chief human resources officer to the employer's deputy general counsel; an October 20, 2014 letter (1 page) from the employer's chief human resources officer to claimant; a "Confidential Outline of Allegations: S. Harper to E. Rogoway – 4/30/15" (1 page); a June 30, 2015 letter (1 page) from the employer's deputy general counsel to claimant's attorney; and "Attachment D" (1 page), a copy of a social media posting.¹

¹ The ALJ did not admit documents in Exhibit 2 which were duplicates of documents in Exhibit 1.

FINDING OF FACT: (1) Multnomah County School District #1 (District), also known as Portland Public Schools, employed claimant, last as principal of Kelly Elementary School, from June 1, 2006 until October 21, 2015.

(2) As an Oregon licensed school administrator, claimant was expected to comply with standards of ethical behavior, which included the responsibility to “[m]aintain the dignity of the profession by respecting and obeying the law, exemplifying personal integrity and honesty.” OAR 584-020-0035(3)(a) (December 14, 2007). Also as an Oregon licensed administrator, claimant was subject to dismissal from her position for a variety of reasons, including inefficiency, immorality and insubordination. ORS 342.845(5) and ORS 242.865(1). Claimant knew about and understood the ethical standards with which she was expected to comply, and the reasons for which she could be dismissed.

(3) On October 10 and 11, 2014, claimant and her domestic partner, and four other District administrators, camped together at an Oregon state park. On October 11, claimant, her partner and the other administrators began drinking at approximately 11:30 a.m. and continued drinking throughout the day and early evening. At approximately 7:30 p.m., another District administrator arrived with her 8-year old twin sons. Claimant did not believe it was appropriate for the twins, who were students at a District school, to join the group of District administrators, who were intoxicated. Claimant left the group and went to the recreational vehicle (RV) where she and her partner were spending the night. When claimant’s partner joined claimant in the RV, claimant and her partner began to argue. Claimant’s partner pushed claimant, and claimant pushed her back. Claimant’s partner left the RV, while claimant remained in the RV and fell asleep. After claimant’s partner left the RV, she talked to the other participants in the group and told them that on one occasion in the past, claimant had allegedly threatened her with a knife and on another occasion, claimant had attacked her with a razor. Early in the morning of October 12, claimant’s partner returned to the RV she shared with claimant. Claimant and her partner apologized to one another, and left the campground.

(4) The District administrators who had participated in the camping trip with claimant and her partner believed that claimant had assaulted her partner, and that they were obligated to report this incident of domestic violence to the authorities. They reported the incident to District administrators and the Portland Police Bureau. On October 30, 2014, a police officer arrested claimant. Also on October 30, 2014, the District placed claimant on indefinite paid administrative leave, pending an investigation into her conduct during the October camping trip. In the letter notifying claimant that she was being placed on leave, the employer’s chief human resources officer gave claimant the following directive: “During administrative leave you are not to contact students, families or District staff unless prior arrangements have been made through me or [the Assistant Superintendent].” Exhibit 2, 10/30/14 letter.

(5) District administrators interviewed all those who had participated in the October camping trip, and on December 30, 2014, District administrators interviewed claimant about her behavior during the trip and her relationship with her partner. Claimant denied that she had any physical contact with her partner on October 10, other than pushing her. She also denied that she had ever threatened her partner with a knife or attacked her with a razor.

(6) On November 6, 2014, the District learned that no charges would be filed against claimant for her actions during the October camping trip.

(7) In February 2015, claimant and the assistant principal at Kelly School exchanged text messages. In response to the assistant principal's text in which she asked how claimant was doing, claimant sent the following text:

Same friend. Same. One day soon I will explain all. You will not believe what has gone down. At the center [B]² manufacturing lies, cause [B] fell for [claimant's partner].
(Exhibit 1, 7/22/14 letter to claimant).

(8) On April 30, 2015, District administrators interviewed claimant about the text message she sent to the assistant principal in February 2015, and also about her interactions with a school secretary and her treatment of the secretary and the teachers whom she supervised. Claimant admitted that on one occasion, she became angry about a mistake the secretary had made, and told another employee to keep the secretary "the fuck away" from claimant. Claimant explained that she subsequently apologized to the secretary for this comment, and denied that she had any other angry interactions with the secretary. Claimant also denied that her treatment of the secretary and the teachers whom she supervised was inappropriate. 3/14/16 Hearing Transcript at 13.

(8) In June 2015, claimant became upset over material critical of her behavior that had been posted on a Facebook page for the Parents for Excellent Portland Principals (PEPP) website, a public website maintained by parents of District students, District staff, and community members. Claimant posted a comment on the PEPP Facebook page in which identified herself as "Marti Diaz," who was a "Portland citizen and taxpayer to our school system." Claimant stated that she believed she was a good principal who made a failing school into a "school in good standing." Claimant provided details of the October 2014 camping trip in her post, naming three of the administrators who went on the trip, admitting that all who went on the trip were drinking on Saturday, October 10, and denying that she ever touched her partner. Claimant concluded her post with the following comments:

In this time Lane³ continued to fall.
Grant⁴ had sex tapes not discovered by SRO.⁵ Same SRO that filled a police report against me TWO weeks later after the camping event.
You know about [J]⁶, you stated she did have an affair with her VP in the building she was serving.
But I'm the one you've all maligned. OK.
Grant. Sex tapes.
Lane. Continues to fall.
But now you have [J] at MLC.⁷

² B is a pseudonym for one of the administrators who participated in the camping trip; claimant's text message referred to this person by name.

³ A District elementary school. An administrator who worked at Lane participated in the October 2014 camping trip.

⁴ A District high school. An administrator who worked at Grant participated in the October 2014 camping trip.

⁵ School Resource Officer, a Portland Police Bureau officer assigned work in District schools.

⁶ J is a pseudonym for one of the participants in the October 2014 camping trip; claimant's posting referred to this person by name.

⁷ MLC is a District school.

BUT Me, someone who worked her heart out for Kelly is the “bad one.”
Okay. Good. Enjoy.
(Exhibit 2, “Attachment D” – emphasis in the original.)

A few minutes after claimant posted this comment on the PEPP Facebook account, she decided it was unprofessional and deleted it. By the time claimant deleted the posting, however, it had been copied and re-posted. 3/9/16 Hearing Transcript at 10.

(9) On July 9, 2015, District administrators interviewed claimant about the Facebook posting she had made, and about her alleged failure in March 2013 to report an allegation of possible child abuse by a District employee to the Oregon Department of Human Services. Claimant admitted to the Facebook posting, and denied that she ever failed to report an allegation of child abuse.

(10) By letter dated July 22, 2015, the District’s chief human resources officer notified claimant that he was recommending to the District superintendent and Board of Education that she be dismissed for inefficiency, immorality, insubordination and inadequate performance under ORS 342.845(2) and ORS 342.865(1). The letter specified the following reasons for recommending claimant’s dismissal: her “conduct on three occasions towards an adult member of your family – your partner – that was violent, threatening or reasonably perceived as threatening; her failure to be “forthright and honest when directed to tell the truth during the personnel investigation”; and her “negative public statements about other District staff who acted responsibly, despite being aware that retaliation on your part is prohibited.” Exhibit 1, 7/22/15 letter to claimant. The letters also specified the following additional reasons for recommending claimant’s dismissal: claimant’s “unprofessional, ineffective behavior as an administrator that was targeted at one staff person” and her failure to make a “required report about potential child abuse.” *Id.*..

(11) On July 30, 2015, claimant and her attorney participated in a “pre-decision” meeting with District administrators. In a letter dated September 30, 2015, the District’s chief human resources officer notified claimant that he was recommending that the District Board of Education dismiss claimant from her position for the reasons stated in his July 22, 2015 letter. Exhibit 1, 9/30/15 letter to claimant from Sean Murray. After clarifying some of the points claimant and her attorney made during the “pre-decision” meeting, the letter stated: “At its core, we are troubled not only by the violence and anger and also your decisions not to tell the truth and to retaliate and/or take steps to make others fearful of providing their observations as required.” *Id.* Also by letter dated September 30, 2015, the District superintendent notified claimant that she would recommend the District Board dismiss claimant.

(12) By letter dated October 21, 2015, the District’s chief human resources officer notified claimant that on October 20, 2015, the District Board of Directors had voted to dismiss claimant from her position.

CONCLUSION AND REASONS: We agree with the ALJ and conclude 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. 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) (August 3, 2011). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the District cited numerous reasons for its decision to dismiss claimant from her position, the record shows that the primary reasons for claimant's discharge were her actions during the October 2014 camping trip and during District's investigation of this trip. The employer's chief human resources officer testified that the "main issue" that led to claimant's discharge was that claimant "was not being truthful during the investigation," and that had she been truthful, the District would have "taken a real long, hard look" before determining to dismiss her. 3/3/16 Transcript at 12. When asked on cross-examination about the role claimant's arrest played in the decision to discharge her, the District's chief human resources officer testified that "all of the factors that led from the arrest" such as "the untruthfulness, the violation of the directives regarding truthfulness, and no retaliation" resulted in the decision to dismiss claimant. 3/9/16 Transcript at 62. Finally, we note that the September 30, 2015 letter, in which the chief human resources officer notified claimant that the District would recommend the Board of Directors dismiss her, summed up the reasons for the recommendation by stating: "At its core, we are troubled not only by the violence and anger and also your decisions not to tell the truth and to retaliate and/or take steps to make others fearful of providing their observations as required." Exhibit 1, 9/30/15 letter to claimant from Sean Murray. We therefore focus our analysis on the claimant's actions during the October 2014 camping trip and the District's year-long investigation into this trip.⁸

The District expected that claimant would behave with honesty and integrity in accordance with the standards of ethical behavior for Oregon school administrators. Claimant knew about and understood this expectation. The District concluded that claimant violated these ethical standards when she failed to provide a truthful account of her conduct during an October 2014 camping trip. The District's evidence regarding what occurred during the camping trip consisted of hearsay accounts of others who participated in the trip; they asserted that claimant engaged in an angry altercation with her partner and assaulted her. They also claimed that while assisting claimant's partner during the camping trip, claimant's partner disclosed to them that claimant had behaved in a violent or threatening manner toward her on two previous occasions. Claimant admitted that she and her partner had argued during the camping trip, but insisted that she had no physical contact with her partner during the camping trip,

⁸ Even if we had considered that the District's decision to dismiss claimant was also based on charges unrelated to the October 2014 camping trip – claimant's "unprofessional, ineffective behavior as an administrator that was targeted at one staff person" and her failure to make a "required report about potential child abuse" (Exhibit 1, 7/22/15 letter to claimant) – we would find that the employer failed to meet its burden to demonstrate that claimant engaged in this conduct. The District presented hearsay evidence regarding claimant's treatment of a staff person whom she supervised and her failure to report possible child abuse, which claimant rebutted in direct testimony. Because the evidence is at best equally balanced on these issues, the District failed to meet its burden to demonstrate that claimant inappropriately targeted a subordinate employee or failed to report possible child abuse.

other than pushing her partner after her partner had pushed her. Claimant also denied that she had ever threatened her partner, or engaged in any violent acts toward her. Weighing the evidence as a whole, we find no reason to accept the employer's hearsay over claimant's first hand testimony, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden to establish that claimant violated the ethical standards with which the employer expected her to comply by providing an untruthful account of her actions during the investigation into the October 2014 camping trip.

The District also concluded that claimant was insubordinate in violation of the ethical standards expected of an Oregon school administrator because she communicated with District staff, parents and community members about the October 2014 camping trip after the District directed her not to do so. In the October 30, 2014 letter which placed claimant on an indefinite paid administrative leave, the District's chief human resources officer told claimant that while on leave, she was prohibited from contacting District staff members, students or families. Exhibit 2, 10/30/14 letter. In spite of this directive, claimant sent a text message to an assistant principal with whom she had worked in February 2015; in the message, claimant accused one of the camping trip participants of lying. In June 2015, claimant posted a message on a Facebook page for a public website maintained and used by District parents and employees. In her posting, claimant provided details of the October 2014 camping trip, identified three of the trip participants by name, and made derogatory remarks about schools where the participants worked. Claimant knew about the directive the employer gave her in the October 30, 2014 letter. Claimant's actions in refusing to obey the District's direct order regarding communications with District parents and employees constituted insubordination and a conscious violation of the ethical standards for an Oregon school administrator with which the employer expected her to comply. Claimant's behavior was therefore, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under the exculpatory provisions OAR 471-030-0038(3)(b). To be isolated, an exercise of poor judgment must be a single or infrequent occurrence. Claimant violated the employer's directive not to communicate with District staff members or parents on two occasions. Her conduct was therefore a repeated act, and not a single occurrence.

Claimant's behavior also cannot be excused as a good faith error. Based on the clear directive the District gave her in its October 30, 2014 letter, claimant could not have reasonably believed that the District would excuse her February 2015 text message to the assistant principal, or her June 2015 Facebook posting.

In her written argument, however, claimant asserted that her June 2015 posting was a commentary on a matter of public concern. Claimant argued that she has a right under the First Amendment of the U.S. Constitution to speak on a matter of public concern and "[t]o use an exercise of a First Amendment right as misconduct sufficient to terminate would be an infringement of that right." Claimant's Written Argument at 2. We disagree.

Public employees have a constitutionally protected right to speak out on matters of public concern, but no constitutionally protected right to speak on matters that are solely related to personal grievances. *See Garcetti v. Ceballos*, 547 US 410 (2006). To determine if an employee's speech is constitutionally protected, the court must first determine "whether the employee spoke as a citizen on a matter of public

concern. If the answer is no, the employee has no cause of action based on his or her employer's reaction to his speech." *Garcetti v. Ceballos*, 547 US at 418 (citation omitted). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Connick v. Meyers*, 461 US 138, 147-148 (1983). In *Connick*, the court applied this test to conclude that most of the matters raised in a survey circulated by a deputy district attorney related to her personal disagreement with office policy, and were unrelated to matter of public concern. The court found that the survey was therefore not constitutionally protected speech and that the district attorney did not unlawfully infringe upon the deputy's constitutional rights when he discharged her for circulating the survey.

Here, claimant spoke as a District employee, and not as a citizen: in her June 2015 Facebook posting: she clearly identifies herself as a District principal. The posting was made during a period when she was contesting action the District had taken against her and when she was upset by negative information about her behavior that had been posted on the Facebook page. Thus, the context of the statement indicates that it was intended to be ammunition in her attack against her detractors, a conclusion reinforced by the contents of the statement, which consists of her account of the October 2014 camping trip and her attempts to discredit the other camping trip participants by identifying them and making derogatory remarks about the schools where they worked. For these reasons, we find that claimant's June 2015 Facebook posting was related to claimant's personal grievances against the District and other District employees, and not matters of public concern. Because the posting was not constitutionally protected speech, the District did not infringe upon her First Amendment rights when it dismissed her partly on the basis of this posting.

The employer discharged claimant for misconduct. She is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-55594 is affirmed.

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

DATE of Service: May 2, 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.