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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0803

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130704). Claimant filed a timely request for hearing. On June 23, 2016, ALJ Wyatt conducted a hearing, and on July 1, 2016 issued Hearing Decision 16-UI-62953, affirming the Department's decision. On July 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Western Communications employed claimant from August 18, 2009 until May 9, 2016, last as a lead pressman.

(2) The employer expected claimant to refrain from using inappropriate language in the workplace. Claimant understood this expectation as a matter of common sense and as he reasonably interpreted it.

(3) Claimant job involved printing a newspaper, and at times, he was subjected to high pressure as the deadline for completing and issuing editions came closer. On occasions during his employment, claimant had disagreements with his supervisors about how best to perform printing tasks. Sometimes, claimant's supervisors told him that he had used inappropriate and subordinate language in the course of the disagreement.

(4) On March 28, 2016, claimant and a manager had a disagreement that might have been heard by customers who were in the front office. After the disagreement, the employer issued a written warning to claimant advising him that his language and his behavior "needed to improve." Audio at ~6:30. This was the first written warning that claimant ever received.

(5) On May 6, 2016, claimant and his supervisor, the general manager, disagreed about the correct width of papers to use on a particular printing project. The disagreement escalated and claimant walked away from the general manager and went into the press room. As claimant opened the door to enter the press

room he “slapped” the door. Audio at ~9:36. The general manager followed claimant into the press room and continued talking to claimant, perpetuating the disagreement. At that time, claimant was “extremely stressed out” and “pushed over the edge” by the disagreement. Audio at ~11:50, ~12:09. Claimant told the general manager to “fuck off.” Audio at ~9:52. Two other pressmen were in the room at the time claimant addressed his comment to the general manager.

(6) On May 9, 2016, the employer discharged claimant for the language he used during the May 6, 2016 disagreement with the general manager.

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

In Hearing Decision 16-UI-62953, the ALJ concluded that the employer met its burden to show that it discharged claimant for disqualifying misconduct. The ALJ reasoned that claimant did not dispute that he had used foul language in speaking to the general manager on May 6, 2016 and his language that day was not excused from constituting misconduct as an isolated instance of poor judgment “because he had been warned less than six weeks earlier [March 28, 2016] that his language would have to improve, after he engaged in an argument with a manager.” Hearing Decision 16-UI-62953 at 3. We disagree.

We agree with the ALJ that it was at least wantonly negligent of claimant to have told his manager on May 6, 2016 to “fuck off,” which is foul and vulgar. However, claimant’s wanton negligence will be excused if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). To qualify to be excused as an “isolated instance of poor judgment,” claimant’s behavior on May 6, 2016 must have been, among other things, 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). Although the ALJ thought it was sufficient to preclude claimant’s behavior from being excused as an isolated instances of poor judgment if claimant had previously received a warning about using inappropriate language, the language of the regulation is clear that receiving a prior warning is not the regulatory standard for exclusion, but it is engaging in prior willful or wantonly negligent *violations* of the employer’s standards. Hearing Decision 16-UI-62953 at 3. The ALJ erred in the standard he applied to determine whether claimant’s behavior on May 6, 2016 was excused as an isolated instance of poor judgment.

The employer’s witness cited claimant’s behavior underlying the March 28, 2016 warning as a prior act of misconduct. However, she was unable to provide any information about what claimant supposedly said that day that was “inappropriate” and claimant, himself, did not recall. Audio at ~6:20, ~11:08, ~14:55. As well, the employer’s witness buttressed her contention that claimant had previously violated the employer’s standards since she also contended that claimant had received several oral warnings prior

to March 28, 2016 for using "unacceptable language." Audio at ~7:30. The witness did not specify the language that the employer considered unacceptable on those occasions and apparently did not know. Audio at ~11:08, ~14:55. That the employer thought claimant's language was "unacceptable" on past occasions and that he was orally or in writing warned about it is not, without more, sufficient to establish that claimant violated the employer's standards in those occasions. It is merely a conclusion that cannot substitute for evidence of the exact language used and a reasonable explanation why it was "unacceptable." The employer did not present sufficient evidence to establish, more likely than not, that claimant ever violated the employer's standards before May 6, 2016. As such, claimant's behavior on May 6, 2016 met the first prong of the test to be excused as an isolated instance of poor judgment.

In addition to being a single or infrequent occurrence, the behavior sought to be excused as an isolated instance or poor judgment, also most have not been the type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Here, claimant's use of foul language, while not condoned, was understandable under the circumstances. Claimant was trying to begin the printing, the general manager and he had disagreed without resolution about the correct size of paper to use, claimant tried to walk away from the general manager and the disagreement but the general manager followed him into another room, continued the disagreement and claimant went "over the edge," which led to his use of foul language in an apparent effort to stop the argument. That claimant tried to retreat from the circumstances that were upsetting him and the general manager engaged in behavior that provoked his use of the foul language were substantially mitigating factors. Also mitigating his use of a foul language was claimant's acknowledgement that using that language was a "mistake." Audio at ~11:50. On these facts, an employer would not have objectively concluded that claimant's first and only use of the expression "fuck off" in the workplace, when he was under pressure and had been provoked, signified that it could not trust claimant in the future to behave according to the employer's standards or made a continued employment relationship with claimant impossible. Since claimant's behavior meets all requirements, it is excused from constituting misconduct as an isolated instances of poor judgment under OAR 471-030-0038(3)(a).

The employer did not demonstrate that the behavior for which it discharged claimant on May 9, 2016 was unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-62953 is set aside, as outlined above.

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

DATE of Service: August 10, 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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