

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1232

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130833). Claimant filed a timely request for hearing. On October 18, 2016, ALJ Shoemake conducted a hearing, and on October 20, 2016 issued Hearing Decision 16-UI-69626, reversing the Department's decision and concluding claimant's discharge was not for misconduct. On November 3, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Northwest Primary Care Group PC employed claimant in its credit department from July 18, 2014 to August 24, 2016.

(2) The employer expected employees to remain at work during their scheduled shifts unless they had permission to leave, and to avoid causing a "scene," using foul language, or engaging in unprofessional behavior. Transcript at 6-7. Claimant understood both expectations.

(3) During the week prior to August 24, 2016, claimant told the finance director she had concerns that the interim team lead did not know her job and that claimant could not take direction from her because of that. The finance director told claimant to listen to the interim team lead and give her a chance. The finance director subsequently concluded that claimant had not complied with that instruction, and had gossiped and used her cell phone.

(4) On August 24, 2016, the finance director and the regular team lead met to give claimant a verbal warning. Claimant said she disagreed with it and voiced ongoing concerns about the interim team lead. The finance director felt claimant was cutting her off and being "defiant," and instructed claimant to follow the interim team lead's directions. Transcript at 8, 10. Claimant felt upset, signed the verbal warning, and left the office. Although the finance director was not done speaking to claimant, claimant felt too upset to continue and needed to leave before becoming emotional.

(5) Claimant began sobbing as she left the finance director's office. The finance director asked the team lead to follow claimant to her desk. She was concerned claimant might make "a scene," wanted claimant to calm down and finish the conversation, and "was going to tell her maybe she should go home," "take a time out from her desk" or "[c]ome back into my office." Transcript at 16.

(6) Claimant went to her desk and began organizing it, intending returning to work. She was distraught, appeared to be collecting and packing some things in her cubicle, and used foul language. Transcript at 18-19, 37, 40. The team lead suggested she leave work for the day and claimant agreed. Transcript at 28. Claimant collected her personal items. When asked, she told the team lead she had one minor task she would give to a coworker to complete, and did so. Claimant felt she was too upset to continue working and did not want to discuss the verbal warning or situation with the interim team lead while she was upset. The team lead told claimant that the finance director wanted to see claimant in her office at 8:00 a.m. the next day. Claimant replied, "okay" clocked out and left for the day. *Id.*

(7) After leaving work, claimant left the finance director text and voicemail messages asking if she could have time off to calm down and get her emotions straight before sitting down with the finance director to talk. One or two hours later, on August 24, 2016, the finance director called claimant, said she was not able to give her time off, and discharged her over the phone, citing claimant's attitude as the reason.

(8) At the time of the discharge, claimant had recently transferred to the finance director's department, but neither the finance director nor another manager had ever given her a warning about her work performance or behavior. All of claimant's previous performance reviews rated her performance at "consistently exceeds" and "above" expectations.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must prove it is more likely than not that events occurred as alleged; if the evidence is credible and equally balanced, the employer has not proven misconduct.

The employer discharged claimant, in part, for leaving work without permission. Although the finance director alleged claimant left without permission, she was not present with claimant and the team lead at the time claimant left and therefore did not have any firsthand information about what occurred. The

team lead who was present at the time could not say whether she suggested claimant leave work, agreed that she could leave, or told her when to return to work. Claimant's testimony that she was authorized to leave work and instructed when to return is, therefore, undisputed, and establishes that claimant did not leave work without permission. To any extent the employer might not have intended to give claimant permission to leave work when she did, any error claimant made in acting on her belief that she had permission was in good faith, and, therefore, was not misconduct.

The employer also discharged claimant, in part, because of her attitude on August 24, 2016. The employer's witnesses did not specify what it was about her attitude that violated the employer's expectations, but mentioned sobbing, ignoring the team lead and ripping items off her cubicle walls, and using foul language as being problematic behavior.¹ With respect to the sobbing, the record fails to show that claimant was capable of controlling her emotional response to the warning and subsequent events. Given that the incident appears isolated in the scope of the employment relationship, and that claimant left the meeting when she did in an effort to control her emotional response to it, we infer that if claimant was capable of controlling her emotions and not crying at work, she likely would have. Claimant's emotional response was not misconduct.

With respect to leaving the meeting, the record is equally balanced. The finance director testified that claimant left without permission despite instructions to stay in the office to finish receiving the warning. Transcript at 10. Claimant testified that she excused herself from the office. Transcript at 31. Although the team lead testified that she asked claimant to return to the office, she did not voice an opinion about whether claimant left the office against instructions. Because the evidence is equally balanced about the circumstances under which claimant left the office, and the record shows that claimant was very emotional at the time, it is questionable whether she heard the instruction or had a conscious or willful intent to violate it, we conclude that leaving the office was not misconduct on claimant's part.

With respect to ignoring the team lead and ripping items off her cubicle walls, again, we find that the evidence in the record is equally balanced. The finance director alleged that claimant was "ripping it ["her personal stuff"] down off the wall . . . there was some yelling of swear words . . . [a] huge scene was caused." Transcript at 8-9. However she also indicated that she was not present when those acts allegedly occurred. Transcript at 7. The team lead who witnessed claimant's behavior testified that claimant "was taking all her personal items off the walls and out of drawers and everything and shoving them into her purse," "pretty much ignored me," "was angrily ripping things off the wall," used foul language but was otherwise "pretty silent," and "ignored me." Transcript at 18-19. Claimant did not testify that she ripped things off her cubicle walls and ignore the team lead, but rather that she organized her work, collected a couple of personal items to put in her bag, and spoke with the team lead. Transcript at 28-29. Testimony from others in the office in the vicinity of claimant's cubicle at the time of the events tends to suggest claimant's testimony is more reliable with respect to that portion of the events at issue. One witness heard emotional "gasping and – and crying and – and things like that," and

¹ The employer's evidence also suggested that the employer concluded claimant behaved improperly with respect to her request for additional time off to calm herself before returning to speak with the finance manager. However, the finance manager did not list that among the reasons for discharge, nor can we discern any misconduct in the act of requesting time off. The employer did not suggest or show that requesting time off, even weeks off, amounted to a violation of a reasonable employer expectation, and did not suggest that, upon refusing claimant's requests, claimant refused or indicated an intent to refuse to return to work on August 25th as the team lead had previously directed. No misconduct was alleged or shown with respect to claimant's request for additional time off work.

walked past claimant's cubicle and saw that claimant "was clearly packing things up and very like distraught." The witness did not describe any yelling, "ripping" activities, or that torn or disheveled items appearing to have been ripped off the walls were strewn about claimant's desk or cubicle. Transcript at 37. Another witness saw claimant and the team lead standing in the cubicle, and "that they were speaking and working together in the cubicle standing up and kind of collecting things," but she did not describe hearing yelling, "ripping" activities, or that claimant appeared to be ignoring the team lead. Thus, the evidence does not suggest that claimant was ripping things from the walls or ignoring the team lead, so misconduct has not been established with respect to that portion of the August 24th incident.

Finally, the employer alleged that claimant used foul language during her conversation with the team lead in her cubicle. Claimant testified that she did not use foul language, and that "I don't even use that language." Transcript at 30. The employer's evidence outweighs claimant's on that issue, however. The team lead testified that she heard claimant say "fucking bullshit." Transcript at 8, 18, 19. A witness in the vicinity of claimant's cubicle testified that although she did not recall the "exact swear words" claimant used, "there were swear words." Transcript at 37. Given the supporting evidence, it appears more likely than not that claimant used foul language. As noted above, the record is not clear that claimant, in her state of emotional upset, was conscious of her conduct with respect to the incidents at issue. Even if claimant's use of foul language was intentional or done with conscious indifference to the standards of behavior the employer had the right to expect of her, however, we would still conclude that the discharge was not for misconduct because her use of foul language was no more than an isolated instance of poor judgment for the reasons that follow.

An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent occurrence of poor judgment, rather than a repeated act or pattern of other willful or wantonly negligent behavior, which may not exceed mere poor judgment. OAR 471-030-0038(1)(d).² Claimant's other conduct on August 24th, for the reasons already explained, did not amount to other willful or wantonly negligent behavior. The finance manager testified that claimant had never before used foul language at work. Transcript at 13. Claimant's performance reviews rated her at exceeds or above expectations, and, prior to August 24th, she had never received a warning for her work performance or behavior at work. For those reasons, we conclude claimant's conduct was isolated. Foul language is not unlawful or tantamount to unlawful conduct. It was a single phrase uttered when claimant was in an apparent and extreme state of emotional distress, used to describe how she felt about the situation and not threatening, directed at or describing any particular person. Considering the totality of the circumstances, the record fails to show that it was the sort of behavior that any reasonable employer would conclude constituted an irreparable breach of trust or made a continued employment relationship impossible. We conclude, therefore, that claimant's use of foul language did not exceed mere poor judgment.

The employer discharged claimant for conduct that, at worst, was an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), an isolated instance of poor judgment is not misconduct. Therefore, claimant's discharge was not for misconduct, and she is not subject to disqualification from receiving unemployment insurance benefits because of this work separation.

² Conduct exceeds mere poor judgment when it is unlawful, tantamount to unlawful conduct, causes an irreparable breach of trust or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

DECISION: Hearing Decision 16-UI-69626 is affirmed.

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

DATE of Service: November 18, 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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