EO: 200
BYE: 201743

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

563
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0065

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110048). Claimant filed a timely request for hearing. On December 22, 2016, ALJ Lohuis conducted a hearing, and on December 28, 2016 issued Hearing Decision 16-UI-73574, affirming the Department's decision. On January 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but did not certify that he served the argument on the other parties as required by OAR 471-041-0080 (October 29, 2006). Claimant's written argument also contained information not offered into evidence during the hearing, and claimant did not show that factors or circumstances beyond his reasonable him from presenting that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument and new information, when reaching this decision.

FINDINGS OF FACT: (1) Looking Glass Youth employed claimant principally as a cook from sometime before 2016 until October 31, 2016. The employer operated a secure facility for youth with criminal backgrounds.

(2) The employer expected claimant to behave professionally during interactions in the workplace. Claimant understood this expectation as a matter of common sense.

(3) On September 14, 2016, during lunch service for the youth, an employee of a vendor arrived and began installing dispensers in a chemical closet off the dining room. Some youth were in the dining room eating at the time. Claimant told the vendor's employee that he did not think the vendor's employee should be there when youth were present in the dining room and asked the vendor's employee if he could perform his work at another time. Transcript at 8, 20-22. One of the employer's supervisors was in a room adjacent to the dining room and could hear the interaction between claimant and the vendor's employee. The supervisor thought that claimant raised his voice inappropriately to the

vendor's employee and was unnecessarily confrontational to him in front of the youth. Transcript at 8-10. The supervisor later spoke to claimant about the way in which he interacted with the vendor's employee and told him it was not acceptable. Claimant denied that he had yelled at the vendor's employee.

(4) Sometime around September 22, 2016, claimant spoke to one of the youth alone in the dining room about some of his behaviors that claimant considered inappropriate. The youth became upset and did not act courteously during the conversation. Claimant told the youth that if he continued to behave that way, "that's the kind of behavior that will keep you in these [types of residential] programs and [he] expected more out of that youth." Transcript at 19. Sometime before September 27, 2016, staff members reported to one of the employer's supervisors that on September 22, 2016 and September 26, 2016 the staff members had overheard claimant commenting to two different youths, "that their behavior meant they would always be in *** programs or in jails." Transcript at 12. The supervisor later told claimant that should "empathize" with the youth and should not speak to them so "abrasively or judgmentally." Transcript at 12.

(5) On September 27, 2016, the employer issued a written warning to claimant based on his behavior, as the employer understood it, on September 14, 22 and 26, 2016. On the warning, claimant disputed that he had ever prohibited the vendor's employee from completing his work or told him he was not allowed on the premises. Exhibit 1 at 3. That warning advised claimant he needed to "demonstrate a commitment to being a [more] positive role model *** through [more] positive interactions with youth, staff and vendors." Exhibit 1 at 4.

(6) Sometime before October 13, 2016, claimant was notified that a new employee was going to start working for the employer and that he was expected to orient her in the operations of the kitchen. On October 13, 2016, the new employee arrived in the kitchen for the orientation. Beginning after approximately October 14, 2016, claimant was scheduled to take a two week vacation, reporting for work on October 31, 2016. Sometime after the October 13, 2016 orientation, the new employee reported to one of the employer's supervisors that claimant had commented during the orientation that the employer's program was "shady," that he was being "forced out" of employment, that she "should watch her back" when she was at work, and that he "hoped the program crashed and burned," presumably when he was gone on vacation. Transcript at 5.

(7) On October 31, 2016, claimant reported for work after his two week vacation. On that day, the employer discharged him for what he told the new employee on October 13, 2014 because it did not comply with the expectations set out in the warning he received on September 27, 2016. Exhibit 1 at 1.

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 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-003893)(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-73754, the ALJ concluded that claimant engaged in misconduct and was disqualified from benefits. The ALJ reasoned that claimant's interactions with the vendor's employee on September 14, 2016 and with the employer's new employee on October 13, 2016 constituted at least wantonly negligent violations of the employer's standards. Hearing Decision 16-UI-73754 at 3. The ALJ further reasoned that claimant's violations of the employer's standards were not excused as an isolated instance of poor judgment since there were two violations, which meant they were not a" single or solitary incident." Hearing Decision 16-UI-73754 at 3. We disagree that claimant's behavior was not excused from constituting misconduct as an isolated instance of poor judgment and that he was disqualified from receiving benefits.

The ALJ implicitly concluded that the employer discharged claimant both based on his alleged behavior with the new employee on October 13, 2016 and his alleged behavior a month earlier with the vendor's employee. However, the employer's witness stated that what caused the employer to discharge claimant when it did was his behavior with the new employee, and the employer had known about claimant's earlier behavior, had issued to claimant a warning that encompassed that behavior and had not discharged him at that time for engaging in it. Transcript at 5, 12-13. On this record, it appears that the proximate cause of claimant's discharge was the final incident that preceded it, which was claimant's interaction with the new employee on October 13, 2016.

While claimant tried to minimize the significance of what he said to the new employee on October 13, 2016 by contending that he was warning the new employee of the employer's inaccurate payroll stubs and errors in calculating the employees' accrual of personal time off, his explanation fell short of explaining how he could have innocuously and unintentionally chosen such unflattering and disparaging language about the employer. Transcript at 23-25. Even assuming that claimant made the comments to the new employee as the employer alleged, however, and that those comments were at least wantonly negligent violations of the employer's standards, to establish misconduct the record must also show that claimant's comments are not excused under at least one of the exculpatory provisions of OAR 471-030-00038(3)(b). In this case, claimant's comments are excusable for the reasons that follow.

OAR 471-030-0038(3)(b) states that behavior that would otherwise constitute misconduct is excused from doing so if the behavior at issue was an isolated act of poor judgment. OAR 471-030-0038(3)(b). To be considered an "isolated instance" of poor judgment, claimant's wantonly negligent behavior on October 13, 2016 must have been, among other things, a single or infrequent occurrence or poor judgment rather than a repeated act of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). It also must not have exceeded "mere poor judgment" by unlawful or tantamount to illegal conduct and must not have caused an irreparable breach of trust in the employment relationship or otherwise have made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, the employer's witness only brought up claimant's alleged behavior with the vendor's employee on September 14, 2016 and alleged comments to youth made on September 21 and 26, 2016 as acts in violation of the employer's standards prior to October 13, 2016. With respect to claimant's behavior with the vendor, claimant plausibly explained that he did not know the vendor's employee was going to be present around the youth, was concerned about keeping confidential their identities when the

vendor's employee was likely to observe them and he approached the vendor to obtain an explanation. Transcript at 20, 21. Claimant denied that he "yelled" at the vendor's employee or that he raised his voice excessively above its normal level. Transcript at 21. There is no reason in the record to doubt the accuracy of claimant's testimony or to give greater weight to the testimony of the employer's witness, in which she stated claimant that claimant had previous knowledge that the vendor's employee was going to be on the premises and for some unexplained reason had "raised his voice" and was "confrontational" with the vendor's employee in front of the youth. Transcript at 8; Exhibit 1 at 3. The evidence is best evenly balanced about claimant's behavior that day. When the evidence on a disputed issue is of equal weight in a discharge case, the uncertainty must be resolved against the employer since it is the party who carries the burden of persuasion. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the employer did not demonstrate that claimant raised his voice excessively or yelled at the vendor's employee, was unreasonably confrontational with the vendor's employee or that claimant did anything in the interactions that fell outside of all reasonable interpretations of professional behavior. The employer did not establish claimant's behavior with the vendor's employee willfully or with wanton negligent violated the employer's standards.

With respect to claimant's interactions with the youth on September 21 and 26, 2016, the employer presented hearsay evidence that claimant supposedly told the youth on both occasions that their behavior meant they were going to always be in jail or in programs like the employer's. Transcript at 12. In connection with the interaction that claimant recalled, on September 21, 2016, claimant explained that in response to a youth acting out, he stated, "that's the kind of behavior that will keep you in these [types of residential] programs [because he] expected more out of that youth." Transcript at 19. Claimant's first-hand evidence on what he actually said to the youth is entitled to greater weight than the employer's hearsay facts about the same matter. While the comment that claimant recounted might not have been unconditionally supportive or completely empathetic of the youth, it also was not abusive. It could reasonably be interpreted as claimant said he intended, as an attempt to impart to the youth the insight that behaviors like those he was evincing in that interaction had not previously led to good outcomes for the youth and might appropriately be reconsidered. On this record, the evidence is insufficient to conclude that the comment claimant made to the youth was unprofessional or that claimant knew or should have known that, by uttering it, he was violating the employer's expectations. With respect to the supposedly similar statement claimant made to another youth on September 26, 2016, the employer again did not present sufficient specific evidence that it occurred or that, if it did, its context was different in substance from that of the comment on September 21, 2016. The employer did not demonstrate that the comments claimant allegedly made to youth on September 21 and 26, 2016 were willful or wantonly negligent violations of the employer's standards. The employer did not show that claimant's alleged behavior on September 14, 21 and 26, 2016 involved willful or wantonly negligent behavior on claimant's part; as such, claimant's wantonly negligent behavior on October 13, 2016 was an isolated act.

While the behavior we have assumed claimant engaged in on October 13, 2016 was ill-advised, it was not a violation of the law or tantamount to an unlawful act. Nothing in the records suggests that it was the type of behavior that would cause a reasonable employer to conclude that it caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. The employer presented no evidence that claimant's behavior on October 13, 2016 was, for some reason, emblematic of such a rupture in the employment relationship that the employer could no longer reasonably trust claimant to comply with its standards in the future. No evidence in this record is

insufficient to support the conclusion that, by its nature claimant's behavior on October 13, 2016 exceeded mere poor judgment. In sum, although claimant's behavior on October 13, 2016 might have been a willful or wantonly negligent violation of the employer's standards, it was a single or infrequent occurrence that did not exceed mere poor judgment. As such, it was an isolated instance of poor judgment. Isolated instances of poor judgment are not misconduct.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-73754 is set aside, as outlined above.

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

DATE of Service: February 13, 2017

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.