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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0160

Hearing Decision 17-UI-75008 Reversed – No Disqualification
Hearing Decision 17-UI-75006 Affirmed – Disqualification

PROCEDURAL HISTORY: On December 2, 2016, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding the employer suspended claimant for misconduct (decision # 135304), and the second concluding the employer discharged claimant for misconduct (decision # 125047). Claimant filed timely requests for hearing on both decisions. On January 18, 2017, ALJ Buckley conducted a consolidated hearing, and on January 19, 2017, issued Hearing Decision 17-UI-75008, affirming decision # 135304, and Hearing Decision 17-UI-75006, affirming decision # 125047. On February 8, 2017, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-75008 and 17-UI-75006. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0159 and 2017-EAB-0160).

Claimant's written argument contained information that was not part of the hearing record and he failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. For example, claimant could have requested that the ALJ keep the record open for the receipt of subsequently obtained relevant evidence, such as telephone records, if he planned to seek such evidence and had provided grounds to believe that such evidence would become available. Accordingly, under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing and claimant's written argument, to the extent it was based on the record.

FINDINGS OF FACT: (1) McDonald's employed claimant as a shift manager from August 1, 2015 to November 3, 2015.

(2) The employer expected claimant to report for work as scheduled or notify the employer at least two hours in advance of an assigned shift that he would be absent. The employer also expected claimant to act professionally in the workplace and refrain from using "obscene, profane, vile or abusive language or gestures" therein. Transcript at 6. The employer had a progressive discipline policy that provided

that a first offense would result in a written warning, a second offense would result in a three-day suspension, and a third offense would generally result in termination of employment. The employer's expectations and progressive discipline policy were contained in its employee handbook, a copy of which claimant reviewed in August 2015. Claimant was aware of the employer's expectations and policies.

(3) On October 12, 2015, claimant failed to report for work as scheduled or notify the employer that he would be late or absent because he forgot that he had to work an assigned shift. After he failed to report for work, the employer called and "reminded" claimant that he was supposed to be at work. Transcript at 13. Although claimant then reported for work, the employer gave him a written warning for being late.

(4) On October 25, 2015, claimant again failed to report for work for an assigned shift or notify the employer that he would be late or absent. The employer made several calls to claimant after his shift started to determine why he was absent, but claimant chose to not respond to its calls, after which the employer covered his shift. Claimant eventually reported for work 5:30 p.m., more than six hours after his shift started.

(5) On October 26, 2015, when claimant reported for work, a supervisor gave him written notice of a three-day suspension for failing to report for work as assigned or notify the employer that he would be late or absent the previous day. Upon receiving the notice, claimant became angry and responded by writing on the notice. Claimant's response included "several…derogatory comments . . . including . . . ,"You guys can go to hell . . . '[Fuck] off," and '[fuck] you.'" Transcript at 27. He then hung the notice containing his comments on a bulletin board that was visible to other employees. After a short period of time, claimant retrieved and destroyed the suspension notice. The supervisor on site notified the owner of claimant's actions.

(6) After three days of suspension, the employer informed claimant that his suspension would continue indefinitely. On November 3, 2015, the owner terminated claimant's employment for violating its policy against using "obscene, profane, vile or abusive language" in the workplace on October 26.

CONCLUSIONS AND REASONS: We agree with the ALJ in part. We disagree that the employer suspended claimant for misconduct and conclude he was suspended for an isolated instance of poor judgment, which is not misconduct. However, we agree that the employer discharged claimant for misconduct.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer suspended or 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

Suspension. In Hearing Decision 17-UI-75008, after finding that "claimant received a written warning for being tardy to work on October 12, 2015," and that claimant was not a credible witness, the ALJ accepted the employer's evidence and concluded that claimant had engaged in disqualifying misconduct on October 25, 2015, for which he was suspended. Hearing Decision 17-UI-75008 at 2-4. The ALJ reasoned that claimant had failed to report for work as scheduled that day or notify the employer he would be absent without a satisfactory explanation, and that because he had been warned for being late to work on October 12, 2015, his conduct could not be excused as an isolated instance of poor judgment. Hearing Decision 17-UI-75008 at 3-4. While we agree that claimant was not a credible witness because his explanations for his conduct were internally inconsistent, and that his conduct on October 25 was at least wantonly negligent because his failure to respond to the employer's calls demonstrated a conscious disregard of the employer's interests, we disagree with the ALJ that claimant's conduct was not excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Although there was no dispute that claimant received a written warning for being late to work on October 12, 2015, neither was there any dispute that he simply forgot about his shift and that his tardiness was his first offense since being employed by the new owner on August 1, 2015. Although his failure to remember that he was scheduled to work on October 12 may have been careless, or even negligent, on this record, it did not rise to the level of a conscious disregard of the employer's interests or expectations regarding attendance. Thus, it was not wantonly negligent. Accordingly, when claimant engaged in a wantonly negligent violation of the employer's attendance policy on October 25, 2015, his conduct was an isolated instance in the context of his employment up to that date.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as acts that are unlawful or tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused. However, claimant's October 25 conduct was not unlawful, tantamount to unlawful conduct or, viewed objectively, did not constitute conduct that would make a continued employment relationship impossible. Nor does it appear that the employer subjectively considered his October 25th conduct to have caused an irreparable breach of trust or made a continued relationship impossible given that the employer imposed a suspension, not a discharge, upon claimant for that conduct. The employer suspended claimant because of an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his October 25, 2015 suspension.

Discharge. The employer discharged claimant for writing derogatory comments, including, "You guys can go to hell . . . '[Fuck] off' and '[fuck] you'", on the suspension notice he received from the employer on October 26 and posting it on an employer bulletin board visible to other employees in violation of its policy against using foul language in the workplace. Although claimant denied using foul language or profanity in writing on the notice, we agree with the ALJ that claimant's testimony during the hearing demonstrated that he was not a credible witness, making the employer's hearsay evidence regarding what claimant wrote on the suspension more persuasive than claimant's testimony. *See* Hearing Decision 17-UI-75006 at 1-2.

Moreover, claimant's subsequent conduct in removing the notice from the bulletin board and then destroying it supports the employer's assertions, and supports our conclusion that claimant's conduct in posting the notice was at least wantonly negligent. Claimant did not dispute that he was aware of the employer's policy, and should have known as a matter of common sense that posting such language on an employer bulletin board would violate an employer expectation. More likely than not, claimant consciously violated the employer's expectation that he act professionally in the workplace and refrain from using "obscene, profane, vile or abusive language" therein. We agree with the ALJ that claimant's conduct was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). As referenced above, for conduct to be considered "isolated," it must be a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's wantonly negligent conduct was not isolated given that he had engaged in a separate act of wanton negligence the day before, resulting in his suspension. Nor was claimant's conduct excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that he sincerely believed or had a factual basis for believing the employer would condone posting foul and inflammatory language regarding its actions on an employer bulletin board visible to all workplace employees.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation, effective November 1, 2015 until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-75008, concluding that claimant was suspended for misconduct, is reversed. Hearing Decision 17-UI-75006, concluding that claimant was discharged for misconduct, is affirmed.

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

DATE of Service: <u>March 6, 2017</u>

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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