

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0342

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155746). Claimant filed a timely request for hearing. On February 23, 2017, ALJ Frank conducted a hearing, and on March 10, 2017 issued Hearing Decision 17-UI-78674, affirming the Department's decision. On March 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Travel Centers of America employed claimant until December 30, 2016 as a bartender.

(2) The employer expected its employees to refrain from engaging in harassing, abusive, disrespectful, disorderly, disruptive or otherwise unprofessional conduct at work. Claimant understood the employer's expectation because she received and reviewed a copy of the employer's policies at hire and as a matter of common sense.

(3) On December 28, 2016, at the end of her shift, claimant allegedly failed to secure the funds to start the next shift in the employer's safe. On December 29, 2016, at approximately 3:00 a.m., at the end of claimant's shift, the employer's general manager gave claimant a written warning stating that claimant had failed to secure the funds on December 28, that it was the second time she had failed to secure funds, and that she would be terminated immediately if she made the same error again. Exhibit 1 at 37, Employee Counseling and/or Separation Report. Claimant signed the warning and began to ask questions about the alleged violation. Claimant became "very indignant" and repeatedly asked who found the funds on December 28 and when the first incident occurred because she was dissatisfied with the manager's responses to her questions. Audio Record at 9:08 to 9:16. During the meeting, claimant

told the general manager that she was “lying” about claimant having left the money unsecured and “had it out for [claimant].” Audio Record at 14:41 to 14:48. Claimant told the manager she was going to take a booklet she had created regarding closing procedures. The general manager told claimant it was the employer’s property, and claimant did not take the booklet. Repeatedly during the meeting, the general manager and another manager who was present during the meeting told claimant she should leave. The other manager told claimant to “act like an adult,” and claimant told the general manager twice that she would “regret this” before leaving the meeting. Audio Record at 15:45 to 15:52; 16:43 to 16:56. Claimant did not use foul language or yell during the meeting. After she left the meeting, claimant briefly completed the end-of-day processes on the computer, and left the premises.

(4) The general manager reported what occurred during the December 29 meeting to the district manager and the human resources department. On December 30, 2016, the district manager discharged claimant for her behavior during the December 29, 2016 meeting, especially her statements to the general manager that she would “regret this.”

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant for an isolated instance of poor judgment, and not 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 is conscious of his conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. 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). Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 17-UI-78674, the ALJ found that the employer had a code of conduct prohibiting harassing, abusive, disrespectful, disorderly, and disruptive conduct and that claimant “repeatedly defied an order to leave the premises,” “tried to take property that did not belong to her,” and “issued a vague verbal threat more than once” during the December 29, 2016 warning meeting.¹ Based on those findings, the ALJ concluded that claimant willfully violated the employer’s conduct expectations and that her behavior during the December 29 meeting was not a good faith error and was too serious to be excused as an isolated instance of poor judgment because “her insubordination was sustained, and her threats, repeated.”²

¹ Hearing Decision 17-UI-78674 at 4.

² *Id.*

The employer discharged claimant for “threatening” the general manager during the December 29 meeting. Audio Record at 9:43 to 9:48. Claimant knew from the employer’s code of conduct, and as a matter of common sense, that engaging in an argument with the general manager violated the employer’s reasonable conduct expectations. Although the record does not establish that claimant’s “threat” that the manager would “regret this” was a communicated intent to inflict harm on her manager, it was insubordinate and presumably intended to unsettle the manager. We thus agree with the ALJ that claimant’s conduct in stating that the general manager would “regret this,” repeating the same questions, telling the general manager she was “lying,” and failing to leave immediately when asked was a willful violation of the employer’s conduct policy. Nor did claimant assert, and the record does not show, that claimant sincerely believed, or had a rational basis for believing, that her conduct complied with the employer’s expectations.

Although claimant’s behavior on December 29 was a willful violation of the employer’s conduct code, it can be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

Even though we, like the ALJ, found facts largely in accordance with the employer’s witnesses’ testimony regarding claimant’s conduct during the December 29 meeting, we disagree with the ALJ’s conclusion that claimant’s conduct was so serious that it exceeded mere poor judgment. Claimant’s conduct was not unlawful or tantamount to unlawful conduct. As stated above, the record does not show that, viewed objectively, claimant intended her comment that the manager would “regret this” to be a declaration of claimant’s intention to harm the manager. Nor does the record show that claimant’s conduct caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Although claimant was overzealous to the point of being insubordinate in communicating her disagreement about the warning, she did not lose control of herself, did not refuse to sign the warning, yell, use foul language, or physically threaten the managers during the meeting. She did not take the closing procedures booklet when the manager told her it was the employer’s property, and she did ultimately close out the computer for the day and leave the premises. Thus, the record fails to support the ALJ’s conclusion that claimant’s conduct exceeded mere poor judgment.

To be excusable as an isolated instance of poor judgment, the behavior must also be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. It is here that our findings differ most with those of the ALJ. We disagree that the preponderance of the evidence establishes the ALJ’s findings that claimant “usually deflected responsibility” for performance deficiencies, or that she had twice left funds unsecured.³ Claimant denied the employer’s allegation that she failed to accept responsibility for performance issues in the past (Audio Record at 31:04 to 31:17), and claimant’s confrontation with the managers on December 29

³ See Hearing Decision 17-UI-78674 at 1-2.

was due primarily to claimant's disagreement with the allegations that she had failed to secure funds on December 28 and one prior occasion. Because the preponderance of the evidence is no more than equally balanced that claimant had been insubordinate or threatening in the past, or that she engaged in other willful or wantonly negligent behavior including failing to secure funds, the December 29 incident was, on this record, a single occurrence. We therefore conclude that claimant's conduct during the December 29, 2016 meeting was an isolated instance of poor judgment, and not misconduct.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-78674 is set aside, as outlined above.⁴

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

DATE of Service: April 6, 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.

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⁴ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.