

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0373

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 123924). Claimant filed a timely request for hearing. On March 16, 2017, ALJ Frank conducted a hearing at which the employer failed to appear, and on March 24, 2017 issued Hearing Decision 17-UI-79562, concluding the employer discharged claimant for misconduct. On March 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). The employer filed an application for review with EAB on April 10, 2017.¹

FINDINGS OF FACT: (1) FMP Ovation Payroll, LLC, employed claimant from October 17, 2007 to November 1, 2016 as a line cook at Hometown Buffet.

(2) Claimant was unaware if the employer had a written policy regarding the use of drugs or alcohol in the workplace. However, the employer expected employees to refrain from consuming alcohol while at work. Claimant understood that expectation.

(3) One time during his employment prior to October 28, 2016, claimant consumed alcohol at work. The employer gave claimant a warning at that time directing him to refrain from consuming alcohol at work.

(4) On October 28, 2016, claimant consumed alcohol while working.

¹ The employer's application for review to EAB lacks justiciability and is not appropriate for EAB consideration because Hearing Decision 17-UI-79562 denied benefits to claimant. The employer may have filed an application for review because it wanted an opportunity to present new evidence regarding the discharge, but EAB did not consider the employer's application for review as a request to provide additional evidence because the employer provided no information establishing that factors or circumstances beyond the party's reasonable control that prevented the party from offering the information into evidence at the hearing, as required by OAR 471-041-0090(2) (October 29, 2006).

(5) On November 1, 2016, the employer discharged claimant because he consumed alcohol at work on October 28, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that the provisions of the Department's drug and alcohol adjudication policy do not apply to this case. We disagree with the ALJ and conclude that 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. 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).² The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-79562, the ALJ concluded that claimant understood as a matter of common sense and based on a prior warning that the employer expected him to refrain from consuming alcohol at work, and that he willfully violated that reasonable expectation by consuming alcohol on the job on October 28, 2016.³ Because claimant had consumed alcohol at work on one prior occasion, the ALJ concluded that the October 28 violation was not excusable as an isolated instance of poor judgment because it was a repeated act.⁴

We agree with the ALJ that claimant knew from a prior warning and as a matter of common sense that the employer expected him to refrain from consuming alcohol at work. Claimant's conscious decision to use alcohol at work on October 28, 2016 demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent. However, we disagree with the ALJ and conclude that claimant's conduct on October 28 was an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or part of a pattern of willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). An isolated act exceeds mere poor judgment only if it violates the law, is tantamount to unlawful conduct, creates an irreparable

² The employer discharged claimant for being under the influence of alcohol at work. Such a discharge would typically be analyzed under the disqualification provisions at ORS 657.176(2)(h) and ORS 657.176(9). However, OAR 471-030-0125(11) provides that, if the employer discharges an employee because of the use of alcohol in the workplace, and the employer has no written policy regarding the use, sale, or possession of drugs or alcohol in the workplace, the provisions of OAR 471-030-0038 apply. The record in this case fails to show the employer had a written drug and alcohol policy regarding the use, sale, or possession of drugs in the workplace. Thus, the provisions of OAR 471-030-0038 apply in this case.

³ Hearing Decision 17-UI-79562 at 4.

⁴ *Id.*

breach of trust in the employment relationship, or otherwise makes a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant consumed alcohol at work one other time during his nine years of employment with the employer. Absent evidence as to when the prior incident occurred, two incidents during nine years of employment fail to show claimant's exercise of poor judgment was not too infrequent to be considered a repeated act. Nor does the record show that claimant's exercise of poor judgment on October 28, 2016 was part of a pattern of other willful or wantonly negligent behavior. Claimant's conduct did not violate the law and was not tantamount to unlawful conduct, and the record fails to show it created an objectively irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible.

We therefore conclude the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-79562 is set aside, as outlined above.

DATE of Service: April 11, 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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