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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-0387

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 62443). Claimant filed a timely request for hearing. On March 13, 2017, ALJ Lohr conducted a hearing, and on March 14, 2017 issued Hearing Decision 17-UI-78875, concluding the employer discharged claimant, but not for misconduct. On March 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Kendall Hunt Publishing Company employed claimant as an acquisitions editor from January 25, 2016 to January 17, 2017. As an acquisitions editor, it was claimant's job to meet with college professors and obtain agreements with them to develop textbooks for the employer to publish and sell.

(2) Soon after claimant's hire, claimant complained to the employer that her male supervisor had made inappropriate and unwelcome sexual advances to her at work. Claimant saw a therapist and was prescribed medication due to the stress she experienced regarding her interaction with her supervisor. Thereafter, the male supervisor filed a similar complaint against claimant. The employer's human resources manager conducted an investigation and eventually concluded both complaints were unfounded. In March 2016, the employer assigned a female manager to supervise claimant.

(3) Claimant's new supervisor was often non-responsive to claimant's requests for information or clarification and treated her differently than other employees. For example, claimant's female supervisor told her not to speak at all with coworkers because she believed claimant would discuss her sexual harassment complaint with them, a prohibition that was later removed by the employer's human resources department as unreasonable. In December 2016, claimant was confused about deadlines for completing three sets of three "pre-plans," essentially appointment schedules she was to have created,

for upcoming campus visits. When she requested clarification from her supervisor, the supervisor refused to contact her by phone and sent an email to claimant that read, "We have nothing to discuss." Transcript at 20. Claimant eventually turned in all nine "pre-plans" on a date on which she thought they were due but which actually was past the supervisor's deadlines. On December 14, 2016, claimant received a written warning for turning in the pre-plans after their due dates.

(4) In January 2017, claimant went to the University of Washington campus to attempt to obtain commitments from professors to write textbooks. While there, claimant experienced problems inputting information regarding her cold calls, appointments and other sales efforts into the employer's "CRM", which was its software for inputting sales efforts and other related information. She contacted the employer's IT department regarding the problem and believed it had resolved the issue. Transcript at 27. She then inputted information, or thought she had done so, regarding her sales activities while there.

(5) On January 16, 2017, the employer's human resources supervisor emailed claimant and requested that claimant participate in a phone conference the next day with her, claimant's supervisor and an employer vice president to discuss claimant's sales activities while at the University of Washington. Claimant spoke to her therapist about the requested phone conference who advised her to avoid it due to the anticipated stress she would experience. When claimant relayed that information to the human resources supervisor, she responded with an alternative - a series of questions claimant could respond to in writing by noon on January 17, 2016. Claimant believed the answers to the questions could be obtained by reviewing the information she had inputted into the CRM while at the University of Washington. Later that afternoon, rather than respond to the questions in writing, claimant sent an email to the human resources supervisor that read, "You know exactly what the answers are because they [are] all in the CRM." Transcript at 35. However, in fact, the information claimant had attempted to input into the CRM while at the University of Washington was not actually in the CRM.

(6) The morning of January 17, 2017, before the noon deadline, claimant sent an email to the human resources supervisor inquiring if she intended to respond to her previous day's email. The human resources supervisor responded by advising claimant that her employment had been terminated.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment and not misconduct.

As a preliminary matter, claimant's first-hand testimony differed from that of the employer's witness, which was based in part on hearsay. However, the ALJ did not explicitly find that claimant was not credible,[1] and in the absence of evidence demonstrating that claimant was not credible, her first-hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant's evidence.

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

[1] *See* ORS 657.275 (2) (EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to an ALJ's implied credibility findings).

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).

In Hearing Decision 17-UI-78875, after concluding that claimant's failure to attend the phone conference on January 17 or respond to the employer's written questions by noon that day was at least wantonly negligent, the ALJ further concluded that claimant's wantonly negligent failure in that regard constituted no more than an isolated instance of poor judgment, which is not misconduct. Hearing Decision 17-UI-78875 at 4. We agree. While claimant was advised by her provider to avoid the telephone conference altogether and she sent emails to the human resources manager both before and after the noon deadline regarding her response that the answers to the questions could be found in the CRM, claimant's failure to do anything more demonstrated a level of indifference to the employer's directive to explain her work activities during the period in question and was at least wantonly negligent. However, we also agree that claimant's indifference constituted no more than 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. Viewing the record as a whole, the employer failed to establish with first hand evidence that claimant's failure to meet her December deadlines was either willful or the result of conscious indifference to the employer's deadlines and expectations. There was no dispute that claimant's supervisor refused to speak with claimant over the phone to answer her questions regarding the deadlines or other issues causing her confusion and that her only response to claimant was her email, "We have nothing to discuss." Accordingly, we agree with the ALJ that claimant's January 17 failure to respond to the employer's inquiries was no more than an isolated instance of wantonly negligent behavior.

OAR 471-030-0038(1)(d)(D) further provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceed mere poor judgment and cannot be excused. Here, claimant's failure to respond to the employer's inquiries was not unlawful or tantamount to unlawful conduct. Nor can we conclude, viewed objectively, that claimant's failure to participate in the employer's phone conference, made a continued employment relationship impossible, given the fact that she was following the advice of her therapist and the employer gave her an alternative to participating. That claimant also failed to respond in writing to the employer's questions also was not so egregious that it made a continued relationship impossible given the short turnaround time she was given, the stress she was experiencing and claimant's sincere belief that the information the employer sought was contained in the employer's CRM software.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-78875 is affirmed.

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

DATE of Service: May 10, 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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