

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0402

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154247). Claimant filed a timely request for hearing. On March 27 and 28, 2017, ALJ Monroe conducted a hearing, and on March 29, 2017 issued Hearing Decision 17-UI-79842, affirming the Department's decision. On April 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a general assistant in a dental office from July 8, 2013 to January 23, 2017.

(2) The employer expected its employees to be professional at work at to refrain from engaging in conduct and conversation at work that could reasonably be considered offensive. The employer also expected employees to be truthful during workplace investigations. Claimant received a copy of the employer's policies containing its expectations at hire and annually.

(3) The employees in the office where claimant worked commonly used foul language and spoke "openly" about sex at work. Transcript at 40.

(4) In July 2016, claimant made statements overheard by two other staff members in the employer's break room about engaging in a sex act with her boyfriend.

(5) On several occasions during the summer of 2016, a dentist who was claimant's superior told claimant regarding another dentist coworker, "Oh, you want to fuck him, don't you?" Transcript at 35. Claimant laughed and said that she would "fuck him if he wasn't married." Transcript at 35.

(6) Beginning in October 2016, the employer initiated an investigation into claimant's coworker interactions. During the investigation, two employees reported the statements claimant made about her

boyfriend in July 2016, and another reported that claimant had allegedly made sexual statements regarding a dentist at work.

(7) Prior to the incidents that arose during the employer's investigation, claimant had not violated the employer's policies regarding professionalism in the workplace.

(8) During November 2016, several employer representatives met with claimant and asked her general questions about the allegations made by claimant's coworkers. The employer representatives did not provide claimant with dates of the allegations or names of the declarants. Claimant denied discussing sexual conduct at work or making sexual statements about a coworker.

(9) On January 23, 2017, the employer discharged claimant for making comments of a sexual nature at work and allegedly being dishonest during the employer's investigation.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, 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 is conscious of her conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the 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 a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer asserted at hearing that it discharged claimant for engaging in a conversation about a sexual experience at work in July 2016, making statements of a sexual nature about a coworker, and being dishonest during the employer's investigation into those matters. Transcript at 5, 30. In Hearing Decision 17-UI-79842, the ALJ found that the employer met its burden to show that claimant engaged in conversations of a sexual nature and established misconduct.¹ We disagree and conclude that the employer discharged claimant for an isolated instance of poor judgment.²

¹ Hearing Decision 17-UI-79842 at 3, 4.

² OAR 471-030-0038(1)(d) (August 3, 2011) provides:

As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

The employer expected claimant to refrain from engaging in inappropriate conversation with other staff members. The employer alleged that claimant violated that expectation in July 2016 by relating a sexual encounter with her boyfriend to other staff in the employer's break room. Claimant did not dispute having made the comments. Although claimant asserted that "everyone in the office was open like that," and that "she didn't think she was doing anything wrong," claimant also stated that she understood that conversations of that nature were "frowned upon" by the employer. Transcript at 40. Claimant's discussion about a sexual encounter in the staff break room in July 2016 was, more likely than not, a wantonly negligent violation of the standards of behavior the employer had a right to expect of her.

Claimant's conduct was isolated, however. The employer presented hearsay evidence of prior incidents when claimant allegedly told a male dentist in her office that she "would so fuck him if he wasn't married." Transcript at 16. The ALJ did not make a credibility determination favoring either party. Claimant's account of the exchange was different, and absent a reason to disbelieve claimant's testimony, we find that claimant's firsthand testimony outweighs the employer's hearsay evidence. Claimant testified that she never initiated a sexual conversation about the dentist. Transcript at 35. Rather, claimant stated, another dentist in the office, who was claimant's superior, was "always giving me a hard time" about the male dentist and would comment that claimant wanted to "fuck him." Transcript at 35, 37. Claimant testified that she "would just chuckle and laugh" and agree because it was known that she "had a crush" on the dentist. Transcript at 35. Claimant testified that she "thought it was just a joke." Transcript at 35. Considering that claimant did not initiate the conversations, and that she was only responding affirmatively and jokingly to statements made by her superior, the record fails to show that claimant's conduct rose to level of being willful or wantonly negligent conduct, so her conduct in those instances did not make her July 2016 conduct part of a repeated act or pattern of other willful or wantonly negligent behavior.

Moreover, the employer failed to show that claimant's responses during the employer's investigation involved willful or wantonly negligent conduct on claimant's part. The employer's testimony about the questions its representatives asked claimant and her responses was inconsistent throughout the hearing. Claimant testified that the employer's questions during the investigation were so vague that she did not recall the alleged incidents the employer was questioning her about, and that her responses during the

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) 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).

investigation were truthful at the time because she did not recall the incidents at that time. Transcript at 43. We are persuaded by claimant's testimony, and conclude that the employer failed to show that claimant consciously engaged in willful or wantonly negligent dishonesty during the employer's investigation. For those reasons, we conclude that claimant's conduct in July 2016 was isolated.

Claimant's conduct in the July 2016 incident involved judgment, as she decided to discuss a sexually explicit incident near other staff, and claimant's judgment to willfully or with wanton negligence violate the employer's expectations was an exercise of poor judgment. The conduct did not violate the law, and was not tantamount to a law violation, however. Therefore, unless claimant's conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible, claimant's conduct is excusable as an isolated instance of poor judgment. The record does not suggest that an irreparable breach of trust occurred or that claimant's act rendered a continued employment relationship impossible.

Having so concluded, claimant's conduct in July 2016 was excusable as an isolated instance of poor judgment. Because isolated instances of poor judgment are not misconduct, we therefore conclude that claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-79842 is set aside, as outlined above.³

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

DATE of Service: April 26, 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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³ 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.