EO: 200
BYE: 201750

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0587

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75958). Claimant filed a timely request for hearing. On April 18, 2017, ALJ Murdock conducted a hearing, and on April 24, 2017 issued Hearing Decision 17-UI-81666, concluding the employer discharged claimant, but not for misconduct. On May 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kerr Contractors Oregon, Inc. employed claimant as a laborer until December 23, 2016.

(2) The employer expected claimant to refrain from arguing with and threatening his supervisors. Claimant should have known the employer's expectation as a matter of common sense.

(3) On December 22, 2016, claimant's foreman sent claimant a text message telling him to report to work early regarding his timecard. When claimant reported to work the morning of December 23 at the office trailer, his timecard was sitting on a table and was ripped in half. The foreman customarily ripped employees' timecards when they failed to complete them. Claimant asked why his timecard was ripped, and the foreman told claimant he forgot to put a date on his timecard. Claimant was dissatisfied that he had to complete an entirely new timecard and told the superintendent and foreman to complete it themselves. Claimant took his timecard, left the office, and went to park his truck and retrieve his equipment for the day. Claimant's superintendent went outside and told claimant as he walked toward his truck that the timecard rule applied to everyone and that the foreman was not treating claimant differently. The superintendent went back in the trailer to attend a meeting with some employees.

(4) Shortly after claimant parked his truck, he went back into the office trailer and began arguing with the superintendent about his timecard. Claimant had his finger pointed at the superintendent and used a raised voice. The superintendent asked the other employees present in the trailer if they had ever had their timecards torn up. Claimant was displeased that the superintendent was discussing his timecard with the other employees. Claimant approached the superintendent and said they should discuss the matter outside. Claimant left the office again. After the other employees left the office, claimant went back inside and asked the superintendent about work that day. The superintendent told claimant he was "done," because claimant "just threatened [him]." Transcript at 8, 39. Claimant denied having threatened the superintendent.

(5) Claimant had never engaged in threatening behavior at work before the alleged threat he made on December 23, 2017.

(6) The employer discharged claimant on December 23, 2016 for his conduct that day, including allegedly threatening the superintendent at work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

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). 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).

The employer's evidence that claimant "threatened" the superintendent on December 23, 2017 by stating that the superintendent and claimant "could go across the street and take care of it" (Transcript at 14) was no more than equally balanced with claimant's testimony that he asked the superintendent to go outside to talk, but did not threaten the superintendent, because he did not want to discuss his timecard in front of his coworkers in the office. Transcript at 31-32. The written statements the employer presented were inconsistent and did not entirely support the testimony from either the employer or

claimant regarding the alleged threat implied in asking the superintendent to go outside and across the street. Exhibit 2. The majority of the statements did not mention claimant having said that he and the superintendent should go outside, and of those that did, only half of them said claimant wanted to go across the street rather than just outside. Exhibit 2. It is implausible that the majority of the coworkers would not have mentioned a threat by claimant in their statements had claimant made an obvious threat. However, it is undisputed that there were multiple coworkers in the office when claimant was arguing with the superintendent and that the superintendent involved the coworkers in the argument. Thus, it is plausible that claimant told the superintendent that he wanted to go outside to discuss the matter because he "didn't want to talk in front of everybody being put on the spot," as claimant asserted at hearing. Transcript at 33. Moreover, it is undisputed that claimant denied having threatened the superintendent when he went back in the office the final time on December 23, and that denial was consistent with his testimony at hearing. Thus, as to whether claimant threatened the superintendent on December 23, we conclude that the evidence is no more than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has not satisfied its burden.

The employer's witness, the superintendent, testified at hearing that the employer would "probably not" have discharged claimant had he not "said something about going across the street to talk further." Transcript at 6. However, although the preponderance of the evidence does not show claimant threatened his supervisor on December 23, the employer did have a right to expect claimant to refrain from arguing with his supervisors about timecard procedures, and it discharged claimant when he did so. The preponderance of the evidence, including the coworkers' written statements, shows claimant engaged in an argument with the superintendent on December 23, including yelling at the superintendent, pointing at him, and "storming" out of the office. Exhibit 2. Claimant should have known as a matter of common sense that his conduct in arguing with the superintendent on December 23 probably violated the employer's expectations, and his conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, that his conduct complied with the employer's expectations. We therefore conclude that claimant's conduct on December 23 was a willful or wantonly negligent violation of the employer's reasonable expectations, which cannot be excused as a good faith error.

However, we do not find that claimant's conduct, when viewed objectively, was conduct that would create an irreparable breach of trust in the employment relationship. Claimant's conduct was inappropriate, but was mitigated by the employer's somewhat unreasonable measure of requiring a completely new timecard because of a minor error and claimant's act of leaving the office to end the argument. Nor does the record show that claimant's conduct exceeded mere poor judgment because it otherwise made a continued employment relationship impossible or was unlawful. The record therefore fails to establish that claimant's conduct exceeded mere poor judgment.

The remaining issue is whether claimant's exercise of poor judgment on December 23 was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. The employer itself presented evidence that claimant's conduct on December 23 was uncharacteristic for claimant, and it did not assert or show that claimant had violated its expectations in other respects, let alone that he did so willfully or with wanton negligence. The employer therefore failed to establish that claimant's exercise of poor judgment on December 23 was a repeated act or pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence.

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

DECISION: Hearing Decision 17-UI-81666 is affirmed.

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

DATE of Service: June 7, 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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