

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0629

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that the employer suspended claimant, but not for misconduct (decision # 92205), and the second concluding that the employer discharged claimant, but not for misconduct (decision # 93444). The employer filed timely requests for hearing on both decisions. On May 1, 2017, ALJ Lohr conducted a consolidated hearing, at which claimant failed to appear, and on May 3, 2017 issued Hearing Decision 17-UI-82402, affirming decision # 92205, and Hearing Decision 17-UI-82408, affirming decision # 93444. On May 22, 2017, the employer filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-82402 and 17-UI-82408. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0629 and 2017-EAB-0630).

FINDINGS OF FACT: (1) Seven Feathers Hotel & Casino Resort employed claimant from November 24, 2014 to March 6, 2017 as a baker in its pastry kitchen.

(2) The employer expected employees to engage in and encourage good coworker relationships by being helpful, and treating and speaking to coworkers in a courteous and respectful manner. Claimant knew or should have known and understood the employer's expectations from training at hire and as a matter of common sense.

(3) On February 22, 2017, claimant asked the executive chef for February 23, 2017 off from work to attend her aunt's funeral. The executive chef denied claimant's request due to business demands, but the lead baker and sous chef later granted claimant's request because they would cover claimant's work for her.

(4) On February 23, 2017, claimant reported to work for her shift because the executive chef had originally denied her request. The executive chef received reports from claimant's coworkers that worked with claimant that day that she behaved in a "very hostile, very rude," "really disrespectful,"

manner that day. Audio Record at 10:03 to 10:11. Claimant had preapproved time off and did not report to work from February 24 to 26, 2017. Claimant worked without incident on February 27 and 28, 2017.

(5) The employer's lead baker and others who worked with claimant on February 23, 2017 alleged that, on that day, claimant used foul language, was "short tempered" and "rude and disrespectful" towards her associates, and was "throwing stuff around." Audio Record at 17:16 to 17:22, 19:40 to 20:02. The lead baker also alleged that other associates stated they were "scared of [claimant]." Audio Record at 17:23 to 17:25. On March 1, 2017, based on the associates' allegations, the employer decided to suspend claimant to investigate the matter further.

(6) Claimant received warnings on January and November 2016 regarding accumulated incidents of tardiness and absences from work. On February 15, 2017, claimant received one verbal warning for burning pies.

(7) From March 1 until March 6, 2017, the employer continued to investigate claimant's February 23, 2017 conduct and decide if discharge was appropriate under its policies by obtaining additional associates' statements and interviewing associates to verify the information.

(8) On March 6, 2017, the employer discharged claimant for treating her associates in a discourteous and disrespectful manner on February 23, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was suspended and discharged, but not for misconduct.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended claimant for misconduct connected with work. 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).

Suspension. The employer suspended claimant to investigate claimant's conduct on February 23, 2017 and decide whether to discharge claimant. Although claimant's conduct on February 23 triggered the suspension, at the time it suspended claimant, the employer had not yet completed its investigation or decided if it would discharge claimant. Because the employer had not yet determined at the time of the suspension that claimant had violated its policies or the extent to which she should be disciplined for any wrongdoing, EAB concludes that claimant's suspension was not for misconduct attributable to claimant. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of her suspension from work.

Discharge. The employer reasonably expected that claimant would treat her associates in a courteous and respectful manner. We presume that claimant understood that expectation as a matter of common sense. The uncontested evidence in the record shows claimant was in a foul mood on February 23, 2017 and treated her associates in a rude and disrespectful manner throughout her shift that day. Based on this record, we conclude it more likely than not that claimant's behavior on February 23 was at least a wantonly negligent violation of the employer's expectations regarding how an employee may treat his or her coworkers. Nor does the record show that claimant's conduct was a good faith error because it does not show claimant honestly believed that her conduct was of the sort that the employer would deem acceptable.

Claimant's willful or wantonly negligent behavior on February 23 may be excused from misconduct that disqualifies her from unemployment benefits if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). An isolated instance 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). Behavior that exceeds "mere poor judgment" may not be excused. OAR 471-030-0038(1)(d)(D). An act exceeds mere poor judgment if it was unlawful, tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship possible. OAR 471-030-0038(1)(d)(D).

It is first necessary to determine if claimant's behavior on February 23 was a single or isolated occurrence of misconduct. Although claimant's conduct affected multiple associates, it was not comprised of separate and discrete acts. It consisted of a single incident with claimant engaging in rude and disrespectful conduct toward her coworkers throughout her shift on February 23. *See accord Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (claimant's violation of the employer's disciplinary policy on two consecutive days was an isolated instance of poor judgment; it was a "single occurrence in the employment relationship" because the incident on the second day was a continuance of the incident on the previous day). Moreover, although claimant had prior warnings, the record fails to show that claimant engaged in any willful or wantonly negligent violation of the employer's attendance or performance policies. EAB therefore concludes that claimant's conduct on February 23 was an isolated instance of willful or wantonly negligent conduct.

Claimant's isolated behavior can be excused as an isolated instance of poor judgment if it did not exceed "mere poor judgment." Claimant's conduct was neither unlawful nor tantamount to unlawful conduct. Claimant's hostile, disrespectful behavior, although upsetting to the employees who worked with her on February 23, involved no direct threats of physical harm. The record does not establish that claimant was attempting to harass her associates, but rather, that she was acting out because she was displeased that the executive chef's initial denial of her request for time off work. Claimant returned to work on February 27 and apparently completed her shifts on February 27 and 28 without further incident. The record fails to show that claimant's conduct on February 23 was the type of behavior that would cause a reasonable employer to lose trust that claimant could continue to effectively perform her job duties or that a continued employment relationship impossible. Claimant's conduct did not exceed mere poor judgment and was, therefore, excusable as an isolated instance of poor judgment.

In sum, the employer suspended and discharged claimant, but not for misconduct. Claimant not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decisions 17-UI-82402 and 17-UI-82408 are affirmed.

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

DATE of Service: June 15, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.