

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0669

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141837). Claimant filed a timely request for hearing. On May 9, 2017, ALJ M. Davis conducted a hearing, and on May 11, 2017, issued Hearing Decision 17-UI-83194, affirming the Department's decision. On May 30, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument, but only to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Seven Feathers Hotel & Casino Resort employed claimant from March 11, 2013 to March 8, 2017, last as a guest services attendant (GSA) in its slots department.

(2) The employer had a policy prohibiting employees from engaging in poor coworker relations, including failing to get along with or show courtesy and respect toward coworkers, and not contributing to good morale. Claimant was aware of the employer's policy.

(3) On February 2, 2017, another GSA told claimant that one of the employer's beverage servers performed sexual favors for guests and used heroin.

(4) On March 3, 2017, a slots supervisor called claimant into the manager's office to sign a corrective action for being absent from work 3 times during the previous 12 months. At the supervisor's request, one of the employer's slots attendants, whom claimant believed often neglected to perform her duties, was present to witness the signing. Claimant did not know the slot attendant was there for that reason, and believed she again was neglecting to perform her duties. Claimant signed the corrective action and left the office. The slot attendant remained in the office.

(5) Claimant was upset but returned to his designated work zone and took some empty glasses to the employer's beverage room. The other GSA was in the beverage room, noticed that claimant was upset, and asked him what was wrong. Claimant replied, "I am just sick and tired of her sitting on her fat ass in the office doing nothing." Audio Record at 19:15. The GSA asked claimant whom he was talking about. Claimant told the GSA he was talking about the slots attendant, and left the beverage room.

(6) A few minutes later, claimant apologized to the GSA for his behavior. However, the GSA reported claimant's behavior to the slots supervisor and slots attendant. The slots attendant confronted claimant and asked if he had a problem. Claimant replied that he did not. The slots attendant told claimant that he should focus on his own work, and not worry about what others were doing. Claimant agreed. Claimant later apologized to the slots supervisor and the slots attendant. The slots attendant accepted claimant's apology.

(7) Claimant also met with the slots supervisor and the GSA to discuss his behavior. During the meeting, claimant questioned what he considered to be the GSA's worse behavior in telling him that the beverage server performed sexual favors for guests and used heroin. Claimant also reported GSA's behavior to the beverage server so that she could complain to human resources if she so desired.

(8) The employer discharged claimant for making the "inappropriate comments" about the slots attendant, and for allegedly "starting to spread harmful gossip that could be interpreted as harassment" by telling the beverage server what the GSA had said about her on February 2, 2017. Audio Record at 8:00.

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

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged 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. 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).

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). Only isolated acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship or otherwise make a continued 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).

In Hearing Decision 17-UI-83194, the ALJ concluded that claimant willfully violated the employer's expectations regarding workplace behavior when he told the GSA that he was "just sick and tired" of the slots attendant "sitting on her fat ass in the office doing nothing," and again when told the beverage server that the GSA had told him the beverage server performed sexual favors for guests and used heroin.¹ The ALJ further concluded that because claimant willfully violated the employer's expectations regarding workplace behavior two times in one day, his conduct could not be excused as an isolated instance of poor judgment.²

We agree with the ALJ that claimant's comment about the slots attendant was a willful, or at least wantonly negligent, violation of the employer's expectations regarding workplace behavior. However, we disagree with the ALJ's conclusion that the same is true with respect to claimant telling the beverage server what the GSA had told him about her. At hearing, the employer's witness testified that the employer concluded claimant's statement to the beverage server violated the employer's policy against "poor coworker relations" because it was the spreading of "harmful gossip" that could be interpreted as "harassment." However, the record shows that claimant notified the beverage server that the GSA was spreading gossip about her so that she could complain to human resources if she desired, and not that claimant was spreading harmful gossip about the beverage server or harassing her. Audio Record at 33:45-34:45, 47:30-48:00. The record therefore fails to show that claimant engaged in the alleged spreading of gossip and harassment for which he was, in part, discharged.

In addition, although the ALJ asserted that claimant testified he understood at the time that his statement to the beverage server violated the employer's policy against poor coworker relations,³ claimant, in fact, testified that he did not. Audio Record at 34:00-35:00, 47:00-48:00. The record fails to show claimant knew at the time his conduct violated the employer's policy, or that he should have known it would through prior training, experience or warnings. Nor do we find claimant's conduct so egregious that we infer he should have known it would as a matter of common sense. The employer therefore failed to show that claimant violated the employer's policy or expectations regarding workplace behavior willfully or with wanton negligence when making the statement to the beverage server.

The remaining issue is whether claimant telling the GSA that he was "just sick and tired" of the slots attendant "sitting on her fat ass in the office doing nothing" may be excused as an isolated instance of poor judgment. Although the record shows that claimant was absent from work three times during the previous 12 months, the employer did not assert, and the record does not show, that claimant was deliberately absent from work, that he consciously engaged in conduct he knew or should have known would result in his absences from work, or that he acted with indifference to the consequences of his absences from work. The employer therefore failed to establish that claimant's poor judgment in making the comment about the slots attendant to the GSA was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence. Claimant's conduct did not violate the law and was not tantamount to unlawful conduct. Nor, viewed objectively, was it so egregious that created an irreparable breach of trust in the employment relationship, especially given

¹ Hearing Decision 17-UI-83194 at 1-3.

² *Id.* at 3.

³ *Id.*

that claimant almost immediately apologized to the GSA, and apologized to the slots supervisor and slots attendant a short time later. Claimant's conduct therefore did not exceed mere poor judgment.

The employer failed to establish that it discharged claimant for misconduct, and not an isolated instance of poor judgment. Claimant therefore is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 17-UI-83194 is set aside, as outlined above.

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

DATE of Service: June 27, 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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