

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1054

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153445). Claimant filed a timely request for hearing. On August 14, 2017, ALJ Meerdink conducted a hearing, and on August 15, 2017 issued Hearing Decision 17-UI-90384, affirming the Department's decision. On August 30, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) ColumbiaCare Services, Inc. employed claimant as a support specialist from April 22, 2016 to June 20, 2017.

(2) On June 20, 2017, the employer's administrator instructed claimant to clean a bathroom. Claimant felt upset because she thought another coworker, whom she felt had bullied her for months, was shirking her own duties and leaving claimant to perform all the chores. Claimant, in a loud voice, told the administrator that she did not feel well, that the other employee had not done any chores the day before, and that the other employee should be assigned to clean the bathroom. The supervisor thought claimant was yelling, told her to lower her voice, and said he was asking her to clean the bathroom. Claimant then went to the utility area to get gloves and cleansers, went to the bathroom, and began to clean it.

(3) While claimant was cleaning the bathroom, the supervisor came into the room and stood over her talking. Claimant felt upset that she had been asked to clean the bathroom, and even more upset that the supervisor came into the room to speak to her about the matter while she was cleaning it. Claimant commented to him, "I'm not your slave" and "I'm not your nigger." Transcript at 7, 8, 27. Claimant then stood up and walked out of the bathroom. The supervisor asked, "Did you know that there's a

client here?” Transcript at 28. Claimant had not seen a client and did not realize any were present. The client and several other staff heard claimant’s argument with the supervisor.

(4) The administrator instructed claimant to leave. Claimant complied and went to the breakroom to get her purse, where she encountered the other employee she felt had been mistreating her and shirking her duties. Claimant told the coworker that she was “a lazy bitch” then left as instructed. *Id.* On June 20, 2017, the employer discharged claimant because of her behavior that day.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that the employer discharged claimant for an isolated instance of poor judgment, which is 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).¹

The ALJ concluded that claimant’s discharge was for misconduct because it was for willful and insubordinate conduct, and, although there was only one instance at issue, that claimant’s “use of a derogatory racial epithet directed at a superior, especially in the presence of a client, is inexcusable and makes a continued employment relationship impossible.” Hearing Decision 17-UI-90384 at 3. Although we agree with the ALJ that claimant’s conduct in yelling at her supervisor, using a racially charged word, and calling her coworker a “bitch” amounted to a willful violation of the standards of behavior the employer had the right to expect of her, we disagree that the conduct is not excusable.

It appears on this record that claimant’s conduct was an isolated instance of poor judgment. Although there were several components to claimant’s conduct on June 20th, it appears that the entire incident involved only one exercise of poor judgment because the entire episode occurred while claimant was upset that her supervisor asked her, instead of her coworker, to do a task, it occurred within what

¹ OAR 471-030-0038(1)(d) provides: As used in this rule, the following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(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).

appears to be a short window of time without any significant passage of time in which she might have cooled down or gathered her thoughts, and it does not appear that she engaged in separate acts of decision-making during the episode. Although the employer issued a disciplinary action to claimant based upon some behavior that occurred prior to May 10, 2017, the employer did not provide sufficient detail about claimant's acts during the hearing from which we could find what, specifically, claimant said or did, what policy or expectation her conduct violated, and whether claimant engaged in the conduct willfully or with wanton negligence. Accordingly, we conclude that claimant's June 20th conduct was an isolated incident.

It also appears that claimant's conduct did not exceed mere poor judgment. Her conduct was not unlawful or tantamount to unlawful behavior, nor did the employer suggest that she engaged in the sort of behavior that would cause an irreconcilable breach of trust in the employment relationship, such as theft, lying or falsification of records, to name a few. The question, then, is whether claimant's conduct made a continued employment relationship impossible. There can be no real dispute that claimant became upset over what was a commonplace instruction to clean a bathroom, a task that was within her job description, nor is there a dispute that her reaction was out of proportion to the circumstances. Likewise, there is no question that the word "nigger" is generally considered offensive and is, usually, taboo, particularly in the workplace. However, the fact that claimant used the word "nigger" in her upset outburst does not, in and of itself, mean that her conduct exceeded mere poor judgment. Contrary to the ALJ's finding, claimant did not "direct" the word at her supervisor or anyone else; if anything, she used the term in reference to herself. She was unaware that any clients were present to overhear her. On this record, she engaged in only one outburst, the outburst was of relatively short duration, she did not utter any threats toward anyone in particular, utter general threats of violence, or use aggressive body language during the incident, and she engaged in only minimal name-calling. Also notable is that at all relevant times, it appears that she complied with the supervisor's instructions, both to clean the bathroom and, later, to leave the workplace, and she did not persist in arguing with the supervisor once told to leave. Those mitigating circumstances demonstrate that, despite her use of strong and charged language in the workplace, claimant's behavior was not so out of control that it would cause any reasonable employer to conclude that she was no longer employable or that a continued employment relationship was impossible because of it. Claimant's conduct therefore did not exceed mere poor judgment, and is excusable as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 17-UI-90384 is set aside, as outlined above.²

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 25, 2017

² 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.

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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