EO: 200
BYE: 201823

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

816
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1107

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144525). Claimant filed a timely request for hearing. On August 24, 2017, ALJ Amesbury conducted a hearing, and on August 28, 2017 issued Hearing Decision 17-UI-91331, affirming the Department's decision. On September 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a retail service specialist from October 22, 2014 until June 13, 2017. Exhibit 1 at 3.

(2) The employer had a harassment-free workplace policy that prohibited all verbal and physical conduct designed to threaten, intimidate, bully or coerce a coworker. Exhibit 1 at 11. Claimant understood the employer's policy.

(3) On one occasion in August 2016 and on another occasion in October 2016, claimant received coaching from her supervisor because all the closing duties had not been completed at the end of the prior night's shift. Claimant was not on duty during one of the two shifts. Her coworker refused to assist her in completing the closing duties on the other occasion.

(4) On June 6, 2017, claimant took her shoes off at work because her feet were swollen. Later, shortly before closing time, claimant sat under the front counter to put her shoes back on and responded to a text message from her father about an urgent family matter. Claimant had taken a lunch break earlier in the day, but had not taken any other rest breaks. A coworker who was working with claimant took a

photograph of claimant sitting below the counter and sent it to a supervisor. The supervisor warned claimant that she was seen sitting under a counter with her shoes off, not working, while she should have been completing closing duties.

(5) On June 7, 2017, claimant sent a text message to the coworker who took the photograph, stating, "I getting really tired of people telling me your [sic] talking shit about me. It better stop or you won't like what will happen." Exhibit 1 at 34. The coworker showed claimant's text message to a supervisor and told him he interpreted claimant's statement as a threat of physical harm.

(6) Claimant had never engaged in harassing conduct toward a coworker at work before June 7, 2017.

(7) On June 13, 2017, the employer discharged claimant for sending a coworker a text message that violated its harassment-free workplace policy.

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.

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 discharged claimant because of the intimidating text message she sent to her coworker on June 7, 2017. Claimant should have known from the employer's harassment-free workplace policy and common sense that the statement, "It better stop or you won't like what will happen," probably violated the employer's expectations, and her conscious decision to send the message demonstrated indifference to the consequences of her actions. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that her conduct complied with the employer's expectations. We therefore conclude that claimant's conduct on June 7 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 make a continued employment relationship impossible. Although the plain language of claimant's text shows claimant intended to intimidate claimant's coworker so he would stop speaking disparagingly about claimant, it does not show, and claimant denied, intent to threaten the coworker with physical harm. Transcript at 18. Moreover, the claimant's conduct is mitigated by the allegedly harassing conduct by the coworker that claimant alleged precipitated her text message. Transcript at 18-19. Thus, although claimant's text message was designed to coerce the coworker, it was not sufficiently threatening or persistent to be unlawful or tantamount to unlawful conduct, or to create an irreparable breach of trust in the employment relationship. 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 June 7 was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. The record contains no evidence that claimant's June 7 conduct was a repeated act in violation of the employer's expectations. The employer did contend that claimant failed to complete the store closing duties twice during 2016. *See* Exhibit 1 at 35, 36. The record fails to show that claimant knew or should have known the employer's closing expectations from its policies, prior training or warnings, or that the failure to complete the closing duties was attributable to claimant, either because it was her coworker who failed to complete the duties, or claimant was not on duty during the particular closing shift. Moreover, the 2016 incidents were too remote in time to constitute part of a pattern of willful or wantonly negligent behavior. Regarding the allegations that claimant was "sitting around" during work time, claimant testified that she had not taken a rest break until that time. Exhibit 1 at 10. The preponderance of the evidence does not show that claimant's decision to take her break when she did on that occasion rose to the level of willful or wantonly negligent conduct. The record fails to show that claimant engaged in other willful or wantonly negligent incidents of poor judgment, so the conduct involving the text to claimant's coworker was isolated, and excusable as an isolated instance of poor judgment.

Because the conduct for which claimant was discharged was an isolated instance of poor judgment, it did not constitute misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-91331 is affirmed.

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

DATE of Service: <u>October 13, 2017</u>

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.