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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1238

Hearing Decisions 17-UI-93928 and 17-UI-93929 Reversed
No Disqualification

PROCEDURAL HISTORY: On June 23, 2017, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that the employer suspended claimant for misconduct (decision # 85153), and the second concluding that the employer discharged claimant for misconduct (decision # 72715). Claimant filed a timely request for hearing on each decision. On September 29, 2017, ALJ Janzen conducted a consolidated hearing, which was continued on October 3, 2017, and on October 5, 2017 issued Hearing Decision 17-UI-93928, affirming decision # 85153, and Hearing Decision 17-UI-93929, affirming decision # 72715. On October 25, 2017, claimant filed applications for review of Hearing Decisions 17-UI-93928 and 17-UI-93929 with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why he was unable to present this information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. Accordingly, EAB considered only information received into evidence at the hearings and claimant's argument only to the extent it was based on the record when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-93928 and 17-UI-93929. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1237 and 2017-EAB-1238).

FINDINGS OF FACT: (1) Albertina Kerr Centers Inc. employed claimant as a direct support professional for physically and developmentally disabled individuals from March 2008 to May 4, 2017.

(2) The employer expected its employees to treat coworkers in a courteous and respectful manner and to refrain from engaging in harassing conduct toward one another. Claimant knew and understood the employer's expectations from both training and as a matter of common sense.

(3) On April 27, 2017, claimant asked his ex-girlfriend (MV), who also worked for the employer and had possession of his automobile, if they could meet. MV told him that she was at work but agreed to meet with him there if he brought her cigarettes. When claimant showed up at the group home where MV was working, she was surprised because she knew claimant did not approve of cigarette smoking. Claimant told MV he was there to discuss her possession of his motor vehicle after their breakup because she had not made payments as agreed. MV became visibly upset over his desire to discuss that matter while she was at work and asked him to step outside to discuss the issue or leave. Claimant initially refused so MV texted the acting supervisor (CD) of the group home to inform her that claimant was at the home and would not leave. CD responded by text and told MV to call the police if claimant persisted in his refusal to leave. At that point, another coworker at the group home intervened and suggested that claimant leave and return "after dinner." Transcript (September 29, 2017) at 19. Claimant agreed and returned to another vehicle which was parked in the driveway. The employer's assistant director (MK), who had been informed by CD what was transpiring, contacted claimant by phone, while he was still in the driveway, and notified him that she was suspending him and that he would remain on suspension until they met. She directed claimant to leave the premises, which he did.

(4) Shortly after claimant left, CD arrived at the group home and MV told her she had not contacted the police because claimant had left the premises. However, CD directed MV to contact the police at that point in case claimant was waiting for her to leave work. The police arrived, looked for claimant and the vehicle he had arrived in , and when they could not find him, told MV and CD there was nothing to be done at that time. No police report regarding the events of April 27 was prepared by the police.

(5) On May 4, 2017, the employer met with claimant and discharged him for violating its policy against coworker harassment based on the same April 27, 2017 incident for which he was suspended. Claimant had not been disciplined previously by the employer.

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

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer suspended or 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, claimant and MV offered testimony regarding the April 27 incident that conflicted with the testimony offered by the employer, which was based largely on hearsay statements from the other staff members at the group home that day that were reduced to writing at the employer's request but not offered into evidence (i.e. double hearsay). For example, MK stated that the other two staff members at the home reported that in arguing with MV, claimant disrupted the home and upset the

developmentally disabled residents there, and after they asked claimant to leave, he replied, "I'm a fucking employee of Kerr and I don't have to leave." Transcript (September 29, 2017) at 7. However, both claimant and MV asserted that claimant never used foul language, the residents at the home did not appear upset and claimant agreed to and did leave the home after another staff member asked him to leave and return later. Transcript (September 29, 2017) at 19, 30-34.

In Hearing Decisions 17-UI-93928 and 17-UI-93929, the ALJ found facts in accordance with the employer's evidence, reasoning that the first hand testimony of both claimant and MV was outweighed by the employer's hearsay evidence[1] and then concluded that claimant was first suspended and then discharged for misconduct, reasoning that claimant refused several employees' requests to leave the work place on April 27 and that his conduct could not be excused as an isolated instance of poor judgment because it was tantamount to criminal trespass. Hearing Decisions 17-UI-93928 at 3-4 and 17-UI-93929 at 4. We disagree with the ALJ's findings, conclusions and reasoning because they were not supported by substantial evidence, found facts in accordance with claimant's first-hand evidence on matters in dispute, and conclude that claimant was suspended and then discharged for an isolated instance of poor judgment, which is not misconduct.

There was no dispute that claimant was aware of the employer's policy prohibiting disrespectful conduct toward coworkers in the workplace. There also was no dispute that claimant, who was off-duty on April 27, came to MV's workplace at her invitation not to bring her cigarettes as she requested but to discuss a personal matter regarding her continuing possession of his motor vehicle, which visibly upset her given it was taking place in the work environment. Thirdly, there was no dispute that claimant initially refused MV's requests to either step outside to discuss the issue or leave, but that he left the residence and returned to his car in the driveway after another coworker suggested he leave at that time and return "after dinner." Accordingly, more likely than not, claimant was conscious of the fact that his attempt to discuss a personal matter with MV while she was at work, which she obviously did not want to do, probably violated the employer's policy regarding respecting coworkers in the workplace and that he was at least wantonly negligent in coming to the employer's group home to do so.

However, we conclude that claimant's conduct was excusable as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The record fails to show that claimant been disciplined previously for other willful or wantonly negligent behavior. See Transcript (September 29, 2017) at 9-10. His conduct on April 27, 2017, therefore, was a single or infrequent occurrence.

However, under OAR 471-030-0038(1)(d)(D) isolated acts that violate the law, are tantamount to unlawful conduct, 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). In Hearing Decisions 17-UI-93928 and 17-UI-93929, the ALJ concluded that claimant's conduct on April 27 "in refusing to leave the group" was tantamount to criminal trespass in the second degree under ORS 164.245(2) and for that reason was not excusable as

[1] *See*, OEC 801 (3)(defining hearsay as a statement by other than the declarant offered in evidence to prove the truth of the matter asserted).

an isolated instance of poor judgment. Hearing Decisions 17-UI-93928 and 17-UI-93929 at 4. However, ORS 164.245 provides that a person commits the crime of criminal trespass in the second degree, a Class C misdemeanor, if the person remains unlawfully in or upon premises.[2] ORS 164.205(3)(b) provides that "remain unlawfully" means "to fail to leave premises that are open to the public[3] after being lawfully directed to do so by the person in charge." ORS 164.205(5) provides that "person in charge" means a person, a representative or employee of the person who has lawful control of premises by ownership, tenancy, official position or other legal relationship." Here, the record fails to show that claimant refused a directive to leave the premises by a "person in charge." The person in charge of the group home in question on April 27, 2017 was CD, who did not direct claimant to leave at any time because he had already left by the time she arrived on April 27, 2017. Her supervisor, KD, was also a person in charge but the record shows that claimant did leave the premises after she directed him to do so by phone while he was still in his car in the group home driveway. Accordingly, claimant's initial failure to leave the premises when initially asked to do so by MV did not constitute or was not tantamount to criminal trespass in the second degree and for that reason did not exceed mere poor judgment under OAR 471-030-0038(1)(d)(D).

The employer also presented hearsay evidence that claimant's behavior on April 27 was extremely disruptive to the residents and staff there at that time and for that reason the employer decided to terminate claimant's employment. Transcript (September 29, 2017) at 11-14. However, because the individuals who reportedly were the source of that evidence, which was disputed by both claimant and MV, did not testify at hearing, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from current or former employees to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. The fact that claimant had the opportunity to question the assistant director regarding what she had been told was insufficient to test the source of those statements. The fact that claimant may have had the same opportunity as the employer to call the witnesses was immaterial, because claimant did not have the burden to prove misconduct. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that his first-hand testimony and that of MV is not outweighed by the employer's hearsay.[4] Accordingly, the evidence as to whether claimant was extremely disruptive to residents and staff on the day in question is, at best, equally balanced, and the ALJ's findings and conclusions that he was, is not supported by substantial evidence.[5]

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[2] ORS 164.205(6) states that "premises" includes any building and any real property, whether privately or publicly owned.

[3] ORS 164.205(4) states that "open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required.

[4] The ALJ's reasoning that the employer's hearsay was more "logical and consistent" than claimant's first-hand testimony, and therefore more reliable, was circular because he measured claimant's testimony against the employer's hearsay, which he apparently accepted as true prior arriving at that conclusion.

[5] *See, Cole/Dinsmore v DMV,* 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

We therefore conclude the employer first suspended and then discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on either the suspension or the discharge.

DECISION: Hearing Decisions 17-UI-93928 and 17-UI-93929 are set aside, as outlined above.[6]

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

DATE of Service: November 28, 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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[6] These decisions reverse a hearing decisions that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.