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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1258

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 151107). The employer filed a timely request for hearing. On October 24, 2017, ALJ A. Mann conducted a hearing, and on October 25, 2017 issued Hearing Decision 17-UI-95296, concluding that claimant's discharge was for misconduct. On October 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stoneybrook Assisted Living/Corvallis Assisted Living LLC employed claimant as a medication aide from April 4, 2016 until July 28, 2017. The employer operated an assisted living facility for elderly residents.

(2) The employer expected claimant to avoid negligence in caring for residents, to promptly attend to residents' needs and to respond to residents' pages for assistance within five minutes of receipt unless another employee had already responded to and cleared the page. The employer also expected claimant to refrain from postings on social media sites that made negative comments about the employer or that were damaging to the employer's reputation. Claimant understood the employer's expectations.

(3) On May 31, 2017, the employer issued a final written warning to claimant for having failed to put a resident to bed on May 20, 2017 as required by the resident's service plan and for allegedly having responded in a "negative, dismissive" way when the employer's management tried to discuss that incident with her. Exhibit 1 at 18.

(4) On June 24, 2017, claimant and a resident aide were the only aides on duty working the night shift. A resident who used a wheelchair had left her apartment, fallen down to the floor and pressed the signaling pendant she wore to notify claimant and the resident aide on duty by page that she required assistance. The resident aide responded to the resident's page, cleared the page and, because the resident had fallen to the floor and might be injured, the resident aide was required to summon claimant, as medication aide, to assess the extent of the resident's injuries before the resident was moved.

Claimant had received the first page, but did not respond because it was cleared by the resident aide within five minutes. After clearing the page, the resident aide tried to reach claimant by radio to perform the injury assessment, but claimant did not respond. Claimant did not receive the attempted radio communication from the resident aide, apparently due to a malfunction of the radio. Because the resident's page had been cleared, claimant then proceeded to deliver some medicine to another part of the facility. Within five minutes of the first page having been cleared and while delivering the medicine, claimant received a second page from the same resident as before. The second page also was cleared within five minutes. At that time, claimant called the resident aide on the radio to see if the resident aide or the resident needed assistance, but the resident aide did not respond, again apparently due to a malfunctioning radio. At approximately the same time, the resident aide made the resident who had fallen down comfortable while she lay on the floor and left the resident there to search the facility for claimant so claimant could make the injury assessment. The resident aide could not find claimant and returned to the resident. Shortly after the resident aide returned to the location of the resident, claimant arrived to offer assistance. Claimant assessed the resident and claimant and the resident aide then assisted the resident in returning to her apartment.

(5) Sometime after July 10, 2017, the employer placed a star identifying claimant by name on the bulletin board where it recognized exceptional employee contributions, stating "Thanks for working extra hours this month." Exhibit 1 at 10. Claimant had not wanted to work the extra hours since she was a single parent and had needed to make special child care arrangements after the employer had scheduled her to work those extra hours. Claimant resented have had to work the extra hours and reacted negatively to receiving the star. Sometime after the star was placed on the bulletin board, claimant took a photograph of the star, superimposed the words "Fuck you" and an emoji of a hand with a raised middle finger on the bottom border of the photograph, and posted this image to the My Story section of her account on the social media site Snapchat. Exhibit 1 at 10. Two of claimant's coworkers had access to claimant's Snapchat postings of this type and viewed it. Claimant understood that the image of the star would be automatically deleted from Snapchat 24 hours after it was posted.

(6) On July 25, 2017, the family of the resident who had fallen on June 24, 2017 visited the facility to review a new service plan for the resident. At that time, some family members told the employer's administrator that the resident had told them of her fall and stated that it had taken claimant thirty minutes to respond the resident's pages that night. On July 27, 2017, one of claimant's coworkers showed the administrator a picture of the photograph of the star that claimant had annotated and posted to Snapchat. On July 27, 2017, the employer suspended claimant pending an investigation of her behavior in responding to the resident's pages on June 24, 2017 and posting the annotated picture of the star on Snapchat.

(7) On July 28, 2017, the employer discharged claimant for her behavior on June 24, 2017 and for the posting she made on Snapchat.

CONCLUSIONS AND REASONS: The employer failed to establish that claimant's discharge was for 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-95296, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that, with respect to claimant's behavior on June 24, 2017, "nothing in the record shows claimant's radio was not working or that she attempted to call her coworker" as she testified at hearing and "nothing in the record shows that claimant previously disputed [to the employer] that the resident was on the floor for 30 minutes," also as she had testified at hearing. Hearing Decision 17-UI-95296 at 4. With respect claimant's posting of the annotated photograph of the star on Snapchat, the ALJ reasoned that the posting demonstrated claimant's misconduct since she admitted that she had made the posting knowing that coworkers would likely see it and that she knew it was inappropriate. Hearing Decision 17-UI-95296 at 4. The ALJ further concluded that neither incident was excused as an isolated instance of poor judgment because claimant's previous willful or wantonly negligent behavior had given rise to the May 31, 2017 warning, and the manner in which claimant responded to the resident's pages on June 24, 2017 and the posting of the annotated picture on Snapchat created an irreparable breach of trust in the employment relationship. Hearing Decision 17-UI-95296 at 4. We disagree that the employer met its burden in connection with the June 24, 2017 incident and further conclude the ALJ erred in shifting the burden of proving otherwise to claimant. In connection with the posting of the annotated picture on Snapchat, we agree with the ALJ that claimant's behavior in doing so was willful or wantonly negligent, but conclude that it was properly excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

As to claimant's behavior on June 24, 2017, the employer did not dispute that the sole source of information it had about the length of time it took claimant to respond to pages from the resident was hearsay from the resident that the employer received second-hand from one of the resident's family members, or, in other words, double hearsay. Transcript at 20-21. In addition, the employer did not persuasively rebut claimant's testimony that the resident had significant memory problems, and might not have been able to reliably estimate the length of time the resident had remained on the floor. Transcript at 28. On this record, claimant's testimony that she responded to the location of the resident within ten minutes of the first page was at least persuasive as the employer's double-hearsay, particularly when the employer's witness did not testify that claimant clearly admitted to her that it took her 30 minutes to respond, the resident aide did not testify and the written statement of the resident aide did not provide any time estimate for claimant's response. Transcript at 20; Exhibit 1 at 9. It is also notable that the employer also did not challenge claimant's testimony that the radios that claimant and the resident aide had to communicate with each other often malfunctioned and that they had apparently done so again on the night of June 24, 2017. Transcript at 30, 31. As well, claimant's testimony that she did not receive the radio calls made to her by the resident aide was further corroborated by the written statement of the resident aide in which the aide stated that claimant told her contemporaneously with her arrival at the resident's location on the floor that night that she had not received the resident

aide's radio calls. Exhibit 1 at 9. Claimant's testimony that the resident's pages were both cleared within five minutes, that claimant had not known that night that the resident and the resident aide needed additional assistance from her after the pages were cleared because her radio had apparently malfunctioned, and that claimant actually searched for the resident aide even though the second page was cleared to confirm that the resident's needs had been properly attended to was at least as persuasive as that of the employer's administrator, particularly since the administrator's testimony was based, in large part, on second-hand hearsay that originated from the resident and was passed on to the administrator by the resident's family and was not independently corroborated by other evidence. On this record, in light of the plausible rebuttal evidence that claimant offered, the employer did not meet its burden to demonstrate the timeliness and manner in which claimant responded to the resident's pages on June 24, 2017 was a willful or wantonly negligent violation of the employer's expectations.

With respect to claimant's posting of the annotated picture on Snapchat, claimant agreed that she had done so and that she had superimposed an offensive image and foul language on it because she wanted to vent her displeasure with the employer to those who had access to the My Story section of her Snapchat account. While claimant explained that the picture was deleted from Snapchat within 24 hours after it was posted, claimant did not dispute that two of her coworkers had accessed the picture while it was on Snapchat and that someone had made an image of it that was later shown to the employer's administrator on July 27, 2017, presumably having preserved the image independently of Snapchat. Claimant knew or should have known that posting such an unflattering image intended show disdain for a commendation that she had received from the employer was contrary to the employer's expectations, even if its time on Snapchat would be relatively short-lived, since the post could be reproduced and freely disseminated by anyone who had access to claimant's posts. The picture of the star commending claimant with the superimposed emoji and foul phrase directed at the employer was at least a wantonly negligent violation of the employer's expectations.

Although claimant's behavior in making the post to Snapchat may have been a wantonly negligent violation of the employer's expectations, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an "isolated instance" of poor judgment if it 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). To be excused as an isolated instance of poor judgment, the behavior at issue also must not have exceeded "mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OR 471-030-0038(1)(d)(D).

Here, aside from claimant's behavior in posting the image on Snapchat, the employer identified only claimant's time in responding to the resident's pages on June 24, 2017 and the behavior for which claimant was warned on May 31, 2017 as prior acts of willful or wantonly negligent behavior. As discussed above, the employer did not establish that claimant behavior on June 24, 2017 in responding to the resident's pages was either a willful or wantonly negligent violation of the employer's expectations. With respect to the behavior that gave rise to the May 31, 2017 warning, although the ALJ found that because claimant "received a warning for neglect and negative attitude a couple of months prior to her discharge," her behavior fell outside that which was excusable as an isolated instance of poor judgment, there is insufficient evidence in the record to support this conclusion. Hearing Decision 17-UI-95296 at 4. First, the warning claimant was issued on May 31, 2017 noted claimant's violations as not putting a resident to bed on May 20, 2017 as indicated in the resident's service plan and

displaying a negative and dismissive attitude when later approached about it by management. Exhibit 1 at 18; Transcript at 13. With respect to the behavior for which claimant received that warning, the employer did not rule out that claimant's failure to put the resident to bed was the result of an inadvertent lapse or the result of some other circumstance that did not arise from claimant's willful or wantonly negligent behavior. With respect to claimant's alleged "negative, dismissive attitude," neither the May 31, 2017 warning nor the administrator's testimony at hearing set out the objective facts from which the employer drew its conclusions about claimant's attitude or how claimant knew or reasonably should have known that by the apparent attitude she exhibited she was violating the employer's expectations. Absent additional evidence on these matters, the employer did not meet its burden to show claimant's behavior that gave rise to the May 31, 2017 warning was a willful or wantonly negligent violation of the employer's standards. Because there was insufficient evidence in the record to establish that claimant had a willful or wantonly negligent state of mind when she engaged in the behaviors that gave rise to the May 31, 2017 warning, the employer failed to show that claimant's behavior in posting the image on Snapchat was not a single or infrequent willful or wantonly negligent violation of the employer's standards. We turn to whether claimant's behavior at issue, the Snapchat posting, was the type of behavior that exceeded mere poor judgment and thus fell outside that which may permissibly be excused as an isolated instance of poor judgment.

While the ALJ concluded in Hearing Decision 17-UI-95296 that the willful or wantonly negligent behavior that he found on claimant's part was not excusable since the employer could no longer trust claimant and her behavior therefore exceeded mere poor judgment, he did not supply the reasons on which he based this conclusion. Claimant reacted negatively and sarcastically to an employer commendation that was based on her being instructed to work extra hours rather than on volunteering to do so, and her perception that the commendation was disingenuous. However, claimant's behavior in making a post that was in poor taste and unflattering to the employer was mitigated by her assumption that the post would be viewed only by a very limited number of her coworkers, did not identify the employer by name, would disappear when it was automatically deleted by Snapchat in 24 hours, and her failure to consider that an image of it might be captured before that deletion and disseminated by someone who had access to it. Claimant's behavior was also mitigated by her ready admission to posting the image, her failure to defend what she had posted as acceptable, and her recognition at hearing that the post was "inappropriate." Transcript at 38. On these facts, an employer would not objectively conclude that it could no longer trust claimant as a result of the posting she made to Snapchat or that a continued employment relationship with her was impossible. Having met all requisites, claimant's behavior in making the post to Snapchat is excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not do so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-95296 is set aside, as outlined above.

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

DATE of Service: <u>December 1, 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.

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