EO: 200
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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-1292

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 94155). The employer filed a timely request for hearing. On October 17, 2017, ALJ Frank conducted a hearing at which claimant did not appear, and on October 19, 2017 issued Hearing Decision 17-UI-94935, affirming the Department's decision. On November 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that offered facts about the scope of an alleged "social media policy" of the employer that were not presented at the hearing. However, the employer did not explain why its testifying witness did not offer this information at the hearing when questioned about whether the employer had a social media policy and its substance, and the employer did not show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). *See* Audio at ~18:10. For this reason, EAB did not consider the new information the employer sought to present by way of its written argument, but considered the argument only to the extent it was based upon information received into evidence during the hearing.

FINDINGS OF FACT: (1) Gunderson, LLC employed claimant from October 31, 2014 until August 4, 2017, last as a fitter-welder.

(2) The employer expected that claimant would wear all required personal protective safety equipment (PPE) when he was performing welding, including a protective hood and goggles, boots, gloves and leather outerwear that covered all exposed skin areas. The employer also expected claimant to refrain from workplace behavior that was unprofessional or inappropriate. Claimant understood the employer's expectations as a matter of common sense.

(3) On August 1, 2017, claimant posted a video of himself to his personal Instagram account that had been shot by a coworker. The video showed claimant performing welding in the workplace. In the video, claimant was naked except for wearing a protective hood, gloves and work boots. In the

Instagram posting, claimant tagged or identified the employer by name as the employer for whom he was performing the welding.

(4) On August 4, 2017, one of claimant's coworkers informed a supervisor of claimant's Instagram posting. Before any employer representatives spoke to claimant about the posting, claimant "turned himself in" to the employer's director of human resources and informed him of what he had posted on Instagram. Audio at ~8:25, ~12:00. When asked why he had decided to post the video, claimant said that he had thought it would be "funny." Audio at ~12:16. Claimant also told the director that he had "thought about it [the posting] more and [realized] it was a bad idea." Audio at ~12:30.

(5) On August 4, 2017, the employer discharged claimant for having posted a video to Instagram of himself welding at the workplace while naked.

(6) Before claimant's discharge, he had never engaged in behavior that was similar to the posting he made to Instagram on August 1, 2017.

CONCLUSIONS AND REASONS: 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 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). 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).

Based on the testimony of the employer's witness at hearing, it appears that claimant was discharged because he posted to Instagram a video that showed him naked while welding at the workplace, which the employer considered both unprofessional and inappropriate workplace behavior and workplace behavior that did not conform to the employer's safety requirements of wearing PPE while welding. Audio at ~14:43, ~15:14. It does not appear that the employer thought claimant had violated its standards by taking the video when he was in the workplace or during time when he was otherwise expected to be working. Audio at ~12:50. By performing welding in the workplace when he was naked, and by deliberately not complying with the employer's safely standards of wearing all required PPE during welding, claimant violated the employer's standards willfully or with wanton negligence. As well, while under certain circumstances the employer's prohibition against unprofessional and inappropriate behavior might have been a vague standard, claimant could only have known that posting a video of himself performing welding work when naked and identifying the employer for whom he was a welder by name was inappropriate and unprofessional behavior that the employer would not condone. By these actions, claimant violated the employer's standards willfully or with at least wanton negligence.

Although claimant's violated the employer's standards willfully or with wanton negligent, his behavior may be excused from constituting misconduct if it was an isolated instance poor judgment under OAR 471-030-0038(3)(b). To be excusable on this ground, claimant's behavior at issue must have been 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 excusable as an isolated instance of poor judgment, the behavior at issue also must not have exceeded mere poor judgment by, in pertinent part, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

At the outset, it appears likely from the circumstances that claimant performed the naked welding with the intention of posting a video of that performance on some social media site. As such, claimant's workplace behavior that violated the employer's safety standards is most properly considered a component of the same exercise of poor judgment as the posting of the video on Instagram for purposes of determining whether that exercise of poor judgment may be excused as an isolated instance. Claimant's exercise of poor judgment in welding on film with the intent of posting it to Instagram should therefore be considered to constitute a single occurrence. At hearing, the employer's witness testified that, prior to August 1, 2017, claimant had never before engaged in behavior similar to that in which he engaged on August 1, 2017. Claimant's behavior in posting a video of himself performing naked welding was therefore an isolated willful or wantonly negligent act.

Turning to whether claimant's behavior on August 1, 2017 exceeded mere poor judgment, the employer did not present evidence from which it might be inferred that, as a result of that behavior, the employer could not trust that claimant would in the future comply with its standards and refrain from welding naked in the workplace. There is no question that claimant disregarded the employer's safety standards in creating the video of naked welding, but no evidence was presented showing that he did so for purposes of discrediting the employer or for any ulterior purpose other than to do something he considered "funny." Claimant's willful or wantonly negligent behavior on August 1, 2017 also was significantly mitigated by the fact that, after reflecting on what he had done, he concluded that he had behaved inappropriately and, on his own initiative, "turned himself in" to the employer before the employer confronted him about the video. Audio at 8:25, ~12:00; ~12:30. On this record, an employer would not have objectively concluded that, as result of the behavior claimant exhibited on August 1, 2017, it could no longer trust claimant to meet its standards in the future or that a continued employment relationship with him was impossible. For those reasons, claimant's conduct did not exceed mere poor judgment, and claimant's willful or wantonly negligent behavior on August 1, 2017 is therefore excused from constituting misconduct as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 17-UI-94935 is affirmed.

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

DATE of Service: <u>December 12, 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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