

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1361

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142645). Claimant filed a timely request for hearing. On November 15, 2017, ALJ Clink conducted a hearing, and on November 16, 2017 issued Hearing Decision 17-UI-97037, affirming the Department's decision. On November 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written to EAB that contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered claimant's argument only to the extent it was based on the record, and not on new information.

FINDINGS OF FACT: (1) Western Communications employed claimant from September 13, 2016 to September 13, 2017 as a customer service representative. Claimant regularly worked three shifts per week, on Friday, Saturday and Sunday.

(2) The employer expected claimant to refrain from engaging in abusive, unprofessional behavior at work. Claimant understood the employer's expectation from prior warnings and as a matter of common sense.

(3) In April, June and July 2017, claimant "bullied" a coworker by calling him names and engaging in other verbal mistreatment of him. The employer warned claimant she had to refrain from bullying coworkers. Claimant and the coworker no longer had shifts together after July 2017.

(4) On September 1, 2017, one of the customer service representatives complained to claimant's manager that she was the only representative taking customer calls. The manager looked at the

representatives' call logs and saw they had not taken many calls that morning. The manager informed the customer service representatives, including claimant, that he expected all of them to answer calls and respond to emails equally. Claimant later went into the manager's office upset and yelling at him regarding the manner in which he spoke to her about her work performance. The manager told claimant he did not like how she was addressing him and sent her home for the remainder of her shift. Exhibit 1 at 24.

(5) On Saturday, September 9, 2017, claimant's supervisor met with claimant to discuss claimant's work performance and other conduct on September 1, 2017. Claimant gave her supervisor a written account of claimant's version of what occurred between claimant and her manager on September 1. Claimant and the supervisor began to argue about claimant's job duties and work performance on September 1, and claimant told the supervisor she did not want to argue about it and the meeting ended. Exhibit 1 at 22.

(6) On Sunday, September 10, 2017, claimant worked her final shift. As usual, she was not scheduled to work again until the following Friday.

(7) On Wednesday, September 13, 2017, claimant's supervisor called claimant and discharged her for her conduct toward her supervisor on September 9, 2017.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An incident of poor judgment 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).

In Hearing Decision 17-UI-97037, the ALJ concluded that the employer discharged claimant for misconduct, finding that claimant yelled at a manager on September 3, 2017¹ and "shouted" at her supervisor on September 9, 2017, and concluding that claimant's conduct of "yelling at two managers within one week" violated the employer's expectations regarding professionalism at work, was not an

¹ We find that the incident the ALJ discussed from September 3, 2017 actually occurred on September 1, 2017. It is the incident between claimant and her manager, Michael Hrycko.

isolated instance, and was misconduct.² We disagree with the ALJ's conclusion that the employer discharged claimant for misconduct because we conclude that the final incident was not the combination of the incidents on September 1 and September 9, but rather, only the meeting between claimant and her supervisor on September 9, 2017, and that the September 9 incident did not amount to misconduct.

EAB generally limits its initial misconduct inquiry to the final incident of alleged misconduct preceding the discharge.³ EAB enquires into prior incidents of misconduct only if necessary to determine whether a final incident of misconduct may be excused as an isolated incident of poor judgment. Here, the manager sent claimant home for her conduct on September 1, but did not discharge claimant for it, presumably because he decided the incident did not merit discharge. The employer permitted claimant to return to work for her next four shifts on September 2, 3, 8 and 9, and the meeting on September 1 between claimant and her supervisor was, at least in part, to discuss the September 1 incident. The record does not show the employer had already decided to discharge claimant because of the September 1 incident. Moreover, the incidents on September 1 and September 9 were separate and discreet incidents occurring more than a week apart. Accordingly, the initial evaluation of whether claimant engaged in misconduct is limited to the facts surrounding claimant's conduct on September 9.

The employer had a right to expect claimant to refrain from engaging in abusive and unprofessional conduct. With respect to claimant's interaction with her supervisor on September 9, the supervisor testified that claimant "yelled" at her. Transcript at 21. However, claimant testified that she did not yell at her supervisor, and she and the supervisor "went back and forth" arguing about the September 1 incident, but that "there was no raising of voices." Transcript at 28, 29. The record does not show who started the argument. Nor was there an allegation of foul language or threatening conduct. The undisputed evidence is that both claimant and the supervisor argued, and that claimant ended the argument. Although claimant and the supervisor argued, disagreeing with a supervisor without being abusive is not generally a violation of an employer's reasonable expectations. Moreover, the evidence is equally balanced as to whether claimant yelled or engaged in a mutual disagreement with her supervisor and responded as the supervisor did with at most a raised voice to the supervisor's own raised voice. Because the evidence is equally balanced as to whether claimant willfully, or with wanton negligence, violated the standards of workplace behavior that an employer has the right to expect of an employee, the employer failed to meet its burden establish misconduct by a preponderance of evidence.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-97037 is set aside, as outlined above.

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

DATE of Service: December 26, 2017

² Hearing Decision 17-UI-97037 at 2-3.

³ See *Appeals Board Decision*, 2016-EAB-0974, September 19, 2016 (citing and applying prior cases); *Appeals Board Decision*, 13-AB-0341, March 28, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); and *Appeals Board Decision*, 13-AB-0029, February 14, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge).

NOTE: 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.

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.