EO: 200
BYE: 201840

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-1448

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114101). Claimant filed a timely request for hearing. On November 29 and December 1, 2017, ALJ Scott conducted a hearing, and on December 1, 2017 issued Hearing Decision 17-UI-98074, concluding the employer discharged claimant, but not for misconduct. On December 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching his decision. EAB did not consider claimant's written argument because it did not contain a statement that it was provided to the other parties as required OAR 471-041-0080 (October 29, 2006) and it also included information not offered into evidence, and claimant made no showing as required by OAR 471-041-0090(2) (October 29, 2006) that she was prevented by circumstances beyond her reasonable control from presenting that information during the hearing

Although the ALJ admitted into evidence at the hearing certain documents that the employer provided as Exhibit 1, she actually marked as Exhibit 1 a few handwritten pages that claimant appeared to have submitted to the Office of Administrative Hearings (OAH) along with her request for hearing. Because claimant stated that she had not submitted any documents as hearing exhibits, and because the documents that the employer submitted as its exhibit are readily identifiable from their description at hearing, we have corrected the ALJ's oversight and marked the documents the employer offered at hearing as Exhibit 1. Audio at ~3:13.

FINDINGS OF FACT: (1) Providence Heath & Services employed claimant as a mental health therapist from January 24, 2000 until October 10, 2017. The education and training that enabled claimant to perform her work included a PhD in psychology and an Oregon certification as a licensed professional counselor (LPC). Claimant was 63 years old.

(2) The employer expected that claimant would refrain from making derogatory comments in the workplace about coworkers' sexual orientations. The employer also expected that claimant would foster an environment where patients felt safe in sharing information without fear of judgment or being shamed or blamed. Claimant was aware of the employer's expectations as she reasonably interpreted them.

(3) On April 2, 2017, claimant facilitated a group therapy session and after the session ended stayed to speak with a few patients who had participated in the group. In that conversation, one of the patients mentioned that she liked a particular colleague of claimant's, who was also a mental health therapist. Claimant shared an office with that colleague. Claimant and the patients knew the colleague was homosexual. Claimant commented that she also liked the colleague and that, although the colleague was different from her, she was accepting of her. Transcript of November 29, 2017 hearing (Transcript 1) at 6. Claimant then commented that the colleague reminded her of the comedian Ellen DeGeneres and shared certain mannerisms with DeGeneres. Claimant stated that the colleague and DeGeneres were "both really butch" and that she "love[d] them both." Transcript of December 1, 2017 hearing (Transcript 2) at 7. The patient objected to claimant's use of the term "butch" in reference to the colleague, and claimant apologized.

(4) The next day, April 3, 2017, the patient who had objected to claimant's language told claimant's colleague of the manner in which claimant referred to the colleague. The patient and the colleague also complained to a supervisor that claimant had referred to the colleague in an inappropriate way the previous evening. That supervisor informed claimant's supervisor of the complaint that had been made.

(5) Sometime after April 3, 2017, claimant's supervisor met with claimant about the complaint. Claimant admitted she had referred to her colleague as being "butch." Claimant told the supervisor that she had not intended the term as a derogatory reference and that she had been trying to demonstrate that she was tolerant of the colleague despite the colleague's differences from her. Claimant stated that she was "old school" and had not known the term "butch" was offensive. Transcript 1 at 29. At that meeting, claimant expressed a strong desire to communicate with and apologize to her colleague, who was on vacation at that time. The supervisor told claimant not to speak with the colleague until the supervisor had determined if the colleague was willing to discuss the matter with claimant. Subsequently, sometime before April 18, 2017, a human resources representative met with the colleague whom claimant had referred to as being "butch." In that meeting, the colleague was "adamant" that she did not want to meet or communicate directly with claimant about the statements claimant had made about her and that she wanted to "just move on." Transcript 1 at 10, 11.

(6) On April 18, 2017, claimant's supervisor and a human resources representative met with claimant and gave her a written warning based on her April 2, 2017 reference to the colleague. Claimant was very remorseful about having referred to the colleague as being "butch," and again "insisted" on apologizing directly to the colleague. Transcript 1 at 10. The employer representatives told claimant that the colleague did not want to discuss the comments with her at any other than a formally "facilitated meeting," where other employer representatives would be present. Transcript 1 at 9-10. The employer representatives stressed to claimant that if she spoke to the colleague outside of a facilitated meeting or "treated her differently" in any way, it could be considered "retaliatory" or "discriminatory," and that claimant should avoid such communication with the colleague for that reason. Transcript 1 at 10. In the comment section of the warning, claimant wrote "deepest apologies." Exhibit 1 at 4.

(7) Sometime shortly before June 7, 2017, the colleague whom claimant had referred to as being "butch" initiated a conversation with claimant in which she told claimant that she thought claimant had been "treating her differently" and "giving the cold shoulder" and asked claimant to tell her what she had done. Transcript 1 at 12. Claimant told the colleague that she was upset that the colleague had spoken with a supervisor about claimant's comment rather than coming to claimant first about it and that it had been "blown out of proportion." Transcript 1 at 12, 13. Claimant apologized to the colleague for referring to her as "butch" on April 2, 2017 and stated that "it was the wrong thing to say." Transcript 2 at 9.

(8) On June 7, 2017, the colleague met with a supervisor and a human resources representative and accused claimant of treating her differently since she had reported claimant's April 2, 2017 comment to her supervisor, and disclosed the substance of the recent conversation in which claimant stated she was displeased about the colleague having reported claimant's "butch" comment first to supervisors. On June 12, 2017, the supervisor and the human resources representative met with claimant about what she had discussed with the colleague sometime shortly before June 7, 2017. Claimant admitted that she had told the colleague that she was upset at her for not coming to her first about the "butch" comment and instead proceeding directly to a supervisor, and that she had been avoiding the colleague since the incident, which might be construed as claimant treating the colleague differently.

(9) On June 21, 2017, the employer issued to claimant a memorandum titled "performance expectations" based on the colleague's complaint of June 7, 2017. The memorandum stated that claimant's "butch" comment violated the employer's standards and claimant's admitted avoidance behavior toward the colleague was considered retaliatory and that if she violated any further performance expectations she would be discharged. The employer issued the memorandum rather than proceeding to discharge claimant since "there seemed to be some confusion around [what was considered] retaliatory behavior" and the employer wanted to make sure that claimant clearly understood its expectations before imposing discipline. Transcript 1 at 17.

(10) Sometime before October 10, 2017, claimant was facilitating a group therapy session. The topic of that session was "affirmations." Transcript 2 at 12. In the course of the session, one of the patient-participants asked claimant why the participant was often abused by men, stating that, although she had repeatedly asked, she had not received an answer from other counselors, therapists or friends. Claimant answered, "[P]erhaps, you wear provocative clothing." Transcript 2 at 15. Claimant's comment was reported to the employer. Claimant admitted to that she had made the comment about provocative clothing to the patient.

(11) On October 10, 2017, the employer discharged claimant for making a comment at the group therapy session that blamed the victim for eliciting the sexual abuse she had experienced.

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. 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 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).

Claimant agreed that what she said to the patient in early October 2017 about wearing "provocative" clothing was likely "inappropriate" and "culturally insensitive." Transcript 2 at 16. Claimant's supervisor, the employer's behavioral health clinical supervisor, testified claimant's comment was a "serious breach" of professional responsibilities in the group therapy context in which it was made since it appeared to blame the participant for the abuse she had sustained and was a comment that most mental health professionals would find to have been inappropriate and harmful. Transcript 1 at 33, 34. Claimant's witness at hearing, also a mental health therapist, concurred that she would not have made the comment to the patient that claimant did about wearing provocative clothing. Transcript 2 at 26. Given the certainty with which these mental health professionals voiced their opinions, it can be inferred that claimant knew or reasonably should have known that the comment she made about the patient wearing provocative clothing was contrary to her obligation to create a safe therapeutic environment for patients in the groups she facilitated and, by making this comment, she exhibited indifference to the consequences of making it. Claimant's behavior in making the comment about wearing provocative clothing was at least wantonly negligent.

Although claimant's behavior may have been wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment. Behavior is considered an "isolated instance of poor judgment" if it was 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 constitute an isolated instance of poor judgment, the behavior of claimant that is 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. OAR 471-030-0038(1)(d)(D).

In this case, the only disciplinary warnings the employer had ever issued to claimant before she was discharged were on April 8, 2017 and June 21, 2017. With respect the warning on April 8, 2017, it was issued based on claimant's having referred to her colleague as being "butch." Claimant testified persuasively that she shared an office with the colleague, had known her well for ten years and had not intended to disparage her, but rather to draw a not unflattering parallel to Ellen DeGeneres, a widely known female homosexual. Transcript 2 at 7. Equally persuasively, claimant testified that she was not aware that butch was a "bad terminology to use." Transcript at 7. While the employer's witness testified that she thought "butch" might be considered "derogatory" when used in connection with a person's sexual orientation, her opinion was far less certain than that expressed by the witnesses at hearing about claimant's comment in connection with wearing provocative clothing. Transcript 1 at 8-9. It appears to us that, while the term "butch" can in certain contexts be considered offensive, in others might be considered a non-insulting, descriptive slang term that refers to a masculine-presenting individual. It does not appear from the context in which claimant used the term "butch" or otherwise, that it was intended to be offensive, derogatory or insulting to the colleague to which it referred. Absent

evidence that claimant knew or should have known that "butch" would be considered a derogatory term when used in reference to her colleague, the employer did not demonstrate that claimant violated its expectations willfully or with wanton negligence when she commented that the colleague was "butch."

With respect to the warning of June 21, 2017, the employer issued it rather than discharging claimant because it thought claimant might not have known that speaking with her colleague about matters that touched on her reference to the colleague as "butch," when the colleague initiated that discussion, was something that might considered retaliatory. Transcript 1 at 17. Claimant also testified that she did not think that the employer's prohibition against speaking with the colleague in a manner that might be considered retaliatory extended to a conversation instigated by the colleague, when the colleague invited claimant's response. Transcript 2 at 8, 9, 18. Given the plausibility of claimant's belief and the employer's uncertainty as to whether claimant understood that she was not to speak at all and under any circumstances to the colleague about matters relating to the incident in which she used the term "butch," the employer did not show that claimant violated its standards willfully or with wanton negligence when she commented on matters relating to her having used the term "butch." On this record, the employer did not show that claimant willfully or wantonly violated its standards other than by her comment in early October 2017 about the patient having possibly worn provocative clothing.

Claimant was a long-standing employee of the employer without, as demonstrated above, a history of violating the employer's standards willfully or with wanton negligence. At hearing, claimant did not attempt to deny or minimize what she had said in any of the incidents at issue and agreed that, on reflection her comment could be considered inappropriate. Transcript 2 at 7, 8, 14. Claimant showed what appeared to be sincere remorse for having made the comment to the patient about provocative clothing. Transcript 1 at 34, 35; Transcript 2 at 13-14, 16. In light of these mitigating factors, an employer would not have objectively concluded that claimant's behavior in early October 2017 exceeded mere poor judgment or that it caused an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. Having met both prongs of the standard to be excused, claimant's wantonly negligent behavior in early October 2017, when she made the comment about provocative clothing, is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-98074 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: <u>January 24, 2018</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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