

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0150

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 111902). The employer filed a timely request for hearing. On February 6, 2018, ALJ Frank conducted a hearing at which claimant failed to appear, and on February 9, 2018 issued Hearing Decision 18-UI-103000, affirming the Department's decision. On February 13, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Monarch Motor Hotel, Inc. employed claimant from November 7, 2014 to November 1, 2017 as a banquet prep cook.

(2) The employer expected claimant to treat coworkers with politeness and respect and to refrain from mistreating them. Exhibit 1 at 4-5, 9. Claimant understood the employer's expectations as a matter of common sense and because he had read it in the employer's code of conduct.

(3) On September 8, 2015, claimant emptied a bin of dishwashing solution on a coworker after he became upset that the coworker had thrown silverware into the bin causing some of the solution to splash onto claimant. The employer suspended claimant for the incident.

(4) On October 22, 2017, the banquet staff was clearing Sunday brunch and claimant put a container on the line. A line cook asked claimant if he would remove the container so the line cook could clean. Claimant asked the line cook if he was "a baby" and asked him if he was "going to start crying" or "go whine to the sous chef again." Audio Record at 12:30 to 12:55. The kitchen staff informed the sous chef about the incident.

(5) On October 26, 2017, the line cook involved in the October 22 incident quit work. The employer's sous chef reported to the executive chef that the line cook had complained that claimant had been "really mean to him and kind of bullying him around," and told the executive chef about the October 22 incident. Audio Record at 13:58 to 14:25.

(6) On November 1, 2017, the executive chef asked claimant about October 22 and claimant admitted to the executive chef that the sous chef's account of what occurred on October 22 was correct and that he could have addressed the matter "in a different way." Audio Record at 16:18 to 16:39. As a result, the employer discharged claimant for being unprofessional toward another employee.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude 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) (January 11, 2018) 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because of his mocking, rude statements to a line cook on October 22. As a matter of common sense and based on the employer's code of conduct, claimant reasonably should have known that the employer would not permit him to mistreat a coworker as he did. Claimant's conduct toward the line cook was at least a wantonly negligent violation of the employer's expectation. Moreover, claimant himself acknowledged to the executive chef that he could have handled the situation differently, showing that he did not have a good faith belief that the employer would condone his conduct.

Although claimant's behavior on October 22 was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that 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, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant had another incident when he mistreated a coworker in 2015. That incident was too remote in time to show claimant's conduct on October 22 was a repeated act or part of a pattern of other willful or wantonly negligent behavior. Moreover, although the sous chef told the executive chef that claimant had mistreated him on other occasions, the employer did not provide evidence of recent incidents. Claimant's behavior on October 22 therefore meets the first prong of the test for an isolated instance of poor judgment since it was isolated. As well, claimant's behavior in making rude statements to the line cook did not exceed mere poor judgment. Claimant did not engage in the type of conduct that would make a continued employment relationship impossible, such as threatening the coworker or even using foul language. An employer would not objectively conclude from claimant's behavior on October 22

that it could not trust claimant to conform to its expectations in the future. Because it meets both prongs of the standard, claimant's behavior on October 22, while it was wantonly negligent, is excused from being disqualifying misconduct as an isolated instance of poor judgment.

We thus conclude that the employer discharged claimant not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 18-UI-103000 is affirmed.

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

DATE of Service: March 9, 2018

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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