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BYE: 201846

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

745
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0222

Reversed
Disqualification

PROCEDURAL HISTORY: On December 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124958). Claimant filed a timely request for hearing. On February 7, 2018, ALJ Wyatt conducted a hearing, and on February 15, 2018 issued Hearing Decision 18-UI-103380, concluding that claimant's discharge was not for misconduct. On March 1, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.[1]

FINDINGS OF FACT: (1) Oregon Olympic Athletics, LLC employed claimant as a coach until November 18, 2017.

(2) On October 9, 2017, the owner reprimanded some of the boys claimant coached. While in the presence of the boys, claimant told the owner that the reprimand was "stupid." Exhibit 1. Claimant then began to leave the gym. The owner told claimant to remain and speak with her and that if he left he should not come back, implying that she would discharge him if he left. Claimant left the gym.

[1] The employer notified EAB of its intent to submit a written argument and requested an extension of time to do so. EAB allowed the employer's extension and established an extended deadline of April 2, 2018 at 5:00 p.m.; EAB nevertheless is issuing this decision before the deadline expires. The outcome of the decision in in the employer's favor, and therefore doing so is not prejudicial to the employer's interests. If any party objects to EAB's issuing the decision before the extended written argument deadline expired, such party may file a request for reconsideration with EAB under ORS 657.290(3) and OAR 471-041-0145. Any such request must comply with the rules set forth at OAR 471-041-0145.

(3) On October 21, 2017, a gymnast asked claimant to help her adjust a metal bar on a piece of equipment. Claimant refused. The gymnast's mother complained to the owner via email. The owner sent claimant a text message stating that claimant "had absolutely no reason to not help change the bar," and stated, "Thank you for creating one more problem for me. And another angry parent to deal with over the weekend." Exhibit 1. Claimant replied, "I am so tired of you constantly nagging me." *Id.* He also disagreed with the owner about the purpose of open gym sessions, stated that he had refused to change the bar because of safety concerns, and wrote "Don't bother me on my weekend again." *Id*.

(4) Between October 21, 2017 and October 23, 2017, the owner forwarded the parent's email to claimant. On October 23, 2017, claimant sent the parent an email that stated the owner "sent me your email and asked not to respond but I need to address this issue with you directly." Exhibit 2. In claimant's email to the parent he wrote that the parent's child had not asked him to adjust the metal bar, disputed that the parent accurately recounted what he had said in her email, rebuked the parent for the content of her report to the owner stating that "is NOT okay with me," rebuked the parent for emailing the owner about him, explained gym rules, and explained why he had refused the request to adjust the metal bar.

(5) On November 18, 2017, claimant was coaching open gym. The gymnast again asked claimant to help her adjust the bar on a piece of equipment, and claimant again refused. The gymnast's mother called the owner. The owner went to the gym, and, without speaking to claimant, immediately adjusted the bar on the piece of equipment for the gymnast. Claimant felt upset with the owner for adjusting the bar and went outside to smoke. While outside he decided to leave work without telling anyone, even though he had over an hour before he would typically leave work for the day. He intended to speak with the owner that day or the next day, but felt that things needed to calm down first. When claimant left, approximately 30 children were participating in an open gym session with only one coach on duty, even though he knew that the employer customarily had two coaches present for open gym.

(6) On November 18, 2017, the owner sent claimant an email telling him not to return to work. The owner would not have discharged claimant for refusing to adjust the metal bar, but decided to discharge him for walking out before the end of his shift without telling anyone or arranging for a substitute, leaving the open gym session understaffed.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant 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 instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that although "claimant was, at least, wantonly negligent in walking off the job on November 18, 2017" his conduct was excusable as an isolated instance of poor judgment because when claimant previously walked off the job on October 9th he had not "left" the employer "in a serious position due to understaffing" on that occasion. Hearing Decision 18-UI-103380 at 4. We disagree.

On November 18th, claimant knew that the employer expected him to work until his shift ended. He knew his shift had not ended. He had been told on a previous occasion that if he left he need not come back to work, from which we infer he knew the employer might consider walking off the job a serious enough violation that it could warrant his discharge. The record does not suggest that he was so upset, or had a reason to be so upset, that he did not realize he should stay and complete his shift. It was under those circumstances that claimant chose to leave work, making his conduct, more likely than not, a willful violation of the employer's expectations.

We also disagree with the ALJ that claimant's conduct was excusable as an isolated instance of poor judgment. An isolated instance is defined in pertinent part as a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. *See* OAR 471-030-0038(1)(d); OAR 471-030-0038(3)(c). The ALJ's analysis appears to be that since claimant had not previously walked off the job leaving the employer seriously understaffed that the final occasion upon which he did that exact conduct was isolated. However, OAR 471-030-0038(1)(d) does not require that claimant had engaged in the exact same conduct with the same potential consequences on previous occasions before conduct is excluded from being considered "isolated." The rule requires that for the exclusion to apply, it the "exercise of *judgment*" – which is also defined by rule – that must not represent "a repeated act *or* pattern of *other* willful or wantonly negligent behavior."[2] In other words, claimant need not have engaged in repeated occurrences or a pattern of the exact same behavior. It is enough that he engaged in repeated exercises of poor "judgment," or a pattern of poor judgment, even if his exercises of poor judgment involved "other" willful or wantonly negligent "behavior."

In this case, claimant's conduct on November 18th was not a single or infrequent occurrence of poor judgment because it was a repeated act or part of a pattern of other willful or wantonly negligent violations of the employer's reasonable expectations. On October 9, 2017, claimant walked off the job despite having been instructed by the employer to stay, which amounted to a willful act of insubordination, and, therefore, an exercise of poor judgment. On October 23, 2017, claimant replied to a parent's email despite knowing the owner had "asked him not to respond." Claimant's email reply was a willful act of insubordination, and, therefore, another exercise of poor judgment. On November 18, 2017, claimant refused a gymnast's request to adjust the metal bar on a piece of equipment despite having been reprimanded for such a refusal in the past. Claimant knew or should have known under the circumstances that, despite any objections he held, the employer would expect him to adjust the bar; his refusal to do so was therefore a conscious deviation from the standards of behavior the employer had the right to expect of him that demonstrated his indifference to the consequences of his actions, and a

[2] (Emphasis added.) A "judgment" is "an evaluation resulting from discernment and comparison" or a "conscious decision" and "poor judgment" is "[a] decision to willfully violate an employer's reasonable standard of behavior" or "[a] conscious decision to take an action that results in a wantonly negligent violation of an employer's reasonable standard of behavior." OAR 471-030-0038(1)(d)(B) and (C).

wantonly negligent exercise of another poor judgment. Because, on this record, claimant engaged in other willful and wantonly negligent exercises of poor judgment on at least three occasions between October 9, 2017 and November 18, 2017. His final willful exercise of poor judgment – walking off the job without notifying the employer he was leaving or ensuring that the children under his care were adequately supervised – therefore cannot be considered "isolated" and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct in the final incident also cannot be excused as a good faith error. He did not sincerely believe, or have a factual basis for believing, that the he was not leaving his shift early and not leaving children without adequate supervision when he left work early on November 18th leaving only one other coach on duty to supervise 30 children. He also did not believe in good faith that it would be acceptable to the employer if he left early without notifying anyone. Not only did he know that he should not have left, he also knew that he was leaving children inadequately supervised, and knew the owner had previously implicitly threatened to fire him if he left work when he had been asked to remain.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-103380 is set aside, as outlined above.

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

DATE of Service: March 28, 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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