

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0223

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70120). Claimant filed a timely request for hearing. On January 8, 2018, ALJ Clink convened a hearing at which claimant did not appear and issued Hearing Decision 18-UI-100398, dismissing claimant's request for hearing because of her failure to appear. On January 23, 2018, claimant filed a request to reopen the hearing. On February 14, 2018, ALJ Wyatt conducted a hearing, and on February 22, 2018 issued Hearing Decision 18-UI-103740, allowing claimant's request to reopen and concluding the employer discharged claimant, but not for misconduct. On March 2, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings, analysis and conclusion in Hearing Decision 18-UI-103740 allowing claimant's request to reopen the hearing are **adopted**.

FINDINGS OF FACT: (1) Orchard Supply Company, Inc. employed claimant until it discharged her on October 27, 2017.

(2) The employer's Orchards Standards of Conduct Policy prohibited employees from permitting trespass onto company property, disregarding safety procedures, and failing to protect company assets. Claimant understood the employer's expectations.

(3) On October 19, 2017, at about 8:45 p.m., the manager told claimant to use a blower to clean the nursery department of the store. At 9:00 p.m., the manager announced on the employees' portable radio

transceivers that the store was closed. Claimant did not hear the announcement because of the noise from the blower. At 9:06 p.m., a male non-employee who was on the outside of the nursery fence asked claimant to let her in to use the restroom. Claimant did not check the time. Claimant knew the man was a patron of the store and allowed him entry without asking permission first from the manager on duty. There was a manager on duty at the time. A few minutes later, claimant told her supervisor that she had allowed a patron into the store.

(4) Another employee saw the man in the store and, believing him to be a customer, reported his presence to the manager. The manager escorted the male from the store at about 9:16 p.m.

(5) Prior to discharging claimant, the employer had not disciplined claimant for a violation of an employer policy or expectation.

(6) On October 27, 2017, the employer discharged claimant for allowing a non-employee into the store when the store was closed.

CONCLUSIONS AND REASONS: We agree with 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) (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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

At hearing, claimant asserted that she was unaware that she was prohibited from allowing a patron of the store into the store after hours because she did not receive the employer's policy stating the employer's prohibition of such conduct. Audio Record at 47:32 to 48:34. We conclude that claimant knew or should have known her conduct would violate the employer's expectations as a matter of common sense. Claimant also asserted that she did not hear the manager announce the store was closed, implying that she would not have allowed the man to enter the store had she known. Although claimant did not hear the manager's announcement, because she presumably knew she was asked to use the blower to clear the nursery area at the end of her shift, we conclude she was wantonly negligent in failing to check the time before she allowed the person to enter the store after hours to use the bathroom.

However, OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The employer did not assert or show that claimant had been disciplined for any other violations of the employer's policies or expectations. Accordingly, on this record, claimant's October 19 violation was no more than an isolated instance of wantonly negligent conduct.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as conduct that is unlawful, tantamount to unlawful conduct, causes a breach of trust or otherwise makes a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused. The record fails to show that claimant's October 19 act of allowing a patron to enter the store six minutes after it closed to use the bathroom was either unlawful or tantamount to unlawful conduct. Nor can we conclude, viewing the facts objectively, that claimant's conduct was so egregious that it made a continued employment relationship impossible, particularly given that claimant did not know the store was closed and knew the person was a patron of the store. Under those circumstances, the employer failed to establish that claimant's conduct was such that it caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 18-UI-103740 is affirmed.

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

DATE of Service: April 3, 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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