

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0244

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110507). The employer filed a timely request for hearing. On February 15, 2018, ALJ Clink conducted a hearing, and on February 20, 2018 issued Hearing Decision 18-UI-103530, affirming the Department's decision. On March 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer 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 the employer's argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Howarth Hospitality Group LLC employed claimant as a front desk agent in the employer's 27-room motel from June 12, 2017 to December 1, 2017.

(2) The employer did not have guidelines regarding posts about the motel or its customers on social media sites. The motel had a check-in policy that required guests to check in by 10:00 a.m. or wait to check in when the hotel opened in the morning.

(3) On November 25, 2017, claimant was scheduled to work from noon to 10:00 p.m. A customer went into the motel five or ten minutes after claimant closed the motel at 10:00 p.m. and asked claimant for a room. Claimant told the customer that the motel was closed for the night and that he would have to wait until the morning for a room. The customer was upset and went out the front door in an angry manner. The property manager saw the customer and asked him what had occurred, and gave the customer a room. As the customer was leaving the office, he told claimant, "Go fuck yourself, you asshole!" Audio Record at 29:57 to 29:58.

(4) On November 25, 2017, after his shift ended, claimant posted a comment about the incident with the customer on the social media website, Facebook. The post stated, “This is dedicated to the last douche bag who checked in tonight. Go fuck yourself.” Audio Record at 14:26 to 15:00. The post did not itself contain identifying information about the employer or the customer. Claimant’s Facebook account was set to allow only friends and family to view his posts. On approximately November 30, 2017, one of claimant’s friends who had seen claimant’s post on November 25 showed the post to the employer’s property manager.

(5) Prior to November 30, 2017, claimant had no written warnings or disciplinary actions.

(6) Claimant was scheduled to work on December 1, 2017. The property manager discharged claimant on December 1, 2017 because of his conduct toward the customer and his Facebook post on November 25, 2017.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has 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).

The employer discharged claimant for his conduct on November 25, 2017. That night, claimant did not rent a room to a customer who entered the employer’s motel five or ten minutes after claimant closed the motel, and he posted an inappropriate comment regarding the customer on Facebook. To the extent the employer discharged claimant because he failed to rent a room to a customer who entered the motel after claimant closed the motel at 10:00 p.m., the employer did not discharge claimant for misconduct. It was undisputed in the record that the motel required customers to check in by 10:00 p.m. or wait until the following morning, and that the customer arrived after 10:00 p.m. on November 25. There was no evidence in the record that claimant knew or should have known that the employer expected him to make an exception to that policy. The employer therefore failed to show that claimant’s failure to rent a room to a customer after closing violated the standards of behavior that the employer had a right to expect of claimant.

Although the employer did not have a social media policy, claimant knew or should have known as a matter of common sense that the employer would expect him to refrain from posting disparaging comments about its customers on online social media. Although claimant’s Facebook posts were accessible to only family and friends, it is common knowledge that the posts may be shared and thus become public. The post was disparaging on its face, contained foul language, and was directed toward a customer. Claimant’s conduct in posting the comment showed a conscious indifference to the consequences of his conduct for the employer and was likely a wantonly negligent violation of the employer’s expectations.

Although claimant's Facebook post was likely 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 471-0300038(1)(d)(D). The record does not show that claimant willfully or wantonly violated any other employer expectations before November 25. Claimant's conduct in posting the Facebook post therefore meets the first prong of the test for an isolated instance of poor judgment since it was isolated. As well, claimant's behavior 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 identifying the employer's business in the post, making a threatening or discriminatory comment about the customer, or posting personal information about the customer. Viewed objectively, an employer would not conclude from claimant's behavior that it could not trust claimant to conform to its expectations in the future. Because it meets both prongs of the standard, claimant's Facebook post, while it was likely 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-103530 is affirmed.

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

DATE of Service: April 5, 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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