

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0350

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132602). Claimant filed a timely request for hearing. On March 28, 2018, ALJ Scott conducted a hearing and issued Order No. 18-UI-106169, affirming the Department's decision. On April 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision, to the extent it was relevant and based upon the hearing record.

FINDINGS OF FACT: (1) Lane County employed claimant as Assistant Public Works Director from June 5, 2017 to January 2, 2018.

(2) The employer's fraternization and nepotism policy stated, "Management and supervisory level employees shall disclose any relationship related to subordinate employees who are Relatives or with whom they have a Personal Relationship as identified in the definitions in this policy and shall defer any and all procedural or policy decisions related to or affected by Personal Relationships or family status to more senior management." Exhibit 1 (also marked employer's exhibit 3 – 1 of 2). Claimant was not aware of the fraternization and nepotism policy.

(3) The employer's county rules also prohibited "[l]ying, untruthfulness or gross deviation from the facts or any other act which is normally construed as dishonest." Exhibit 1 (also marked employer's exhibit 4 – 5 of 9). Claimant understood the employer's county rules.

(4) The Public Works Director supervised claimant's position. The County Administrator supervised the Public Works Director.

(5) In mid-November 2017, claimant and the Public Works Director began to develop personal feelings for one another. They exchanged messages including the statements, "I love you," "nice butt," and "I'm falling for you." Transcript at 9. Claimant journaled private thoughts about making emotional decisions and losing her job. Despite the feelings they held, claimant and the Public Works Director did not enter into a relationship with each other or physically express their emotions for each other.

(6) At all relevant times, claimant was married to someone who did not work for the employer. Claimant's then-husband became convinced that claimant and the Public Works Director were having an affair. He collected information, including evidence of the messages between claimant and the Public Works Director, copies of claimant's journals, and photographs. Claimant's then-husband sent anonymous messages to claimant and the Public Works Director threatening to expose their relationship.

(7) On December 4, 2017, claimant and the Public Works Director met with the County Administrator to disclose the anonymous messages they had received. The County Administrator asked them if there was any truth to the allegations in the anonymous messages. Claimant and the Public Works Director said there was not, and that they did not have a relationship like was described in the messages. The County Administrator asked them if there was anything to their relationship that could potentially embarrass the employer, and they said there was not. The County Administrator reassigned claimant to be supervised by the employer's Director of Operations as a precautionary measure.

(8) On the next business day after the meeting, after some reflection, claimant became concerned that her report to the County Administrator could be construed as unforthcoming. Claimant told the Director of Operations the full range of her personal, emotional relationship with the Public Works Director, and that they had exchanged electronic messages about songs, philosophy and other things that could be construed as romantic. The Director of Operations told the County Administrator what claimant had disclosed, after which the employer hired an investigator to investigate the situation.

(9) At some point in time after receiving the anonymous messages but before the employer instructed claimant and the Public Works Director not to have any contact with one another, claimant and the Public Works Director discussed their feelings and decided not to enter into a romantic relationship with each other. On December 14, 2017, claimant obtained a restraining order against her then-husband due to physical and sexual abuse.

(10) On January 2, 2018, the employer discharged claimant for being dishonest to the County Administrator about her relationship with the Public Works Director.

CONCLUSIONS AND REASONS: We disagree 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. 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 ALJ concluded that the employer discharged claimant, “not for the fact or nature of the relationship with [the Public Works Director], but because she had failed to disclose the true nature and extent of the relationship at the meeting of December 4, 2017.”¹ We agree that the record supports the ALJ’s conclusion. The ALJ then concluded that claimant did fail to disclose her relationship in violation of the employer’s rules, because “claimant and [the Public Works Director] told [the County Administrator] that there was nothing more to it [their relationship] and that there was absolutely no truth to the allegations in the email that had been brought to [the County Administrator’s] attention,” which was “disingenuous” because at that time claimant knew there were messages, journal entries and “declarations of love in a format that could be captured in documentary form.”² The ALJ wrote, “It was very obvious from the testimony, and would have been obvious to any person with ordinary common sense, that withholding this information from [the County Administrator] under these circumstances, was dishonest.”³ The ALJ concluded that claimant’s dishonesty with the County Administrator was aggravated because claimant and the Public Works Director were the ones that opted to have the meeting in the first place, after having “time to weigh and consider how much to tell” him about the relationship, but “elected to mislead” him “by minimizing the nature of their relationship,” and that her conduct “was, at the very least, wantonly negligent.”⁴

The ALJ then analyzed whether or not claimant’s conduct should be excusable as an isolated instance of poor judgment, and concluded that it should not. The ALJ found that although claimant’s failure to respond truthfully to the County Administrator was an isolated exercise of poor judgment, OAR 471-030-0038(1)(d)(D) provides that acts that create an irreparable breach of trust in the employment relationship or make a continued employment relationship impossible exceed mere poor judgment and cannot be excused, and the County Administrator testified that “since claimant was not truthful with him [the County Administrator] during the meeting of December 4, 2017, claimant could no longer be trusted and a continued employment relationship was impossible.”⁵ On that basis, the ALJ concluded that claimant’s discharge exceeded mere poor judgment and could not be excused from constituting misconduct. We disagree for the reasons that follow.

¹ Order No. 18-UI-106169 at 4.

² *Id.*

³ *Id.*

⁴ *Id.* at 4, 5.

⁵ *Id.* at 5-6.

Assuming *arguendo* that the record supports the ALJ's conclusion that claimant was dishonest with the County Administrator, we disagree with the ALJ that claimant's conduct was not excusable as an isolated instance of poor judgment.⁶ The fact that the County Administrator testified that claimant could no longer be trusted is not dispositive of whether or not her conduct caused a breach of trust or exceeded an isolated instance of poor judgment. That determination is objective, not subjective, and involves an evaluation of claimant's decision-making process and judgment; the seriousness of claimant's violation does not transform an act into misconduct, and the employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not.⁷

In this case, the record does not establish that any reasonable employer would have concluded, like the employer, that claimant's conduct caused a breach of trust. Not only did claimant initially approach the employer to make a report about the potential problem, she self-identified that her report might have been inadequate and corrected the possible deficiency in her original report by making a full report the next business day. The ALJ opined that doing so did not "exonerate claimant from the earlier deception," inferring that claimant and the Public Works Director had "control" of the meeting and had strategized beforehand to mislead the employer.⁸ Not only does the evidence, on the balance, not support the ALJ's conjecture about claimant's control of the meeting and preformed plan to deceive, the record shows that claimant, acting alone on her own reconsidered judgment, weighed her December 4th statements, thought about their veracity, and decided to self-report without ever having been asked or challenged about the earlier statements she had made, and without having been informed that her earlier statements would be investigated to determine whether they were truthful. In other words, whatever dishonesty might have occurred on December 4th, claimant decided, with little possible benefit and great risk to herself, to promptly approach her supervisor to more fully disclose the nature of her relationship with the Public Works Director. In so doing, we conclude that she mitigated the severity of her dishonest conduct the previous business day. Claimant then offered to resign when she made her full report, demonstrating that she was subjectively aware of the severity of her conduct and demonstrating remorse, and thereafter cooperated with the employer's investigation by participating in interviews with the investigator. Also mitigating claimant's exercise of poor judgment on December 4th, it appears that the events in claimant's life, including physical and sexual abuse by her then-husband, learning the extent to which her then-husband had been monitoring her conduct and was willing to harm her career by exposing what he thought was her affair with the Public Works Director, and developing an

⁶ The record does not clearly establish that claimant was dishonest with the County Administrator given the parties' reasonable dispute about exactly what claimant was asked on December 4th about her relationship with the Public Works Director versus asked whether the anonymous allegations about the relationship were true. Assuming she was asked about her relationship, the record is not clear that claimant understood at that point in time that she was expected to disclose that she had an emotional connection to the Public Works Director that she did not act upon outside of messages and her private journals, or that failing to disclose details about her feelings for the Public Works Director would be viewed as dishonest. Assuming she was asked whether the anonymous allegations were true, the record did not include the specific allegations contained in the anonymous messages and we therefore cannot compare claimant's statements at the December 4th meeting to the allegations to see if the answers claimant provided were or were not true.

⁷ See accord *Isayeva v. Employment Dep't.*, 266 Or. App. 806, 340 P.3d 82 (2014); *Smithee v. Employment Dep't.*, 288 Or. App. 346, 208 P.3d 965 (2009); *Callaway v. Employment Dep't.*, 225 Or. App. 650, 202 P.3d 196 (2009); *Freeman v. Employment Dep't.*, 195 Or. App. 417, 98 P.3d 402 (2004).

⁸ Order No. 18-UI-106169 at 4.

emotional relationship with her supervisor that jeopardized her employment, likely impaired claimant's judgment at the time. Considering the totality of the circumstances and mitigating factors present in this case, we cannot say that any reasonable employer would conclude that claimant's conduct had caused an irreparable breach of trust in the employment or otherwise made a continued employment relationship impossible. We therefore conclude that claimant's conduct did not exceed mere poor judgment.

For the foregoing reasons, we conclude that the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-106169 is set aside, as outlined above.⁹

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

DATE of Service: May 10, 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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⁹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.