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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0452

Order No. 18-UI-108334 Reversed ~ No Disqualification
Order Nos. 18-UI-108296 and 18-UI-108306 Affirmed ~ Ineligible

PROCEDURAL HISTORY: On March 15, 2018, the Oregon Employment Department (the Department) served three notices of three administrative decisions, one concluding the employer discharged claimant for misconduct (decision # 90057), the second concluding that claimant did not actively seek work from February 25, 2018 to March 10, 2018 (decision # 93714), and the third concluding that claimant was not able to work from February 25, 2018 to March 10, 2018 (decision # 92747). Claimant filed timely requests for hearing. On April 20, 2018, ALJ Wyatt conducted a consolidated hearing on decisions # 93714 and 92747, and a hearing on decision # 90057. On April 27, 2018, the ALJ issued Order No. 18-UI-108334, affirming decision # 90057, Order No. 18-UI-108296, affirming decision # 93714, and Order No. 18-UI-108306, concluding claimant was not able to work from February 25, 2018 through March 24, 2018. On May 1, 2018, claimant filed applications for review of all three decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-108296, 18-UI-108306, and 18-UI-108334. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0452, 2018-EAB-0453, and 2018-EAB-0454).

With respect to Order Nos. 18-UI-108296 and 18-UI-108306, EAB reviewed the entire hearing record and claimant's argument. On *de novo* review and pursuant to ORS 657.275(2), Order Nos. 18-UI-108296 and 18-UI-108306 are **adopted**.

FINDINGS OF FACT: (1) Wenspoken Resources, LLC, dba Wendy's restaurant, employed claimant until February 21, 2018.

(2) The employer prohibited claimant from using offensive language at work. Claimant understood the prohibition.

(3) On February 18, 2018 or February 19, 2018, the shift manager sent claimant home from work for refusing to wear a headset. As claimant left, he said that the shift manager was a “cunt.” Audio recording at ~ 17:00. The shift manager and a coworker heard claimant.

(4) Thereafter, claimant worked a normal shift. On February 21, 2018, the employer discharged claimant for calling the shift manager a “cunt.”

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant’s discharge was 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 claimant’s discharge was for misconduct because his “behavior clearly violated the employer’s reasonable expectations,” and, although “an isolated event,” his “use of such an extremely offensive and abusive term shocks the conscience and exceeds mere poor judgment,” so it created an irreparable breach of trust in the employment relationship and was not excusable as an isolated instance of poor judgment. Order No. 18-UI-108334 at 3. We agree with the ALJ that claimant’s behavior violated the employer’s expectations willfully or with wanton negligence and that it was an isolated event. However, we disagree with the ALJ that it exceeded mere poor judgment.

OAR 471-030-0038(1)(d) provides that conduct that exceeds mere poor judgment includes behavior that is unlawful, tantamount to unlawful, causes an irreparable breach of trust or makes a continued employment relationship impossible. Calling a supervisor a “cunt” is not unlawful or tantamount to unlawful conduct. It does not appear that his use of the term made a continued employment relationship impossible because the employer continued the employment relationship by allowing claimant to work another shift despite his use of that term. It also does not appear that his exercise of poor judgment by using that term caused an irreparable breach of trust for the same reason. Additionally, because claimant appears not to have directed his use of the offensive word toward the supervisor, used the word to threaten her or as part of a threat, engaged in threatening body language at the time of the event, or accompanied his use of the term with other offensive or vitriolic words or body language, his conduct, although a violation of the employer’s policy and expectations, was not the sort of behavior that any reasonable employer would conclude exceeded mere poor judgment by irreparably breaching its trust.

The employer therefore discharged claimant for an isolated instance of poor judgment. Isolated instances of poor judgment are not misconduct. Therefore, claimant’s discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-108334 is set aside, as outlined above. Order Nos. 18-UI-108296 and 18-UI-108306 are affirmed.

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

DATE of Service: June 1, 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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