

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0476

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 13, 2108, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 80535). Claimant filed a timely request for hearing. On April 5, 2018, ALJ Amesbury conducted a hearing, continued on April 25, 2018, and on April 27, 2018, issued Order No. 18-UI-108281, affirming the Department's decision. On May 4, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant submitted a written argument. However, she failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's argument or any information not received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claeys Catering Inc. employed claimant as a cook and chef from June 1, 2017 to December 15, 2017.

(2) The employer expected its employees to report for work as scheduled and to obey its reasonable instructions. The employer also expected its employees to refrain from destroying its property or product without reason. Claimant was aware of and understood the employer's expectations either because she was informed of them or as a matter of common sense.

(3) Claimant did not have a regular work schedule and often learned her work schedule for the next day either before she left work for the day or after work hours, by text message.

(4) The employer occasionally authorized claimant to work overtime but sometimes claimant worked overtime without authorization, in violation of the employer's expectations.

(5) In August 2017, the employer counseled claimant against working unauthorized overtime by starting work early without the employer's authorization. On December 5, 2017, claimant was scheduled to begin work at 7:00 a.m., but she reported for work early and began working at 6:15 a.m. On December 7, 2017, claimant again was scheduled to begin work at 7:00 a.m., but she reported for work early and began working at 6:30 a.m. On December 7, 2017, the employer again counseled claimant for working unauthorized overtime by starting work early on December 5 and 7 without the employer's authorization.

(6) On December 10, 2017, claimant was scheduled to begin work at 8:00 a.m. At 6:42 a.m., claimant texted her supervisor and requested permission to begin work at 7:00 a.m. Her supervisor responded to claimant by text, stating, "No, not today," to which claimant replied, "Oh, ok I'll do homework lol." Exhibit 1. In fact, claimant had reported for work and began working at 6:00 a.m., and at the time she requested permission to begin work early, she had already worked 42 minutes.

(7) On December 14, 2017, claimant engaged in a verbal altercation with her supervisor after the supervisor directed her to stop breaking down boxes and work on a different task. Claimant became angry and took a tray of the employer's baked product and dumped it into the garbage, wasting it and making it unavailable for the employer's planned use for it that day.

(8) On December 15, 2017, the employer discharged claimant for repeatedly violating its instructions regarding work hours and destroying the employer's work product on December 14, 2017.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant and the employer disagreed regarding some of the events concerning claimant's discharge. Claimant's assertion that she was authorized to begin work whenever she wanted was inconsistent with the employer's texts concerning start times and internally inconsistent with her own texts inquiring about her start time for a given day or requesting permission to begin work early. Transcript (April 5, 2018 hearing) at 27; Exhibit 1. Moreover, claimant's texts to her supervisor on December 10 were misleading given that she had already begun work at 6:00 a.m. and did not intend to leave before 8:00 a.m. Because claimant was not a credible witness, on matters in dispute, we based our finding on the employer's evidence.

The employer had a right to expect claimant to obey its instructions concerning her work times especially after claimant had been counseled against reporting for work early. The employer also had a right to expect claimant to refrain from destroying its work product in anger, as a matter of common sense. Although claimant provided hearsay evidence that she had been told to get rid of the work product in question, pumpkin bars, by another employee, she did not dispute that she did so in anger in the presence of another coworker who witnessed that event and told her she intended to use the pumpkin bars later that day. Transcript (April 25, 2018) at 10-14. On this record, claimant was conscious of her conduct in beginning work before she was scheduled to work and destroying the employer's work product, and knew or should have known that her conduct would probably result in a violation of standards of behavior the employer had the right to expect of her. Claimant's conduct was at least wantonly negligent.

Claimant's violations of the employer's expectations cannot be excused as an isolated instance of poor judgment as it was not isolated, having occurred on December 5, December 7 and December 14, 2017. Moreover, acts that create irreparable breaches of trust in the employment relationship make a continued relationship impossible, exceed mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Taken together, claimant's insubordinate and destructive behavior was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment and, also for that reason, does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct also cannot be excused as a good faith error in her understanding of the employer's expectations. Given both the repeated counseling she received and as a matter of common sense, claimant knew that her insubordinate and destructive conduct violated the employer's expectations. Accordingly, claimant's conduct was not the result of an error in her understanding of those expectations.

The employer discharged claimant for misconduct under ORS 657.176 (2)(a), and claimant is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-108281 is affirmed.

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

DATE of Service: June 6, 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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