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BYE: 201906

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0500

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145938). Claimant filed a timely request for hearing. On April 6, 2018, ALJ Janzen conducted a hearing, and on April 25, 2018 issued Order No. 18-UI-108089, concluding the employer discharged claimant, but not for misconduct or for committing a disqualifying act. On May 14, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Total Renal Care, Inc. employed claimant as a medical assistant from February 2017 to February 14, 2018.

(2) The employer had a written drug and alcohol policy that specifically prohibited "using" or "being under the influence of" alcohol while performing services for the employer. Exhibit 1. The employer's policy provided for testing based on "reasonable suspicion" and was published and communicated to claimant at hire. The employer also had a written policy concerning "teammate investigations" that provided that "upon request, all teammates (employees) are expected to participate and cooperate in the investigation in good faith, and to provide truthful and complete information." Exhibit 1. Claimant was aware of and understood the employer's drug and alcohol policy and expectations regarding teammate investigations.

(3) On February 1, 2018, a work day, claimant had lunch with two coworkers at a restaurant. Claimant did not consume alcohol during lunch.

(4) On February 5, 2018, two employees reported to the employer that claimant ordered and consumed a shot of vodka during lunch on February 1st. That day, the employer's practice manager asked claimant if she had consumed alcohol while at lunch on February 1, 2018, and claimant denied it.

(5) On February 7, 2018, claimant received a phone call from a coworker about an allegation the employer had made. Amongst the text messages exchanged between claimant and two other coworkers that morning, was the following text message from claimant, which read, in relevant part,

> "Ok girls, so they are really trying to turn us on each other clearly. Making us feel like we are talking about each other. And saying someone saw us drinking at lunch. We have not, we have drank after work. I even called the Mexican restaurant and asked Manuel if anyone has gone in or called and asked about us and he said no. Say nothing!!! We have each other's backs, we all know this so don't get caught up in this bs game."

Exhibit 1.

(6) On February 7, 2018 a coworker provided the employer with the text message.

(7) On February 14, 2018, the employer discharged claimant for allegedly consuming alcohol on February 1, 2018 during her lunch before returning to work, and for later impeding its investigation into her conduct.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct or committing a disqualifying act under ORS 657.176.

As a preliminary matter, the employer provided only hearsay evidence regarding claimant's conduct on February 1, 2018. Audio Record ~ 9:45 to 10:45. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath more weight than the employer's hearsay evidence, and therefore found facts in accordance with her testimony on matters in dispute.

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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to participate and cooperate in its investigation conducted during the week of February 5 in good faith, rather than impede it in any way. Claimant was made aware of that expectation at hire and should have been aware of it as a matter of common sense. Claimant's February 7 text message to her coworkers suggesting that they "Say nothing" when contacted by the employer on its face violated that expectation. More likely than not, claimant was conscious of her conduct and knew or should have known suggesting that coworkers say nothing during an investigation would likely violate the employer's expectation that employees participate and

cooperate in an investigation "in good faith." Claimant's text message was at least a wantonly negligent violation of the employer's expectation.

At issue then is whether claimant's conduct was an isolated incident of poor judgment under OAR 471-030-0038(1)(d) and thus excusable under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Under OAR 471-030-0038(1)(d)(D) certain acts, even if isolated, that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

The Department's initial decision did not address the issue of an isolated instance or poor judgment. The ALJ, after concluding that the record did not establish that claimant consciously tried to impede the employer's investigation further concluded that "[e]ven if claimant's conduct could be considered a willful or wantonly negligent violation of the employer's policy, it was an isolated instance of poor judgment" reasoning that the record failed to show that claimant previously violated the employer's policies or that claimant's conduct was too serious" to exceed mere poor judgment. We agree. The record fails to show that claimant had been disciplined previously for other willful or wantonly negligent behavior. Her conduct on February 7 was therefore a single or infrequent occurrence. Her text message was not unlawful or tantamount to unlawful conduct, and absent a preponderance of evidence showing that claimant had, in fact, consumed alcohol at lunch, was not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after claimant received a warning against engaging in similar conduct in the future. While claimant's conduct in sending the text message showed poor judgment, it did not exceed mere poor judgment by creating an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Her text message, therefore, was no more than an isolated instance of poor judgment and thus excusable under OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant for allegedly consuming alcohol on February 1, 2018 during her lunch before returning to work, the employer failed to show that the alleged conduct constituted a disqualifying act under ORS 657.176(2)(h). OAR 471-030-0125(9)(a) (January 11, 2018) defines "disqualifying act" to include an admission that the employee has violated a reasonable written employer policy governing, among other things, the use or effects of alcohol in the workplace and OAR 471-030-0125(9)(b) defines "disqualifying act" to include, in the absence of a test for alcohol, "clear observable evidence that the employee is under the influence of alcohol in the workplace." The employer did not assert or show that claimant admitted to consuming alcohol on February 1, failed or even was administered a test for alcohol on that date or that there was any observable evidence that claimant was under the influence of alcohol while in the workplace on that date. Audio Record ~ 17:30 to 18:40. Accordingly, the employer failed to show that claimant's conduct constituted a disqualifying act.

In sum, the employer discharged claimant, but not for misconduct or committing a disqualifying act under ORS 657.176.

DECISION: Order No. 18-UI-108089 is affirmed.

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

DATE of Service: June 14, 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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