

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0044

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125419). Claimant filed a timely request for hearing. On December 19, 2013, ALJ M. Smith conducted a hearing, and on December 30, 2013 issued Hearing Decision 13-UI-07339, affirming the Department's decision. On January 8, 2013, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she contended the hearing proceedings were unfair and the ALJ was biased against her. Claimant specifically asserted that the ALJ treated her "as a second class citizen," was "rude and disrespectful" during the hearing and did not give her a "legitimate opportunity to testify." Written Argument at 5, 6. EAB reviewed the hearing record in its entirety. It does not show the ALJ was biased or impolite toward claimant. It shows that that the ALJ inquired fully into the matters at issue and gave claimant a reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). EAB considered claimant's remaining arguments to the extent that they were based on evidence in the hearing record. *See* OAR 471-040-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Klamath Open Door Clinic employed claimant as a dental intake specialist from March 12, 2013 until August 19, 2013. In this position, claimant's work station was at the employer's front desk, within easy earshot of waiting patients. Claimant job duties included greeting patients, answering telephones and performing miscellaneous data entry tasks. Claimant spoke Spanish, and one of the reasons the employer hired her was to allow it to effectively communicate with Spanish-speaking patients.

(2) The employer expected claimant to behave in a professional and business-like fashion at all times while she was at work. Claimant understood the employer's expectations.

(3) On April 16, 2013, claimant had a disagreement with a coworker while at the front desk and in front of patients in the waiting room. Claimant and the coworker “screamed” at each other and used “foul language.” Transcript at 42; *see also* Transcript at 10, 11. After this incident, claimant’s supervisor warned her that, regardless of any provocation from a coworker, the employer expected claimant to behave in a professional manner at all times when patients might see or overhear her and to refrain from using disrespectful language or arguing with a coworker in front of patients. The supervisor told claimant that the way she had behaved and the language she had used “is absolutely not tolerated here.” Transcript at 43.

(4) On approximately July 30, 2013, claimant’s coworker had shut down her till early and asked claimant to take a payment from a patient who was at the front desk. Claimant refused to take the payment and began arguing with the coworker in front of the patient about the reason the coworker had closed her till. Claimant’s supervisor came up and told claimant to take the payment from the patient. Claimant resisted taking the payment and started arguing with the supervisor about the coworker’s behavior. The patient was still waiting at the front desk. The supervisor again told claimant to take the payment and told claimant she was not going to argue with her in front to the patient. On approximately July 31, 2013, claimant’s supervisor discussed this incident with claimant and warned claimant again not to express disagreements within the hearing of patients. The supervisor told claimant her job would be in jeopardy if she argued again with a coworker or supervisor within the hearing of patients, and that if her behavior did not improve she was “on a thin line.” Transcript at 62.

(5) On August 16, 2013, claimant’s supervisor learned claimant was behind in entering insurance information for patients and asked claimant if she needed some help from her coworker to catch up in her work. Claimant told the supervisor in a raised voice that she did not need help and threw a stack of papers containing insurance information onto her coworker’s “scan pile.” Transcript at 29. A short time later, the coworker asked claimant to handle a telephone call from a Spanish-speaking patient because the coworker did not speak Spanish. Claimant resisted taking the call, and when the coworker tried to explain why she wanted claimant to speak with the patient, and that it was a part of claimant’s job duties to handle calls from patients who preferred to speak in Spanish, claimant told the coworker to “shut up.” Transcript at 8, 37. Claimant also told the coworker, “I take all the calls” and “I’ll just transfer to you all the white calls [from non-Spanish speaking patients].” Transcript at 37; *see also* Transcript at 8. Claimant’s comments, both to the supervisor and to the coworker, were heard by patients waiting in the lobby.

(6) On August 19, 2013, the employer discharged claimant for having a disagreement with her coworker in front of patients on August 16, 2013.

CONCLUSIONS AND REASONS: 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. 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. A claimant’s isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer's witnesses who testified had first-hand knowledge of claimant's behavior on August 16, 2013 as well as on July 30, 2013 and included claimant's supervisor and claimant's coworker. Each provided detailed testimony of claimant's behavior on these dates to support the employer's contention that claimant violated the employer's expectations. Claimant generally denied that she had acted in the manner the employer's witnesses described, but agreed that her supervisor had warned her she "needed a better attitude," that her behavior was "not going to be tolerated" and that she was on a "thin line." Transcript at 45, 47, 51-52, 61, 62. Claimant could not explain why her supervisor had warned her in this manner if her behavior had not been objectionable other than to contend that the supervisor wanted "just to make me feel more inferior," "always found a way to turn it around and blame me for it" and "wanted to shove it down my throat." Transcript at 48, 64, 65. Claimant's attempts at explanation suggest a self-servicing justification. Moreover, rather than addressing the ALJ's questions, much of claimant's testimony was directed toward the "very rude" behavior of her supervisor, and the "bad work habits" of her coworkers and their "antagonizing," "volatile," "erratic" and "disrespectful" behaviors. Transcript at 46, 47, 55, 56, 65, 69. The vigor with which claimant blamed her coworkers and her supervisor at hearing sheds light on how claimant might have reacted if she had a disagreement in the workplace. Taking claimant's testimony as a whole, her rebuttal of the testimony of the employer's witnesses was not persuasive. The fair preponderance of the evidence shows, more likely than not, that claimant engaged in the behavior that the employer contended and we have relied on the employer's evidence in the findings of fact.

The employer operated a service business in which the perceptions of its patients were important. The employer's expectation that claimant would refrain from having visible disputes or arguments with coworkers in front of patients was reasonable. Claimant was aware of the employer's expectation both because her supervisor clearly told her when she warned her on April 16, 2013 and on July 31, 2013 and as a matter of common sense. By visibly disagreeing with her coworker on August 16, 2013 and telling her coworker to "shut up," in front of patients when they could hear her, claimant violated the employer's expectations with at least wanton negligence.

Claimant's behavior on August 16, 2013 was not excused as 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 471-030-003891(d)(A). Here, claimant was made aware of the employer's expectations at least by April 16, 2013, when her supervisor told in clear language that the employer expected her not to express her disagreements with coworkers in front of patients, and she violated this instruction with at least wanton negligence on July 30, 2013 when she expressed disagreement with her coworker and with her supervisor. Based on her behavior on July 30, 2013, claimant's behavior on August 16, 2013 was not isolated but, rather, was a repeated act of misconduct. Since it was not a single act of misconduct, claimant's behavior on August 16, 2013 was not excusable as an isolated instance of poor judgment.

Claimant's behavior on August 16, 2013 was also not excused as a good faith error under OAR 471-030-0038(3)(b). Claimant neither asserted she believed, nor presented evidence showing she had a factual basis for believing, that the employer would excuse her behavior in disagreeing with a coworker in front of patients. In addition, given the clarity of the employer's prior warnings to her, it is

implausible that claimant believed the employer would condone her behavior in having a visible dispute with a coworker on August 16, 2013.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 13-UI-07339 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating

DATE of Service: February 13, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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