

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0109

*Reversed
Disqualification*

PROCEDURAL HISTORY: On September 25, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 74753). The employer filed a timely request for hearing. On December 5, 2013, ALJ Clink conducted a hearing at which claimant did not appear, and on January 2, 2014 issued Hearing Decision 14-UI-07582, affirming the Department's decision. On January 17, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Emerald Valley Spirits, LLC employed claimant as a cashier and general worker in a liquor store from March 21, 2013 until August 16, 2013. As a part of his job, claimant worked at a cash register and processed customers' purchases.

(2) The employer expected claimant to refrain from insubordinate behavior directed at the employer's owner. Claimant was aware of this expectation as a matter of common sense.

(3) On approximately March 28, 2013, the owner was holding a staff meeting in which she discussed difficulties some employees were having with the employer's point of sale (POS) system. Claimant came up to the owner and told her he did not understand everything she had said. When she reassured claimant that she did not expect him to understand because it was early in his employment, claimant commented in a sarcastic voice, "Well, I wonder what else I'm gonna find out [from you]." Audio at ~13:19. Thereafter, the owner issued several warnings to claimant for mistakes claimant made when operating the employer's POS system. The owner perceived that claimant resisted her authority.

(4) On August 16, 2013, the owner told claimant she wanted to speak with him about mistakes he had made the day before using the POS system. Claimant told the owner he wanted to leave the store to deposit his paycheck and the owner agreed to wait to have the discussion until he returned. The owner left the store. When the owner returned, claimant and a coworker were attempting to determine why the

POS system was not functioning correctly. There were customers waiting in line at the cash register to purchase merchandise. The owner immediately went to the cash register to try to remedy the problem. The owner told claimant to leave the cash register and to wait for her in the office to have their discussion. Claimant refused to leave. The owner asked claimant again to go to the office. Claimant still refused to leave. The owner asked claimant a third time to leave and claimant went to the office doorway. In front of the waiting customers and at least one coworker, claimant said to the owner in an insolent tone, "Sugar, you don't even know how to operate your own equipment." Audio at ~9:55. The owner told claimant, "You're fired. Leave the area." Audio at 10:00.

(5) On August 16, 2013, the owner discharged claimant for the manner in which he had spoken to her.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-07582, the ALJ found that claimant was discharged for "failing to perform the work to the employer's standards." Hearing Decision 14-UI-07582 at 2. The ALJ concluded the employer did not show that claimant's inadequate work performance was the result of willful or wanton negligence within the meaning of OAR 471-030-0038(3)(a). We disagree.

In her decision, the ALJ ignored the owner's clear testimony that she discharged claimant on August 16, 2013 because of the insubordinate comment he made to her after she asked him to leave the cash register. Audio at ~9:46, ~10:16, ~16:57. To decide this case correctly, the true cause of the discharge must be assessed to determine whether the discharge resulted from claimant's willful or wantonly negligent violation of standards the employer might reasonably expect. At the outset, because claimant did not appear at the hearing, there was no direct evidence that he was aware of an expectation against insubordinate behavior. However, the expectation that an employee will not act for the purpose of defying the authority of an owner or supervisor is so fundamental to the employment relationship, that we will impute an awareness of it to claimant as a matter of common sense. *See Elizabeth K. Long* (Employment Appeals Board, 12-AB-0714, April 11, 2012) (absent evidence to the contrary, an employee's awareness of the expectation to refrain from insubordinate behavior is assumed as a matter of common sense). The remaining issue is whether claimant's comments and actions on August 16, 2013 were insubordination as the term is reasonably understood.

From claimant's tone of voice, there was no innocent explanation for the comment claimant made to the owner on August 16, 2013. Audio at ~9:46. The only reasonable explanation for the words claimant chose and the tone he used was that claimant wanted to insult the owner, belittle her, embarrass her and defy her authority in front of customers and other employees. In its context, the comment claimant made to the owner can only be interpreted as conspicuously insubordinate behavior. Since claimant

made the comment for the seemingly sole purpose of expressing his disdain for the owner, we can only conclude, more likely than not, that he willfully violated the employer's expectations on August 16, 2013.

Claimant's comment to the owner on August 16, 2013 is not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, behavior that does not exceed mere poor judgment by causing and irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D). An employer cannot reasonably trust on an employee who has previously engaged in behavior undertaken for the sole purpose of flouting an owner's authority and expressing scorn for that owner. Claimant's insubordinate behavior was of a magnitude that exceeded mere poor judgment and it therefore cannot be excused as an isolated instance of poor judgment.

Claimant's behavior toward the owner also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant can only have understood his behavior violated the employer's expectations, and he acted with the intention of violating that expectation. The behavior that gave rise to claimant's discharge was not the result of a good faith error in understanding the employer's expectations.

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

DECISION: Hearing Decision 14-UI-07582 is set aside, as outlined above.

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

DATE of Service: February 19, 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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