

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0119

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 25, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 130725). The employer filed a timely request for hearing. On January 10, 2014, ALJ Sime conducted a hearing, and on January 16, 2014 issued Hearing Decision 14-UI-08647, reversing the Department's decision. On January 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Glacier Northwest, Inc. employed claimant as a driver at its cement plant from September 6, 2012 until September 6, 2013.

(2) The employer expected claimant to refrain from physically threatening his supervisors and his coworkers. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On June 5, 2013, claimant and a coworker had a disagreement. Both claimant and the coworker yelled very loudly, made aggressive and threatening gestures at each other, and several times one or both of them shouted the word "fuck." Transcript at 8, 22, 23, 31, 36, 37. Claimant's supervisor heard the shouting. After hearing both parties' accounts of the argument, the supervisor warned claimant not to try to resolve workplace disputes with threatening behavior.

(4) On September 6, 2013, claimant's supervisor and a coworker were taking measurements outside of the plant when claimant drove up in his truck. The supervisor told claimant to park the truck underneath the plant so the supervisor and the coworker could continue taking measurements. The coworker left and the co-worker asked claimant to shut the truck off. Claimant shouted at the supervisor while sitting in the truck, "You've never drove a fucking truck in your life." Transcript at 19. The supervisor did not respond immediately to claimant's shouted comment, but continued taking measurements and told the coworker to complete the measurements. After a few minutes had passed, the supervisor went to the

driver's side window of claimant's truck and told claimant to "treat him with a little respect." Transcript at 24; *see also* Transcript at 7, 43. Claimant responded by shouting at the supervisor, "What did you fucking say to me?" Transcript at 19. Claimant shouted this question to the supervisor "at least four times" in a very loud and angry voice. Transcript at 20. One of claimant's coworkers who was present during the incident, thought, "Oh my God, here we go." Transcript at 20. Claimant then left the truck, while appearing visibly "upset" and continuing to scream "pretty loud" at the supervisor. Transcript at 20. What claimant was screaming was not clear. Claimant started approaching the supervisor, still screaming, and the supervisor started backing away from claimant. Transcript at 20. Claimant continued pursuing the supervisor. Claimant was "flaying his arms and fists in anger" as he came at the supervisor. Transcript at 7. The supervisor said to claimant "Get outta here right now. I'm gonna call the cops." Transcript at 20. Claimant still continued coming at the supervisor and the supervisor continued backing away. The supervisor thought claimant intended to physically attack him. As a "last resort to keep from getting [his] head beat in," the supervisor told claimant, "You're fired." Transcript at 20, 39. Claimant abruptly stopped. Claimant then left the workplace "shaking his fist" and "pointing his finger" several times at the supervisor while laughing. Transcript at 21. On September 6, 2013, the supervisor discharged claimant.

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).

At hearing, claimant's supervisor and a coworker gave consistent, detailed descriptions of claimant's behavior on September 6, 2013, and the employer presented hearsay statements from two additional witnesses who had observed the incident that corroborated their testimony. Transcript at 6-18, 19-21, 24-25. Claimant denied he engaged in the behavior the employer's witnesses described and asserted that the supervisor spontaneously, and without any apparent reason, "blew up" at him. Transcript at 29-30, 33, 42. Claimant's testimony was contradictory and did not provide an adequate explanation of the undisputed events that occurred that day. For example, after initially denying he had yelled "What the fuck did you say?" at his supervisor, claimant admitted late in his testimony that, in fact, he had done so. Transcript at 29-30, 43-44. When addressing the reasons the employer's witnesses might testify falsely, claimant generally asserted "they lied quite a bit there [in the workplace]," but did not present concrete examples of any bias against him. 34. Claimant was also unable to explain why his supervisor might have spontaneously discharged him other than to state "he's kinda weird-looking," which supposedly caused the supervisor to misinterpret some innocent comments from claimant as threatening. Transcript at 41-42. To resolve the inconsistency between the testimony of claimant and the supervisor in describing the incident on September 6, 2013, we give significant weight to the testimony of claimant's coworker and the hearsay statements of the other two coworkers because those witnesses observed some or all of the incident and, different from claimant and the supervisor, were relatively disinterested in the outcome of the hearing. Because claimant's testimony was insufficient to rebut the persuasiveness of

the statements of the three disinterested witnesses, the preponderance of the evidence shows that, without a reasonable provocation, claimant shouted obscenities at the supervisor and advanced on him with the apparent purpose of instigating a physical fight. We have adopted the hearing testimony of the one coworker and the statements of the other two coworkers, and drawn reasonable inferences from them, in our findings of fact.

The employer reasonably expected claimant to refrain from physically advancing at his supervisor with the purpose of instigating a physical fight. At a minimum, claimant understood this expectation as a matter of common sense. See *Glen W. Ross* (Employment Appeals Board, 12-AB-3215, January 14, 2013) (a claimant's awareness of the employer's expectation against instigating a physical fight with a coworker is inferable as a matter of common sense); *Justin D. Leddin* (Employment Appeals Board, 12-AB-0501, March 22, 2013) (same). In this case, claimant consciously left his truck and advanced on his supervisor to initiate a physical confrontation. When claimant's supervisor told him to stop, rather than walking away, claimant continued coming at the supervisor and making aggressive physical gestures. On these facts, without any apparently reasonable provocation, claimant willfully violated the employer's reasonable expectations.

Claimant's behavior on September 6, 2013 is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. An "isolated instance of poor judgment" is behavior that does not exceed mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant chose to resolve his anger at his supervisor by advancing on the supervisor with the apparent purpose of provoking a physical fight and, although claimant had an opportunity to halt after the supervisor instructed him to stop, claimant continued coming at the supervisor to instigate the fight. By continuing this aggressive physical behavior after the supervisor attempted to stop it, claimant irreparably breached the employer's trust that in the future he would resolve workplace disputes appropriately, without physical confrontations. For this reason, claimant's behavior on September 6, 2013 exceeded mere poor judgment and is not excusable as an isolated instance of poor judgment.

Claimant's behavior on September 6, 2013 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, or present evidence showing, that he had a good faith belief that the employer would condone his actions in aggressively approaching his supervisor and trying to provoke a physical fight. Claimant's actions were not based on a mistaken understanding of the employer's expectations, and were not the result of a good faith error.

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

DECISION: Hearing Decision 14-UI-08647 is affirmed.

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

DATE of Service: February 25, 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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