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

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EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0271

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct (decision # 85430). The employer filed a timely request for hearing. On January 29, 2014, ALJ Tiana conducted a hearing, and on February 4, 2014 issued Hearing Decision 14-UI-09810, reversing the Department's decision. On February 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Unified Grocers, Inc. employed claimant as a general warehouse worker from July 19, 2004 until October 25, 2013.

(2) The employer expected claimant to refrain from bringing weapons to the workplace, making threatening gestures or brandishing weapons while at work. The employer allowed its employees, including claimant, to bring and use small pocket knives in the workplace but prohibited larger sized knives. Claimant was aware of the employer's expectations.

(3) On May 31, 2012, claimant had a disagreement with a coworker about a pallet jack. During the argument, claimant used foul language and it appeared to a supervisor that claimant was threatening the coworker. The supervisor physically placed himself between claimant and the coworker to stop the dispute. On June 21, 2012, the employer issued a written warning to claimant for his behavior on May 31, 2012. At the meeting to deliver the warning, claimant "raised" his voice to his supervisor, "belligerent[ly]" disputed the warning and called the supervisor an "idiot." Exhibit 1 at 8. The employer issued to claimant a one-day suspension for this behavior.

(4) At between approximately 9:00 a.m. and 9:30 a.m. on September 11, 2013, claimant was in the workplace breakroom with four coworkers. One of the coworkers was asleep. In the presence of the coworkers, claimant took out of his backpack a knife with a six to twelve inch blade that appeared to be a hunting knife. Transcript at 6; Exhibit 1 at 20, 21, 31. Claimant removed the knife from its sheath and its blade was visible. Claimant brought the unsheathed knife up close to his face, twisted and waved the blade back and forth and then lowered the knife until it was parallel to his neck and made a gesture as if slashing his throat. As he mimed the throat cutting, claimant was looking at one of the coworkers. One of the coworkers told claimant to put the knife away and he did.

(5) One of the coworkers reported claimant's behavior to the foreman on September 11, 2013. The employer attempted to speak with claimant about the incident that day. However, claimant had already left the workplace at approximately 1:25 p.m. to begin a scheduled leave of absence for a hand injury.

(6) On September 26, 2013, the employer interviewed the coworkers who were present in the breakroom with claimant on September 11, 2013. One of the coworkers stated that, while in the breakroom, claimant showed him a large knife that was in a sheath. Exhibit 1 at 20. A second coworker stated that, while he was in the breakroom, claimant displayed a knife with an eight to ten inch serrated blade that was not sheathed, twisted the blade near his face and mimed a gesture of throat cutting. Exhibit 1 at 20. The third coworker stated he had not been paying attention and had seen nothing. Exhibit 1 at 21. On October 2, 2013 and October 3, 2013, the two coworkers who had observed claimant with a knife on September 11, 2013, and the foreman to whom claimant's behavior was first reported submitted to the employer handwritten statements of what they observed on September 11, 2013. Exhibit 1 at 22, 24, 25. The employer decided not to take any disciplinary action against claimant until the employer had interviewed claimant. The employer then learned that claimant intended to return from his leave on October 7, 2013, and deferred interviewing claimant until that date.

(7) On October 7, 2013, the employer's labor relations manager and the security manager interviewed claimant. Claimant admitted to them he regularly brought with him to the workplace a pocket knife that had a six inch blade, but denied he had brought out that knife out while in the breakroom on September 11, 2013. Claimant complained to them that he was constantly harassed in the workplace, and the reports from the coworkers about his behavior on September 11, 2013 were examples of that harassment. Exhibit 1 at 27, 29. The employer asked claimant to bring in his pocket knife to rule out that it was the knife that claimant's coworkers saw on September 11, 2013. Claimant's union representative did so.

(8) On October 17, 2013, the employer showed the knife that claimant's representative had brought in to one of the coworkers who was present in the breakroom on September 11, 2013. The coworker stated that the knife claimant displayed in the breakroom was "much larger" than the knife that the employer was showing him. Exhibit 1 at 30. The coworker spread hands eight to ten inches apart to demonstrate the size of the knife that claimant had brought in to the breakroom. Transcript at 8. On October 23, 2013, the employer showed the knife that claimant's representative had brought in to the second coworker. That coworker stated that the knife he had seen claimant show in the breakroom was "bigger." Exhibit 1 at 32. He also placed his hands approximately eight to ten inches apart to demonstrate the size of the knife he had observed claimant displaying in the breakroom. Transcript at 8.

(9) Based on its interviews, the employer concluded claimant had brought a knife to work on September 11, 2013 and had made threatening gestures with it. On October 25, 2013, the employer discharged claimant for his behavior in the breakroom on September 11, 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. 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).

Claimant affirmatively testified he was aware of the employer's prohibitions against bringing knives, other than pocket knives, into the workplace and brandishing weapons in the workplace. Transcript at 24. Claimant conceded that, if he brought a knife of the size his coworkers had reported and displayed it as they reported, he was in violation of the employer's policies. Transcript at 39. Claimant's position at hearing was simple. He contended that he was not in the breakroom on September 11, 2013 and that the coworkers' and supervisor's reports that he had a knife were false and made as part of a pattern of harassment against him. Transcript at 25, 27, 28-29, 34. Although claimant testified their harassment was due to an injury to his hand, it was not clear why his hand injury should have any impact, let alone a negative impact, on either his coworkers' or his supervisor's attitudes toward him or why it should cause them to conspire to fabricate a false story about claimant's behavior in the breakroom. In addition, claimant did tell the labor relations manager or the security manager when he was interviewed on October 7, 2013 that he was not in the breakroom on September 11, 2013, as would have been expected if he actually was not. Exhibit 1 at 27, 29. Moreover, claimant denied at hearing that he ever told the labor relations manager or the security manager that he regularly carried a six inch pocket knife at work, which seems unlikely since the notes both of them independently took during the interview contained such a statement from him. Exhibit 1 at 27, 29. Given claimant's across-the-board denial, the inconsistencies between his hearing testimony and his prior statement to the employer, and his failure to provide evidentiary support for his claims of bias, the employer's evidence appears, more likely than not, to provide the correct account of claimant's behavior on September 11, 2013.

The several statements that claimant's coworkers gave to the employer are largely consistent. Both stated or gestured that, while in the breakroom on September 11, 2013, claimant brought out a large hunting-style knife with an eight to ten inch blade. Exhibit 1 at 20, 30, 31, 36; Transcript at 8. Although one of these two witnesses did not recall claimant taking the knife out of its sheath, that witness also stated he did not see the second witness in the breakroom, which suggests that the first witness left the breakroom upon seeing the knife and before claimant displayed or gestured with it. Exhibit 1 at 32. Based on the specific detail of the second witness's statement, its consistency over several repetitions and its corroboration by the report he gave to the foreman on September 11, 2013, it is more likely than not the complete and accurate account of claimant's behavior. We made our findings of fact in accordance with the evidence that the second witness provided.

By consciously bringing a knife with an eight to ten inch blade to the workplace, when he knew the employer prohibited all knives but small pocket knives, claimant willfully violated the employer's expectations.¹ By displaying the knife and mimicking a slashing motion across his throat, claimant with at least wanton negligence violated the employer's prohibition against brandishing weapons in the workplace. Although claimant did not argue at hearing that he was not aware that the employer considered a knife a weapon, he was reasonably aware, if only as a matter of common sense, that the employer prohibited him from displaying large knives or using them to gesture in a threatening manner. Claimant's behavior in the breakroom on September 11, 2013 was misconduct.

Claimant's behavior on September 11, 2013 is not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means behavior that, among other things, does not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant knowingly took a knife of a prohibited size into the workplace, displayed it to coworkers and, with we can only infer to have been self-conscious and studied behavior, made conspicuously threatening gestures with it in front of coworkers. Safety in the workplace is reasonably a serious matter to an employer. By intentionally flouting the employer's prohibition against large knives and mimicking using that knife to cause harm, claimant's behavior was outside that which a reasonable employer might consider an excusable lapse. A reasonable employer could conclude that claimant's behavior on September 11, 2013 caused an irreparable breach of trust in its employment relationship with claimant. Because claimant's behavior caused an irreparable breach of trust, it cannot be excused as an isolated instance of poor judgment.

Claimant's behavior on September 11, 2013 also is not excusable as a good faith error under OAR 471-030-0039(3)(b). Claimant did not contend or present any evidence to show that he sincerely believed or had a factual basis for believing that the employer would condone his behavior in bringing a large knife into the workplace and in making threatening gestures with the knife.

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

DECISION: Hearing Decision 14-UI-09810 is affirmed.

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

DATE of Service: March 17, 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>.

¹ While the employer did allow employees to have small pocket knives in the workplace, a knife with a blade of eight to ten inches in length cannot reasonably be considered a small pocket knife.

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