

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0287

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 15, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 144847). The employer filed a timely request for hearing. On January 30, 2014, ALJ Hatfield conducted a hearing at which claimant failed to appear, and on January 31, 2014 issued Hearing Decision 14-UI-09649, concluding that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. On February 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Opportunity Foundation of Central Oregon employed claimant from December 7, 2012 to October 23, 2013.

(2) The employer provided life improvement services for clients with intellectual and developmental disabilities. Claimant worked for the employer as a truck driver and mill worker. The employer prohibited employees from using foul or abusive language when speaking to clients or other employees. Claimant understood that expectation.

(3) On October 23, 2013, claimant found a client outside of the mill in an area where the client was not allowed. Claimant told the client to get his "ass" back in the mill. Transcript at 7. The client felt threatened.

(4) The client reported to one of the employer's vocational aids that claimant had spit in his face. The vocational aid asked claimant if he had done so. Claimant denied doing so and stated, "And if that little

fucker – then I’m going to,” before the vocational aid interrupted claimant and asked him if he could give the client “some space” for the rest of the day. Transcript at 17. Claimant agreed to do so.

(5) Claimant walked away and began talking to another client. The client who had complained approached the vocational aid and asked him what claimant said, and what he was telling the other client. The vocational aid looked over at claimant and believed claimant and the other client were “glaring” at them. Transcript at 17.

(6) The vocational aid felt threatened and informed the employer’s program manager that claimant had spit in the client’s face. The program manager asked claimant if he had spit in the client’s face. Claimant denied doing so. The program manager asked claimant what had happened, and claimant stated that the client was outside the mill in an area where he was not allowed, and claimant told the client to get his ass back in the mill. The program manager told claimant that in the future, he should inform a vocational aid about such issues, and allow the vocational aid to speak to the client.

(7) The employer discharged claimant for his behavior toward the client. Because the client had felt threatened by claimant, the employer filed a report of possible abuse of the client to the State of Oregon. The state investigated the incident, interviewed the client, the vocational aid and the program manager, and concluded that the abuse was “substantiated.” Transcript at 20.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant’s discharge was not 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to prohibit employees from using foul or abusive language when speaking to clients or other employees. Claimant understood the employer’s expectations, and consciously engaged in conduct he knew or should have known probably violated those expectations when speaking to the client and the vocational aid on October 23, 2013. Claimant’s conscious decision to behave in such a manner demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

However, we agree with the ALJ that the employer failed to establish that claimant’s conduct on October 23, 2013 was misconduct, and not an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment is single or infrequent occurrence rather than a repeated act or pattern of

willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Isolated acts exceed mere poor judgment only if they 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. OAR 471-030-0038(1)(d)(A).

Claimant used foul language when speaking to the client, and again when speaking to the vocational aid. However, claimant's conduct occurred over a very short period of time, and his use of foul language when speaking to the client, and then when speaking about the client, amounts a single instance of willful or wantonly negligent behavior. *See Perez v. Employment Dept.*, 164 Or App 356, 992 P2d 460 (1999) ("isolated instance" of poor judgment may consist of a series of acts arising from the same episode). Absent evidence that claimant had engaged in willful or wantonly negligent behavior on prior occasions, we conclude that his conduct on October 23, 2013 was an isolated act.

We also agree with the ALJ that claimant's conduct on October 23, 2013 did not exceed mere poor judgment. At hearing, the employer conceded that claimant's conduct did not violate Oregon statutory law, but asserted that it violated unspecified Oregon administrative rules regarding "abuse" of persons with intellectual and developmental disabilities. Transcript at 11-12. However, the employer did not specify what it reported to the state regarding claimant's behavior. The employer did not state whether the state interviewed claimant, or what the client, vocational aid and program manager told the state during their interviews. Nor did the employer specify whether the state found that claimant spit in the client's face, or threatened the client or the vocational aid, neither of which is supported by a preponderance of evidence in the record before us. Nor did the employer specify what administrative rule or rules the state concluded that claimant had violated. Absent such information, the employer failed to establish by a preponderance of evidence that claimant's conduct violated the law, or was tantamount to unlawful conduct. Nor do we find claimant's use of foul language so egregious that it created an irreparable breach of trust in the employment relationship, or otherwise make a continued relationship impossible.

We therefore agree with the ALJ that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-09649 is affirmed.

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

DATE of Service: March 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>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.