

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0288

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On October 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #134720). The employer and claimant filed timely requests for hearing. On December 10, 2013 and January 22, 2014, ALJ R. Davis conducted a hearing, and on February 14, 2014 issued Hearing Decision 14-UI-10432, concluding the employer discharged claimant for misconduct. On February 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Chemwest Systems, Inc. employed claimant from April 21, 2003 to August 21, 2013 as a plastic welder. Claimant used a welding machine at work.

(2) On August 20, 2013, claimant sank to one knee as if he were having a heart attack or a fainting spell. Claimant felt dizzy and heard ringing in his ears. Claimant did not want medical attention, and returned to his workstation. The employer's vice president told claimant that the employer needed a doctor's note saying he could return to work before it would allow him to work. Claimant understood the employer's request and left work.

(3) Claimant did not meet with his doctor before returning to work on August 21, 2014. Claimant reported to work at 6:00 a.m., his normal time to start work. The employer's vice president asked claimant for the doctor's note releasing him to return to work. Claimant told the employer he was not able to see his doctor yet to get a note. The vice president told claimant he could not return to work until he gave the employer a doctor's note because of the medical incident the previous day. The vice president then asked claimant twice to leave. Claimant understood the vice president was asking him to leave, but refused to leave until the employer told him who would pay the medical expenses and if the employer was going to pay him for his time off work. The vice president told claimant the employer

was discharging him, and asked him again to leave. Claimant refused to leave. The vice president asked a manager to call the non-emergency police line.

(4) Claimant's coworker began to talk to him, and after approximately five minutes, convinced claimant he should leave the shop floor. Claimant went outside and waited on the front steps. At approximately 6:20 a.m., a police officer arrived. The officer discussed the situation with claimant, and asked him to leave. Claimant went to his vehicle and left.

(5) On August 21, 2013, the employer discharged claimant for insubordination because he refused to follow the employer's instruction to leave the workplace.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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). In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he refused to leave work when the vice president told him to leave the premises. Based on claimant's symptoms at work on August 20, 2013, the employer reasonably required claimant to provide a note from his doctor before returning to work. The employer also had a right to expect claimant to leave its premises after its vice president told claimant to leave. We infer that claimant understood that expectation as a matter of common sense. Claimant refused to leave until the employer told him who would pay the medical expenses and if the employer was going to pay him for his time off work. In repeatedly refusing to follow the vice president's repeated orders to leave the employer's premises, claimant willfully violated the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d). ORS 164.245 provides that a person commits the crime of criminal trespass in the second degree if the person remains unlawfully upon premises. ORS 164.205(3) provides that "remain unlawfully," means to fail to leave premises¹ that are open to the public² after being lawfully directed to do so by the person in charge. ORS 164.205(5) provides that a "person in charge" is a person, representative or employee of the person who has lawful control of premises by ownership or tenancy. Here, claimant understood the employer's vice president had told him to leave the employer's property at least three times because he did not yet have the

¹ "Premises" includes any building and any real property, whether publicly or privately owned. ORS 164.205(6).

² "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required. ORS 164.205(4).

doctor's note. Claimant's conduct was tantamount to the crime of criminal trespass. Thus, his conduct exceeded mere poor judgment and did not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct also cannot be excused as a good faith error. The record does not show that claimant had a good faith belief or a reasonable basis to believe that the employer would condone his refusal to follow repeated instructions to leave the premises. Claimant's conduct therefore was not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is therefore disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-10432 is affirmed.

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

DATE of Service: March 12, 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.