

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0353

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 5, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for an isolated instance of poor judgment and not misconduct (decision # 132642). The employer filed a timely request for hearing. On February 24, 2014, ALJ Erwin conducted a hearing, and on February 25, 2014, issued Hearing Decision 14-UI-11114, concluding claimant was discharged for misconduct. On March 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Carl Diebold Lumber Co employed claimant as a mill right superintendent from September 6, 2011 to November 6, 2013. Claimant was in charge of equipment maintenance at the employer's mill and had one subordinate employee to assist him. During 2013, circumstances at the employer's mill required claimant to work long hours for extended periods of time with little time off.

(2) On August 14, 2013, claimant became stressed and upset over his workload and told coworkers he was quitting before walking off the job. He later returned to the work site and explained his actions to the plant manager, who understood his circumstances and allowed him to maintain his employment although that was the third time claimant had engaged in such behavior.

(3) On October 16, 2013, claimant again expressed his frustrations over his workload and told coworkers he intended to quit before leaving the employer's premises. When claimant returned, the plant manager told him that he was required to discuss work issues with him and to "quit having these incidents - having these blowups on everybody." Transcript at 11. The employer warned claimant, "We're not doing this anymore where you just get upset and say you're going to quit. Pick up your things and just walk off the job. We're not doing this anymore." Transcript at 8.

(4) On November 6, 2013, claimant became angry and upset over work, told coworkers he intended to quit and began gathering his things. The plant manager became aware of the incident, and after calming claimant down, met with him in his office. After listening to claimant's complaints about his work, the

manager told claimant, “If you want to quit, just go.” Transcript at 5. When claimant asked if that was what the manager wanted, the manager responded “yeah, I want you just to go” and directed him to pick up his tools the following day. Transcript at 5, 20.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Although the employer’s witness asserted that during their office meeting on November 6, he told claimant “If you want to quit, just go” and that claimant subsequently left work, he acknowledged to the ALJ that he had no intention of allowing him to return to work at that time and did not dispute that he instructed claimant to return the following day to pick up his tools. Transcript at 10. Because the employer was not willing to allow claimant to continue to work for an additional period of time, the work separation was a discharge.

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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded the employer discharged claimant for misconduct, reasoning that claimant’s November 6 complaints about work and stated intention to quit in front of coworkers violated the employer’s October warning, and that because he engaged in similar conduct in August and October of 2013, it could not be excused as an isolated instance of poor judgment. Hearing Decision 14-UI-11114 at 4. Even assuming, *arguendo*, that claimant violated the employer’s expectation on November 6, we disagree that claimant’s discharge was for misconduct because we agree with the Department that claimant’s conduct was no more than an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Here, although the employer’s witness testified that its handbook required employees to speak to their supervisors about work complaints and that its policy “should be clearly communicated” to employees, he did not establish that claimant received a copy of its handbook or was aware of the policy and the record does not show that claimant admitted he was aware of it. Transcript at 7. Although claimant admitted he became aware of the employer’s concern about getting upset in front of coworkers and threatening to quit *after* the October 16 incident, the employer failed to show that

claimant's August 14 and October 16 conduct demonstrated his indifference at those times to a known employer expectation. Transcript at 21. Accordingly, the employer failed to establish that on a prior occasion claimant was at least wantonly negligent and that his November 6 conduct was not isolated.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible exceeds mere poor judgment and cannot be excused. Here, claimant's November 6 conduct was not unlawful, tantamount to an unlawful act or, viewed objectively, of the sort that would make a continued employment relationship impossible.

The employer discharged claimant because of an isolated instance of poor judgment, which is not misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-11114 is set aside, as outlined above.

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

DATE of Service: April 3, 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.