

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0381

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On February 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73310). Claimant filed a timely request for hearing. On March 5, 2014, ALJ Seideman conducted a hearing, and on March 6, 2014 issued Hearing Decision 14-UI-11762, affirming the Department's decision. On March 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Taco Time of Seaside employed claimant as an assistant manager from April 21, 2011 until January 17, 2014. The employer operated a restaurant.

(2) The employer expected claimant not to report for work while under the influence of alcohol or to drink alcohol at work. Based on what the owner told claimant, claimant was aware of the employer's expectation.

(3) Sometime in late November 2013, claimant and his wife separated and claimant moved into a motel. Sometime after the separation, claimant's son died. After those events, claimant started to drink alcohol excessively.

(4) Sometime before Christmas 2013, claimant and his son went to the restaurant to clean the grease trap when the restaurant was closed. On this day, claimant took some beer to the workplace and he and his son drank it while they were cleaning the trap. The employer's assistant manager reported to the owner that claimant and his son had been drinking in the restaurant. The owner told claimant that drinking alcohol while in the restaurant was prohibited at all times unless he had given claimant specific permission to do so.

(5) By approximately January 2014, several of claimant's coworkers had noticed that he often smelled of alcohol while at work. On one occasion, a coworker observed that claimant was "clearly intoxicated" and "very drunk" at work and took some money from the restaurant's tip jar. Transcript at 10. On January 11, 2014, while at work, claimant told a coworker he was going to a nearby liquor store to purchase a lighter. After claimant returned, the coworker smelled an odor of alcohol on his breath. The coworker observed that the alcohol odor on claimant became stronger throughout the shift and the coworker thought claimant was drinking on the job. Claimant had several drinks from a cup during the shift and the coworker observed that the beverage was a different color from the colors of the beverages the employer had available to drink. The coworker surmised claimant had placed alcohol in the cup he was using. The coworker told claimant that night that she smelled alcohol on his breath, but claimant denied that he had been drinking.

(6) On January 14, 2014, claimant reported to work an hour and a half late. The same coworker observed that claimant smelled of alcohol, spoke unusually slowly and slurred his words. The coworker noticed that claimant was speaking very loudly in the restaurant lobby and disturbing the customers. Claimant loudly used the word "fuck" several times in the lobby and the coworker apologized to the customers. Later during this shift, claimant slapped the coworker playfully on her buttocks. Acting this way in front of customers or with his coworker was not usual for claimant.

(7) On January 17, 2014, the employer discharged claimant for being under the influence of alcohol during his shift on January 14, 2014.

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.

Claimant testified that the owner "made it very clear" that he was prohibited from drinking in the restaurant after the incident involving the grease trap. Transcript at 19. Claimant did not dispute at hearing that he understood the employer's prohibition to extend to reporting for work when he was under the influence of alcohol. As a matter of common sense, claimant knew he was expected not to report for work when under the influence of alcohol as well as not to drink alcohol during a shift.

Claimant conceded at hearing that he was drinking excessively during the months preceding his discharge and that he assumed that this drinking had caused his coworkers sometimes to notice an odor of alcohol on his person when he was at work. Transcript at 19. Claimant also agreed he drank in the workplace when he cleaned the grease trap, but denied he was under the influence of alcohol in the workplace on January 11, 2014 or on January 14, 2014. Transcript at 14, 19, 22. However, the coworker who observed claimant on both days provided detailed observations of claimant and claimant's behavior that, absent other evidence, were reasonably consistent only with a conclusion that claimant was under the influence at work, including smelling alcohol on his person, his slow and slurred speech and his uncharacteristically disinhibited behavior. Claimant did not present any evidence to show that the behaviors the coworker observed were attributable to a cause other than the consumption of alcohol.

Claimant also did not contend, and no evidence was presented at hearing suggesting or tending to suggest that the coworker was biased against claimant or would obtain any benefit by providing false testimony against him. Indeed, the owner's testimony showed that the generally high esteem in which claimant was held in the workplace. Transcript at 5, 21. Since claimant had a motive to slant his testimony to avoid disqualification, and his coworker apparently did not have any such motive, we give more initial weight to the coworker's testimony. Since the coworker supported her conclusion that claimant was intoxicated on both days with detailed and objective supporting evidence that, without rebuttal evidence, is reasonably most consistent with claimant's intoxication, its persuasive weight is strengthened. More likely than not, claimant was under the influence of alcohol in the workplace on January 11, 2014 and January 14, 2014. Given this finding and claimant's failure to provide an alternative explanation for his observed behavior, we can only conclude that claimant knowingly and consciously consumed alcohol before or during his shifts on those days, rather than inadvertently or accidentally consuming the alcohol. Claimant's behavior was at least a wantonly negligent violation of the employer's standards, as communicated to claimant after the incident involving the grease trap.

Claimant's behavior on January 14, 2014 in reporting for work under the influence of alcohol is not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In this case, claimant was under the influence of alcohol in the workplace on at least two occasions, on January 11, 2014 and January 14, 2014, after the owner clearly informed him that he was prohibited from consuming alcohol at work or being under the influence of alcohol while at work. Because claimant violated the employer's expectations on both those days with at least wanton negligence, the wantonly negligent behavior for which claimant was discharged was not a single or infrequent occurrence. As such, claimant's behavior on January 14, 2014 is not excusable as an isolated instance of poor judgment.

Claimant's behavior on January 14, 2014 is also not excusable as an good faith error under OAR 471-030-0038(3)(b). At hearing, claimant did not assert 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 being under the influence of alcohol during his shift at work.

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

DECISION: Hearing Decision 14-UI-11762 is affirmed.

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

DATE of Service: March 28, 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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