

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0654

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145016). Claimant filed a timely request for hearing. On March 27, 2014, ALJ R. Frank conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14417, affirming the Department's decision. On April 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Microwave Oven Service employed claimant from April 25, 2007 to November 29, 2013.

(2) On approximately ten occasions in 2013, claimant became agitated in the workplace. He displayed signs of frustration and violent movement, including waving his arms. In approximately June 2013, claimant "flipped out and said he was gonna [sic] walk off the job." Transcript at 14. When the employer's owners confronted claimant about his unprofessional behavior in that incident, claimant deflected responsibility for his behavior and indicated that he was testing what kind of reaction he would get to his behavior. The employer issued claimant a final warning for displaying lack of respect to leadership and threatening to walk off the job.

(3) On November 22, 2013, claimant rode in a vehicle with a female driver. The driver was relying on a GPS unit for directions but missed a turn. The GPS system re-routed the driver, but claimant "started yelling that I needed to follow his directions and kept moving his body back and forth in front of the mirrors." Exhibit 1, Letter dated 11/25/2013.

(4) The driver reported the incident to the owners when she returned to the office. She appeared distraught and frustrated, and said she did not think she could ride with claimant again because his behavior had scared her. The owners confronted claimant and told him that his behavior could be considered harassment. The owners told claimant no further such incidents would be tolerated, and he

would be discharged "[i]f this happens again, anything, of you overreacting, freaking out, acting like this again." Transcript at 15. Claimant apologized to the driver.

(5) That evening, claimant approached the driver again after business hours, when everyone else had left work. Claimant told the driver she needed to tell the owner that claimant had not really yelled at her, because her statement to the owners that he had "was going to end up getting him in huge trouble and possibly fired," and she "needed to go make things rights." Exhibit 1, Letter dated 11/25/2013. During the interaction, the lights were off, claimant stood very close to the driver, and, after his conduct toward her earlier in the day, she felt "very uncomfortable" with his behavior. *Id.*

(6) Later that evening, the driver called the owner, distraught, and left a voicemail describing claimant's behavior toward her. On November 25, 2013, the driver prepared a written statement for the owners describing claimant's behavior toward her. On November 29, 2013, the employer discharged claimant because of his behavior toward the driver on November 22, 2013.

CONCLUSIONS AND REASONS: We agree with the Department and 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. 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.

As a preliminary matter, we found the employer's evidence more credible than claimant's. The employer's testimony was specific, detailed, and based on contemporaneously collected witness statements and personal observations. Claimant's testimony was vague, lacked detail, and he claimed he did not recall certain incidents in which he had been involved or regarding which he had signed for a warning. *See* Transcript at 16, 17, 18, 19, 26-27. Claimant's testimony was also internally inconsistent. For example, he claimed he did not recall the employer ever counseling him about his behavior toward his coworkers, then immediately contradicted himself by acknowledging a counseling he received. Transcript at 16. He claimed he only apologized to the driver in the final incident because the owner made him do so. Transcript at 21. However, he later testified that he apologized to the driver a second time while they were alone, of his own volition. Transcript at 22. Because claimant's testimony was not consistent or plausible in some respects, and he averred he lacked recollection about most details of the incidents at issue, where the evidence presented by the parties was in dispute, we found facts in accordance with the employer's more credible evidence.

The employer had the right to expect claimant to behave in a respectful manner towards his coworkers. Claimant knew or should have known that expectation both as a matter of common sense, and because the employer had warned claimant in June about behaving disrespectfully after a couple of instances in which he had displayed agitation in the workplace.

On November 22, 2013, claimant violated the employer's expectations by approaching his coworker after work, in the dark, while standing close to her, to ask her to retract a complaint she had made to the employer's owners about him. His behavior made the coworker feel very uncomfortable and distraught, particularly following the incident earlier the same day in which he had yelled at her and moving his body around in an agitated manner while she drove, scaring her. Claimant knew based on the warning and apology he was made to give earlier that day that the employer and coworker considered his conduct to be harassment. He knew or should have known that approaching the same employee later that same evening under the circumstances as they were at the time would probably be considered disrespectful, or a continuation of the same behavior that had already gotten him in trouble that day, and would probably violate the standards of behavior the employer had the right to expect of him. Claimant's conduct in the final incident was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant neither sincerely believed, nor had a factual basis for believing, the employer would consider his conduct acceptable.

Conduct may only be considered an "isolated" instance of poor judgment if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant had previously engaged in agitated behavior toward the same coworker earlier the same day as the final incident, and had engaged in agitated behavior toward her previously in approximately June 2013, under circumstances where he was, more likely than not, conscious of his behavior and knew or should have known that it would probably violate the standards of behavior the employer had the right to expect of him. Because claimant had repeatedly engaged in the same type of wantonly negligent behavior towards the same coworker, his conduct in the final incident was a repeated act, which, therefore, cannot be considered "isolated" or excused as such.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-14417 is affirmed.

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

DATE of Service: May 20, 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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