

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0702

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74651). Claimant filed a timely request for hearing. On April 11, 2014, ALJ Wipperman conducted a hearing, and on April 16, 2014 issued Hearing Decision 14-UI-15316, affirming the Department's decision. On April 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Goodwill Industries employed claimant as a dock worker from November 8, 2012 to February 14, 2014.

(2) The employer expected claimant to work when scheduled, follow his supervisor's instructions, and refrain from engaging in intimidating or disrespectful behavior. Claimant knew or should have known those expectations as a matter of common sense.

(3) On February 11, 2014, claimant's supervisor issued him a warning for having been late or absent 18 times. The supervisor informed claimant he would be suspended for three days beginning Friday, February 14, 2014.

(4) Claimant left that meeting with his supervisor and returned to work for a period of time, then stopped working and went to the break room. The supervisor heard a report that claimant was in the break room during a time that was not designated as a break time, and went to the break room to confront claimant.

(5) The supervisor asked claimant what he was doing, and claimant replied that he was going home because he had been suspended. The supervisor told claimant several times that he was not suspended yet, and needed to return to work. Claimant continued to state that he was suspended. At one point, claimant stood and in a "really aggressive[]" manner told the supervisor not to speak to him like a child. Transcript at 7. Claimant began to walk toward the supervisor, at which time the supervisor told

claimant he was suspended until further notice. Claimant then made some challenging statements to the supervisor about whether the supervisor was too afraid of claimant to escort him from the building.

(6) The supervisor had others escort claimant from the employer's building. As claimant left, he made "badmouthing" remarks about the employer, including the phrase, "Fuck Goodwill." Transcript at 12.

(7) Effective February 14, 2014, the employer discharged claimant for leaving his duties on February 11, failing to return to work when instructed to do so by his supervisor, because of his aggressive behavior toward the supervisor, and for making derogatory comments about the employer as he was escorted from the building.

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. 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.

The evidence is in dispute. Claimant argued that he did not engage in the behavior the employer alleged, for instance, testifying that he did not leave his duties on February 11th, but instead that he went to the break room because the supervisor had implemented the three-day suspension immediately. Transcript at 21. However, that argument was inconsistent with other testimony by claimant that upon finding claimant in the break room the supervisor asked claimant why he was not working. Transcript at 21. Still later, claimant later denied having even testified that the supervisor made any statement that claimant was supposed to have been working. Transcript at 24. Claimant's statements with respect to that issue are irreconcilably inconsistent, and therefore lack credibility. Because claimant's testimony has proven to lack credibility in one respect, we infer that it is similarly lacking in other respects. Where the evidence is in dispute, we have therefore found facts in accordance with the employer's evidence.

Finding facts in accordance with the employer's evidence, it is more likely than not that claimant left his assigned duties during work time to go to the break room, refused or failed to return to work when reasonably instructed to do so by his supervisor, then demonstrated aggressive behavior toward the supervisor and made derogatory comments about the employer as he was escorted from the building. The employer had the right to expect claimant to display appropriate behavior in the workplace, including staying on duty except for designated break times, complying with supervisors' reasonable instructions, refraining from being aggressive toward other employees, and refraining from using foul language or making derogatory remarks about the employer's business. Claimant knew or should have known those expectations, as a matter of common sense. On February 11, 2014, claimant knowingly and intentionally violated the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because it exceeded mere poor judgment by causing a breach of trust in the employment relationship and making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). For example, even if we were to assume for the sake of argument that claimant had initially been under a mistaken belief that his suspension was to begin immediately, once his supervisor corrected his belief and directed him to return to work, claimant still continued to refuse to return to work and engaged in aggressive behavior to the supervisor, made challenging remarks about having scared the supervisor, then said "fuck" the employer as he was being escorted from the building. Claimant's behavior on February 11th was so disproportionate to the circumstances, prolonged, and inappropriate, and involved threatening behavior, that objectively considered, the employer could reasonably conclude that it could no longer rely on claimant to work when scheduled and behave in a professional manner in the workplace, making a continued employment relationship impossible.

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

DECISION: Hearing Decision 14-UI-15316 is affirmed.

Tony Corcoran and J.S. Cromwell,
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: June 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.