

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0748

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91208). Claimant filed a timely request for hearing. On April 21, 2014, ALJ Mann conducted a hearing, and on April 22, 2014 issued Hearing Decision 14-UI-15693, affirming the Department's decision. On May 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) MSC Industrial Direct employed claimant as a vendor support representative from October 1, 2010 until February 24, 2014. Claimant often performed work offsite on the premises of the employer's customers.

(2) The employer expected claimant to refrain from making comments at the workplace or on customers' premises that expressed unflattering attitudes based on an individual's gender, national origin or physical characteristics or that otherwise were reasonably construed as derogatory. Claimant was aware of the employer's expectations.

(3) Sometime in June or July 2013, at one of the employer's sales meetings, there was a discussion about how the employer might complete jobs faster. Claimant commented during the discussion, "We should hire some Mexicans." Transcript at 27. The employer gave claimant an oral warning for making this statement and told claimant that the statement violated its policy about making offensive comments. Transcript at 27.

(4) Sometime in approximately September to October 2013, claimant commented to a customer that a female driver whose deliveries were late was a "dumb blonde." Transcript at 14, 27-28. Around this same time, when a customer told claimant that the employer had arranged for two female coworkers of claimant's to help him take inventory, claimant stated to the customer that he did not need the assistance of those "bitches." Transcript at 7, 20, 22; Exhibit 2 at 6. Also around this same time, claimant called one of the sales associates "Big Red" multiple times when he referred to her in conversations with one of the employer's customers. Transcript at 7, 13. The associate was significantly overweight and the customer knew her and worked with her in addition to claimant. Exhibit 2 at 4. On October 11, 2013, the employer issued to claimant a final written warning for making these derogatory comments about females and told claimant that such unflattering or insulting comments based on gender violated the employer's policies. Exhibit 2 at 6. The employer referred specifically to the comments of "dumb blonde," "bitch" and "Big Red" as being prohibited under the policy. Transcript at 7, 13; Exhibit 2 at 6. The warning stated that further violations of the employer's policy would result in claimant's discharge. Exhibit 2 at 7.

(5) Sometime in late January 2014, one of the employer's customers complained to an outside sales associate about claimant's behavior when on the customer's premises, including some comments that claimant had made. Sometime in February 2014, the employer conducted an investigation of claimant's behavior. The employer interviewed the customer who had made the complaint. The customer stated that, when claimant was at the customer's site, the customer had noticed that claimant walked away when a female sales associate entered the room and the customer asked claimant why he had done so. Claimant explained to the customer he had been disciplined for derogatory comments that he had made about females based on reports the associate had made to the employer. Claimant then stated to the customer that he "needed to be very careful of what he said around 'Big Red,'" referring apparently to the female associate who had made the reports of claimant's derogatory comments. Transcript at 13.

(6) Sometime in February 2014, after interviewing the customer, the employer interviewed claimant about the comments he supposedly made to the customer in January 2014. Claimant denied that he had made any derogatory comments, and specifically denied he had referred to the overweight sales associate as "Big Red." Transcript at 10.

(7) On February 24, 2014, the employer discharged claimant for derogatory comments about his coworkers to the customer during January 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.

Significantly, claimant did not dispute that he understood that the employer prohibited him from making derogatory comments about his coworkers based on gender or other physical characteristics. Nor did claimant dispute that comments like "bitch" or "dumb blonde" or "Big Red" would have violated the

employer's policy. Transcript at 24. Claimant also did not appear to dispute that he had made such statements during the January 2014 conversation with the customer. Transcript at 22, 23; Claimant's Written Argument at 3. Claimant's principal contention at hearing was that any purportedly derogatory statements that he made to the customer in January 2014 were merely describing to the customer the behavior for which he had been previously disciplined. Transcript at 18, 26; Claimant's Written Argument at 3. However, it appears that claimant made a direct conversational reference to the sales associate as "Big Red," when he commented to the customer that, in the future, he "needed to be very careful of what he said around 'Big Red.'" Transcript at 13. Claimant's reference to "Big Red" was not stated as part of a description of what he had said that had previously gotten him in trouble, but a derogatory characterization of the sales associate in active conversation. Because the employer had previously warned claimant that referring to the overweight sales associate as "Big Red" was insulting to her and violated the employer's standards, claimant's reference to the associate as "Big Red" in January 2014 violated the employer's expectations with at least wanton negligence.

Claimant's attorney appeared to contend at hearing that the phrase "Big Red" was not, in and of itself, a derogatory comment and that, if claimant made that comment, it should not disqualify him from benefits. Transcript at 14. This contention, however, completely ignores the context in which the phrase referred to the associate, that she was overweight, and ignores that the employer had specifically told claimant that the phrase was insulting to the overweight associate and had forbidden him from using this phrase to describe her. We infer that claimant's continued use of this reference during his January 2014 conversation with the customer could only have been intended as a sarcastic, unflattering reference to her physical appearance. Claimant also contended at hearing that he had Parkinson's Disease that sometimes caused him to be unable to control what he said about people, and that any derogatory statements that he might have made were a result of his disease. Transcript at 21. Aside from stating this contention, claimant presented no objective, medical information corroborating this claim. Moreover, claimant conceded that when he received the warnings before February 2014 for making derogatory comments he never told the employer about his Parkinson's Disease or that its disinhibiting affects contributed to him making the comments. Transcript at 23. On this record, it cannot reliably be concluded that the statements that claimant made to the customer during January 2014 were attributable to Parkinson's Disease and not within claimant's reasonable control.

Claimant's behavior during the January 2014 conversation with the customer were not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent act rather than a repeated occurrence or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). It was not disputed that claimant was aware after he received the employer's oral warning in June or July 2014 that the employer prohibited him from making derogatory comments based on an individual's national origin or, by logical extension, other fixed characteristics. The references to "dumb blonde," "bitches" and "Big Red" that led to the October 11, 2013 warning were therefore at least a wantonly negligent violation of the employer's standards. That claimant continued to refer to the sales associate as "Big Red" when he spoke to the customer during January 2014, was a repeated wantonly negligent violation of the employer's standards. Because claimant's behavior was a repetition of wanton negligence, it is not excused as an isolated act of poor judgment.

Nor was claimant's behavior during the January 2014 conversation with the customer excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence showing that he

had a mistaken understanding of the employer's standards or that he thought the employer would condone his reference to the sales associate as "Big Red."

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

DECISION: Hearing Decision 14-UI-15693 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 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>.

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