EO: 300
BYE: 201507

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

266
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0852

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74116). Claimant filed a timely request for hearing. On April 30, 2014, ALJ Kirkwood conducted a hearing, and on May 1, 2014 issued Hearing Decision 14-UI-16657, affirming the Department's decision. On May 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) J C Penney Corporation, Inc. employed claimant from March 28, 2011 to February 21, 2014 as a service specialist.

(2) The employer expected claimant to treat coworkers, customers and vendors with dignity and respect, and to refrain from engaging in illegal or unethical conduct toward them. Claimant understood the employer's expectations.

(3) Prior to August 2013, claimant made inappropriate statements about women while he was working with a male associate in the stock room. Claimant stated to the male associate, "I'd like to stick my dick in that," and "she can ride me any day." Transcript at 28. The employer warned claimant that his comments were inappropriate at work.

(4) On August 18, 2013, claimant and a coworker discussed that many of the store's customers on Sundays were Hispanic, and began joking about the name, Jesus, and how it is pronounced in English

compared to how it is pronounced in Spanish. Another coworker overheard the conversation and told a supervisor about it. The supervisor told claimant to stop speaking in that manner, or to leave the store. On August 23, 2013, the employer gave claimant a written warning regarding his comments on August 18, 2013.

(5) On approximately November 30, 2013, on a female coworker's first day of work, claimant learned that the coworker had a child when she was 16. Claimant stated to the coworker that he "would have shot himself" if he had a child at age 16. Transcript at 16.

(6) On February 17, 2014, claimant saw some female customers walk past his work area wearing tight black pants. He commented to a male associate that he liked the way women looked from behind in the tight black pants. A female coworker was standing near claimant and heard his comments. Claimant pointed at the female coworker and stated that she was wearing the same style of black pants. The female coworker was offended by claimant's comments.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to comply with its reasonable policy regarding workplace behavior. We agree with the ALJ's determination that claimant's comment about female customers' appearance in tight black pants, within earshot of a female coworker who was wearing the same style of pants, was a wantonly negligent violation of the employer's reasonable expectations regarding workplace behavior. Claimant testified at hearing that he stated that the women's "tight athletic pants" were an "attractive look," but that he was commenting on a fashion trend and not on women's bodies. Transcript at 34. However, both coworkers who were present when claimant made the comments testified at hearing that claimant stated that the women looked "hot," and referred to the appearance of their "rear ends" in black pants. Transcript at 15, 26 to 27. The associate to whom claimant made the comment testified that he and claimant did not normally talk about fashion and that claimant was not referring to a fashion trend when he made the comment about black pants. Transcript at 50. The preponderance of the evidence shows that claimant knew or should have known that making such comments in front of coworkers, including a female coworker wearing similar black pants, probably violated the employer's expectations regarding workplace behavior, and claimant's conscious decision

to make the comments demonstrated indifference to the consequences of his actions. Claimant's conduct therefore, was, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be 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 had made offensive comments to coworkers on at least three separate prior occasions. Claimant testified that his coworkers were "oversensitive" and that he did not intend to offend anyone with his comments. Transcript at 43, 48. However, regardless of whether claimant intended to offend his coworkers, claimant knew or should have known, based on the prior warnings and common sense, that his comments were inappropriate for the workplace. His exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

The record does not show that claimant sincerely believed, or had a rational basis for believing, that the employer would tolerate his comments on February 17, 2014. Claimant's conduct therefore cannot be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-16657 is affirmed.

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

DATE of Service: <u>June 30, 2014</u>

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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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