

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0976

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80632). Claimant filed a timely request for hearing. On May 13, 2014, ALJ Francis conducted a hearing, and on May 16, 2014 issued Hearing Decision 14-UI-17830, affirming the Department's decision. On June 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamins, Inc. employed claimant as an "assistant" manager from May 28, 2008 to March 20, 2014.

(2) The employer expected claimant to be courteous to customers, refrain from displaying rude or unfriendly behavior towards them, and avoid being dishonest with them. The employer discussed those expectations during all of its staff and managers' meetings. On September 28, 2010, the employer discussed its customer service expectations with claimant when issuing him an oral warning for failing to meet those expectations. Claimant understood the employer's policies, and that he was expected to act in such a manner that customers felt welcome at the employer's business.

(3) On approximately November 27, 2013, claimant was assigned to serve a set of customers. He did not greet the customers, he did not approach them for approximately 30 minutes after they arrived, interrupted one of the customers and tried to leave while one of the customers was placing a food order, did not deliver their drinks, and, during the customers' stay at the employer's business, "disappeared" for approximately 40 minutes. The customers later complained to the employer. Around the same time, several other customers also complained to the employer about the service claimant had provided. On December 17, 2013, the employer gave claimant a final written warning.

(4) Between 7:45 p.m. and 9:01 p.m. on March 16, 2014, a group of 17 customers patronized the employer's business. The group had not called ahead to notify the employer that they were coming.

The restaurant was busy with several other groups at the time, but the employer was staffed at its usual dinner staffing levels, including an extra server and a food runner.

(5) Claimant did not greet the customers or say hello, but instead asked how many people were in the group and scolded the customers that they should have called ahead to notify the employer they were coming, although the employer did not require that customers do so. Claimant did not provide the customers with menus. Claimant did not serve some of the customers the drinks they had ordered, necessitating that the customers go to the bar to get their own drinks. Claimant was also “short” with some of the customers. Transcript at 6. When the customers prepared to leave, they requested separate checks. Claimant felt “exasperated over the situation” and stated, “aw shit.” Transcript at 26-27.

(6) On March 17, 2014, one of the customers from the group called the employer’s business to complain about claimant’s service. Claimant answered the call and identified himself as Jason. After the customer described the experience the night before, claimant told the customer that the other server, Eric, had been responsible for their service, and he would see that the complaint was included during Eric’s performance review. Claimant did not know at the time that the customer had a receipt showing he had been the server, or that the customer knew he was being untruthful. He lied to the customer in an attempt to cover up the customer’s complaint because he knew he was on a final written warning for several other customer complaints.

(7) The customer was concerned that claimant would not notify anyone about the complaint he had received about himself. On March 19, 2014, the customer contacted the employer again to complain to another manager about claimant’s customer service, and also complained that claimant had lied to the customer when he blamed Eric for his poor customer service. The same day, a second customer from the same group also called to complain about claimant’s customer service.

(8) Claimant admitted to a manager that he had lied to the customer who had called to complain about him. On March 20, 2014, the employer discharged claimant based on his poor customer service and dishonesty.

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 employer had the right to expect claimant to treat customers with courtesy, serve customers when they ordered food and drinks, avoid rude behavior and using foul language toward customers, and refrain from engaging in dishonest behavior. Claimant understood those expectations. Transcript at 25.

With respect to the March 16, 2014 customer complaints, claimant testified that he “gave my best,” made the customers feel welcome, and “was very personable with everybody.” Transcript at 27. However, he also testified that he “may not have shown the best attitude at the time” and “might not have given the best service” because he was busy and “may have shown that I was upset,” “may have been harried,” and “may have been under some stress.” Transcript at 23, 25. Claimant also admitted that he said “aw shit” to customers out of “exasperation” that the customers wanted separate checks. Given the complaints the customers made about claimant, and claimant’s admissions, claimant’s claim that he provided his best customer service, made customers feel welcome and was very personable was not credible. The record shows that it is more likely than not that claimant knowingly provided those customers with poor service, engaged in rude or discourteous behavior, and used foul language with them, which violated the employer’s expectations of him.

Claimant argued, too, that he had “good reason” to display a poor attitude or provide bad service, because the customers arrived late, and he was working alone while handling the group of 17 and all the other customers in the restaurant. However, the employer’s records showed that claimant created a ticket for a customer at 8:01 p.m., which would, as a practical matter, mean that the customer had to have been at the business for some time in order for the customer and the 16 others in the customer’s group to have been seated, reviewed menu and/or drink options, placed an order, and for claimant to have then created the ticket. That means it is more likely than not that the customers arrived sometime around 7:45 p.m., and both claimant and the employer’s witnesses agreed claimant would not have been, and was not, working alone at 7:45 p.m. Transcript at 28, 35. Given that circumstance, claimant’s attempt to justify his rude or discourteous behavior, use of foul language and poor service was not persuasive.

The preponderance of the evidence shows that claimant failed to greet or welcome customers, scolded them about failing to call ahead, failed to provide them with menus, was “short” with customers, failed to serve them their drinks, and, ultimately, used foul language. Based on that, and claimant’s testimony that he acted that way with “good reason” and his admissions that he showed a poor attitude, gave poor service, and showed exasperation, it is more likely than not that claimant was conscious he was being rude or discourteous and failing to provide customer service to the customers at the time of those events, and his failures demonstrated indifference to the consequences of his conduct.

The preponderance of the evidence also shows that claimant was dishonest with a customer that called him to complain about his service, and, although claimant denied at the hearing that he had done so, his testimony was not credible given the customer’s allegation that he had been dishonest, the receipt one of the employer’s witnesses reviewed showing that claimant was the server, and his admission to the employer that he had lied to the customer to cover up the customer’s complaint because he knew he was on a final written warning for providing poor customer service and wanted to avoid the consequences of his conduct toward the customers on March 16th. Claimant’s dishonesty under those circumstances constituted a willful violation of the standards of behavior the employer had the right to expect of him.

Claimant’s conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant knew the employer’s policies and expectations and was on a final written warning for having provided poor customer service to other customers. He did not sincerely believe, or have any basis for believing, the employer would consider his behavior toward the customers on March 16th and March 17th acceptable behavior.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be 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). In this case, claimant engaged in repeated willful or wantonly negligent acts, with respect to the poor customer service he provided on March 16th and his willful dishonesty on March 17th. He also engaged in similar behavior on November 27, 2013, when, despite his understanding of the employer's expectations that he provide good customer service, claimant did not attend to customers for 30 minutes after their arrival, tried to walk away from the customers while they were trying to place an order, failed to serve their drinks, and disappeared for approximately 40 minutes without attending to the customers during that time. It is more likely than not that claimant knowingly provided the customers with poor customer service on that occasion, making that a third instance of other willful or wantonly negligent conduct. Claimant's March 16th and March 17th conduct were repeated acts of willful or wantonly negligent conduct, and cannot be excused as an isolated instance of poor judgment.

For the foregoing reasons, 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-17830 is affirmed.

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

DATE of Service: July 11, 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 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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