

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0998

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 73109). The employer filed a timely request for hearing. On May 22, 2014, ALJ Wipperman conducted a hearing, and on June 2, 2014 issued Hearing Decision 14-UI-18781, concluding the employer discharged claimant for misconduct. On June 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) River Hawk Boats employed claimant as a laborer in its “paint and prep” department from May 1, 2013 to April 16, 2014. Transcript at 4.

(2) On April 15, 2014, another employee asked claimant to help him move a boat from one work area to another. Claimant asked the employee what the boat looked like. The employee jokingly replied, “A lot like you, if you had a dress on.” Transcript at 10. Claimant found the employee’s comment offensive, but helped the employee move the boat, and returned to his work area.

(3) A short while later, claimant left his work area and walked to the employee’s work area, which was in another building. Claimant yelled at the employee and used foul language, asking the employee if he had implied that claimant was a “bitch.” Exhibit 1 at 6. The employee told claimant that it was a joke, and that claimant took things too seriously. The employee suggested they return to work, but claimant continued to yell at the employee and use foul language. The employee repeatedly asked claimant to return to his work area, and called claimant a “psycho.” Transcript at 19. Claimant got “in [the employee’s] face,” warned him not to come into claimant’s work area, either, and physically threatened the employee, who kept backing away from claimant. Transcript at 11.

(4) Claimant left and returned to his work area, where he told the department manager that he “just about knocked [the employee] out.” Exhibit 1 at 5. The employee entered the work area for materials,

and claimant pointed at him and called him a derogatory name. The employee again called claimant a “psycho.” Transcript at 19. Claimant called the employee derogatory names, threatened him, and drew his fist back to strike the employee. The employee responded by walking away.

(5) The department manager left to discuss the incident with his supervisor and an owner. Claimant interrupted their meeting, asserting that he was being penalized for an incident he did not cause. The employer ordered claimant to leave work early, and claimant complied.

(6) On April 16, 2014, claimant again asserted to the employer that the incident with the employee was not his fault. The employer discharged claimant for his behavior toward the employee on April 15.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant’s discharge was 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 refrain from his verbally abusive and physically threatening behavior toward the other employee on April 15, 2014. Claimant knew or should have known as a matter of common sense that such behavior probably violated the employer’s expectations, and his conscious decision to engage in such behavior demonstrated indifference to the consequences of his actions. Claimant’s conduct therefore was, at best, wantonly negligent.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). In this case, claimant verbally abused and physically threatened another employee in response to the employee’s relatively harmless, if misguided, attempt at humor. Although claimant found the employee’s comment offensive, he had time to reflect and calm down before he left his work station and verbally abused and physically threatened the employee despite the employee’s repeated attempts to defuse the situation. Claimant also had time to reflect and calm down before he again verbally abused and physically threatened the employee, and drew back his fist to strike the employee. He also had time to reflect and calm down before twice refusing to take responsibility for his verbally abusive and physically threatening behavior toward the other employee. Claimant’s conduct was sufficient to create an irreparable breach of the employer’s trust that claimant would refrain from

similar, or worse, behavior in the future. His conduct made a continued relationship impossible, and therefore exceeded mere poor judgment.

Claimant's conduct cannot be excused as a good faith error. Although claimant repeatedly asserted that the incident with the other employee was not his fault, he did not assert or show that he sincerely believed, and had a rational basis for believing, the employer would condone his verbally abusive and physically threatening behavior toward the other employee.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-18781 is affirmed.

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

DATE of Service: July 15, 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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