

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1035

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 113415). The employer filed a timely request for hearing. On May 27, 2014, ALJ Buckley conducted a hearing, and on May 28, 2014 issued Hearing Decision 14-UI-18619, affirming the Department's decision. On June 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, and the employer's argument, to the extent it was based on the record.

FINDINGS OF FACT: (1) Ashland General Hardware, Inc. employed claimant from February 16, 2012 to April 3, 2014 as a freight person.

(2) The employer expected claimant to be respectful to his managers and to refrain from engaging in insubordinate behavior, yelling, using foul language, or acting in an aggressive manner in the workplace. Claimant understood the employer's expectations.

(3) In May 2012, the owner gave claimant a written warning because he was exhibiting a negative attitude at work and performing his job duties too slowly. During claimant's first six months of employment, claimant's supervisor regularly reminded claimant to perform his job duties.

(4) On April 1, 2014, claimant asked the owner for a wage increase and became angry. Within earshot of customers and coworkers, claimant yelled and used foul language toward the owner. After arguing for approximately ten minutes, claimant returned to performing his job duties. Later that day, the owner

discussed the argument with the store managers and decided he was not willing to allow claimant to return to work, and would discharge claimant when he reported to work the next day.

(5) On April 2, 2014, claimant did not report to work due to illness. Claimant called and told his supervisor he was sick and unable to work.

(6) On April 3, 2014, claimant reported to work and began unloading freight. His supervisor told him the owner wanted to speak with him in his office. Claimant asked the supervisor if the owner could come to the unloading area to speak with claimant. The owner came to speak to claimant and told claimant he had to leave work because he quit on April 2. Claimant responded that he did not quit. The owner told claimant that, if he was not quitting, he was discharged. Claimant refused to leave until the owner gave him his final check. The owner told claimant he would call the police and left to call the police. Claimant left work.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude the employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The employer’s owner decided on April 1, 2014 that he would discharge claimant, and would not permit claimant to continue working after that day. Although claimant showed he was willing to continue working by reporting to work on April 3, 2014, the owner told claimant to leave work. Because claimant was willing to continue to work for the employer for an additional period of time, but was not allowed to do so by the employer, the work separation was a discharge.

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’s owner discharged claimant for being insubordinate toward him during an argument about his wages on April 1, 2014. Because the owner decided to discharge claimant as a result of his behavior during that argument, that incident was the proximate cause of the work separation, and the focus of the initial misconduct analysis. At hearing, it was undisputed that, during the final incident, claimant argued with the owner, yelled in a loud voice, and used foul language. Claimant knew or

should have known that yelling and using foul language toward the owner, within earshot of coworkers and customers, probably violated the employer's expectations. Claimant's conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent, and not a good faith error.

The remaining issue is whether claimant's conduct on April 1, 2014 was an isolated instance of poor judgment, and not misconduct. An act is isolated if the exercise of poor judgment is 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). 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). OAR 471-030-0038(1)(d)(D).

At hearing, the employer alleged that claimant exhibited a negative, insubordinate attitude on multiple prior occasions, and that the owner and claimant's supervisor gave him repeated verbal warnings. Transcript at 11 to 12, 20. However, the employer did not provide details of prior incidents of insubordination. Additionally, the verbal and written warnings from 2012 are too remote in time to show the final incident was part of a pattern of other willful or wantonly negligent behavior. The employer alleged that claimant also had poor attendance. However, the employer showed only that claimant missed work twice before April 2, 2014; the employer did not demonstrate that these absences were unexcused or due to a reason other than illness or other exigent circumstance. Transcript at 10. The employer's owner also alleged claimant did not call to report his absence on April 2, 2014. Transcript at 5. Claimant and his witness testified that he called and told his supervisor he would be absent due to illness. Transcript at 25, 39. Because the evidence on that issue is equally balanced, the employer did not show by a preponderance of evidence that claimant failed to call in to report he would miss work due to illness on April 2, 2014. The employer did not show by a preponderance of evidence that claimant's exercise of poor judgment during the final incident was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence.

The employer did not allege or show, when viewed objectively, that claimant's conduct in the final incident made a continued employment relationship impossible. Although the employer's owner alleged that claimant acted in an "aggressive" manner during the final incident, he did not show that claimant's conduct included violence or threats of violence. Given that claimant's conduct did not continue for an extended period of time and was followed by claimant's return to performing his job duties, the employer also has not shown that claimant's conduct caused a breach of trust in the employment relationship or otherwise made a future employment relationship impossible such that claimant's conduct exceeded mere poor judgment. Nor was claimant's behavior on April 1, 2014 unlawful or tantamount to unlawful conduct. Claimant's conduct is thus excused as an isolated instance of poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-18619 is affirmed.

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

DATE of Service: July 22, 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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