

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1230

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81150. Claimant filed a timely request for hearing. On June 24, 2014, ALJ Seideman conducted a hearing, and on June 27, 2014 issued Hearing Decision 14-UI-20530, affirming the Department's decision. On July 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores Inc. employed claimant as a produce clerk from December 1, 2007 to May 2, 2014.

(2) Claimant's wife also worked for the employer, although at a different store. On April 29, 2014, claimant arrived at that store to drive his wife home from work. Claimant observed the employer's loss prevention manager questioning his wife outside the store, and then leading her back into the store through the door employees used to enter and exit the store. After waiting approximately 20 minutes, claimant began "pounding" on the locked door. Transcript at 12. An employee opened the door to exit the store, and claimant entered the building yelling and using foul language, including, "I want my fucking wife." Exhibit 1. The loss prevention manager and a loss prevention specialist exited their office. The loss prevention manager told claimant they were speaking with his wife, and asked claimant to wait outside. Claimant yelled at the loss prevention manager and used foul language, including, "Fuck you," and "You are a little bitch." Exhibit 1. The loss prevention manager told claimant he would call the police if claimant did not leave. Claimant refused to leave. The loss prevention manager told claimant he was calling the 911, and claimant left the employer's premises in his vehicle. The loss prevention manager cancelled his 911 call.

(3) Claimant drove home, and then returned to the employer's premises with his two step-daughters. Claimant again banged on the employee door and yelled out demands to know why the loss prevention manager had detained his wife. The loss prevention manager opened the door, and stated that he did not want to discuss the matter in front of claimant's children. The loss prevention manager told claimant to leave. As the loss prevention manager attempted to close the door, claimant pulled the door open, and again yelled at the loss prevention manager and used foul language. The loss prevention manager told claimant he was calling the police again, and claimant appeared to leave.

(4) Claimant returned and pounded on the door, yelled and used foul language, and called the called the loss prevention manager a "little bitch." Exhibit 2. Claimant then followed another employee into the building. The loss prevention manager again called the police, and told claimant they were on their way. The employer's night freight manager asked claimant to leave. Claimant and his daughters left the employer's premises in claimant's vehicle.

(5) The employer discharged claimant for his conduct on April 29, 2014.

CONCLUSIONS AND REASONS: We agree with the Department and 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 connected work. 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).

When a claimant was discharged for off-duty conduct, the first issue is whether the conduct was "connected with work," so that the employer had the right to expect her to refrain from such conduct. For off-duty conduct to be connected with work, it must have a reasonable likelihood of affecting the workplace. *Levu v. Employment Department*, 149 Or App 29, 941 P2d 1056 (1997). It is enough that the ramifications that flow from the claimant's actions have a reasonable likelihood of negatively impacting the morale or atmosphere of the workplace. *Id.* Claimant actions on the employer's premises on April 29, 2014 had a reasonable likelihood of negatively impacting the morale or atmosphere of the workplace. His conduct therefore was connected to work, and the employer had a right to expect him to refrain from such conduct. Claimant knew or should have known as a matter of common sense that his conduct probably violated the employer's expectations, and his conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions. Claimant's conduct therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error. Claimant did not assert, and the record does not show, that claimant sincerely believed, and had a rational basis for believing, that his conduct complied with the employer's expectations.

At hearing, claimant argued that his conduct was an isolated instance of poor judgment, and therefore not misconduct. Transcript at 36. However, acts that create irreparable breaches of trust in the employment relationship 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). In the present case, claimant repeatedly entered the employer's store without authorization, repeatedly verbally abused the employer's loss prevention manager, and repeatedly refused to leave the employer's premises until being told for the second time that the employer had called the police. Claimant's actions took place over a significant period of time, during which he had at least two opportunities to reflect on, and discontinue, his behavior. Viewed objectively, as a whole, claimant's actions were sufficient to create an irreparable breach of the employer's trust in claimant to refrain such behavior in the future. Claimant's actions therefore exceeded mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

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

DECISION: Hearing Decision 14-UI-20530 is affirmed.

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

DATE of Service: August 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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