

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1240

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95132). Claimant filed a timely request for hearing. On July 7, 2014, ALJ Shoemake conducted a hearing, and on July 14, 2014 issued Hearing Decision 14-UI-21482, affirming the Department's decision. On July 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant provided 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 him 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) Pick N Pull Auto Dismantlers employed claimant from November 26, 2005 to May 19, 2014 as a customer service associate.

(2) The employer expected employees to treat customers in a professional and courteous manner. If an employee was unable to assist a customer, the employer expected the employee to request assistance from a manager. Claimant understood the employer's expectations.

(3) The manager gave claimant several verbal warnings during 2013 about claimant raising his voice, using foul language, and treating customers in an unprofessional manner.

(4) On March 23, 2014, claimant was working at the customer service counter, and became upset with a coworker who was assisting claimant's customers. Within earshot of customers at the service counter,

claimant told the coworker, "I'll help this fuck, and you help that fuck." Exhibit 1. The employer counseled claimant and gave him a written warning stating that the employer expected him to conduct himself in a professional, courteous manner at work.

(5) On May 19, 2014, a customer brought items to claimant at the service counter. The customer became upset with claimant and began to yell and use foul language toward claimant. Claimant raised his voice with the customer, argued with him, and did not seek assistance from his manager. At the end of the transaction, claimant threw the receipt at the customer.

(6) On May 19, 2014, the employer discharged claimant for acting in an unprofessional, discourteous manner toward a customer.

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 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).

The employer had a right to expect claimant to treat customers in a professional and courteous manner. Claimant understood the employer's expectations. Claimant knew or should have known that arguing with a customer and throwing a receipt at him probably violated the employer's expectations. Claimant told the employer he responded to the customer in a hostile manner because the customer was rude, yelling and using foul language. Transcript at 9. Claimant's conscious decision to engage in such behavior demonstrated indifference to the consequences of his actions. Claimant's conduct was, at best, wantonly negligent.

Claimant's conduct on May 19, 2014 was not 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). The employer warned claimant several times during 2013 about unprofessional conduct toward customers. Claimant also exercised poor judgment when he referred to customers using foul language, within their earshot, on March 23, 2014. His exercise of poor judgment on May 19, 2014 therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant did not assert or show that he sincerely believed, and had a rational basis for believing, the employer would condone his having thrown the receipt toward the customer.

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

DECISION: Hearing Decision 14-UI-21482 is affirmed.

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

DATE of Service: August 20, 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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