

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1302

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 92557). The employer filed a timely request for hearing. On July 1 and July 14, 2014, ALJ Shoemake conducted a hearing, and on July 18, 2014 issued Hearing Decision 14-UI-21743, concluding the employer discharged claimant for misconduct. On July 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant from December 27, 1993 to April 24, 2014 as an assistant store manager.

(2) The employer expected employees to contribute to a positive work environment through cooperative and professional interactions with coworkers and vendors. The employer prohibited employees from engaging in acts of intimidation or violence of any kind. Claimant understood that the employer had a zero tolerance policy regarding acts of intimidation and violence in the workplace, and that such acts were grounds for immediate discharge.

(3) On April 2, 2014, a receiving clerk called claimant to the back room of the store because the freight crew had left many shopping carts there containing returned merchandise and recyclable materials. The receiving clerk was dissatisfied because she had cleared the area one hour before, and had other duties to complete. Claimant told the receiving clerk that it was her job to clean the back room. The receiving clerk was dissatisfied with claimant's response, and told him she was not responsible for cleaning carts left by the freight crew, and that she would "double-check" with the general manager when she arrived in two hours. Transcript - July 14, 2014 at 5.

(4) In response to the receiving clerk's comments about her job duties, claimant forcefully kicked a line of approximately seven carts, and began shoving other carts toward a baler machine, where another employee was working. Claimant again forcefully kicked more carts. The clerk immediately left the area, accompanied by a vendor who was present during the incident, because claimant appeared angry

and “out of control,” and the clerk feared being hit with a cart. Transcript - July 14, 2014 at 7. The receiving clerk reported the incident to the general manager when the manager arrived at work.

(5) On April 24, 2014, the employer discharged claimant for his conduct on April 2, 2014.

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. 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. 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).

Claimant and the employer disagreed about what occurred during the final incident on April 2, 2014 that resulted in claimant's discharge. Claimant asserted that he kicked and shoved the carts in the back room after speaking with the receiving clerk on April 2, but that he did so to clear the heavy carts from the area, and not out of anger. Transcript - July 1, 2014 at 30-31. However, the firsthand testimony of the employer's receiving clerk, corroborated by that of the human resources director and general manager, who viewed video of the final incident, outweighed claimant's uncorroborated testimony. Claimant's explanation that he was merely clearing the back room was also implausible considering that there were three other people, including a vendor, in a room described as being only about “ten to twelve feet square” in size (Transcript - July 14, 2014 at 8), when claimant kicked and shoved the carts. The clerk also testified that employees “never kick the carts,” (Transcript - July 14, 2014 at 10) and her testimony that claimant was “very angry” and “out of control” (Transcript - July 14, 2014 at 6-7) was a plausible reaction to the clerk's arguably insubordinate refusal to clear the back room herself. We therefore found facts in accordance with the employer's evidence on matters in dispute.

The preponderance of evidence shows claimant became angry with the receiving clerk and aggressively kicked and shoved carts, intimidating and endangering the safety of two employees and a vendor. The employer had a right to expect claimant to refrain from engaging in violent and intimidating behavior. Claimant understood the employer's expectations. On April 2, 2014, claimant consciously engaged in conduct that he knew violated the employer's expectations, and therefore willingly violated those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that make a continued employment 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). Claimant's reaction to the situation on April 2 was sufficiently intimidating and dangerous to his coworkers that, considered objectively, the employer could reasonably conclude that it could no longer rely on claimant to perform his duties as an assistant manager, and to act as liaison between employees and upper management, making a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct also cannot be excused as a good faith error. Claimant knew his conduct violated the employer's expectations. His conduct was not the result of an error in his understanding of those expectations.

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

DECISION: Hearing Decision 14-UI-21743 is affirmed.

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

DATE of Service: September 4, 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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