

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1327

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115253). Claimant filed a timely request for hearing. On July 24, 2014, ALJ Clink conducted a hearing, and on August 1, 2014 issued Hearing Decision 14-UI-22704, affirming the Department's decision. On August 7, 2014, claimant filed an application for review with the Employment Appeals Board (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 claimant 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) Anthony's Restaurants employed claimant as a cook from May 13, 2009 June 9, 2014.

(2) The employer expected its employees to refrain from physically fighting with coworkers on the employer's premises. Claimant was aware of the employer's expectation as a matter of common sense.

(3) On June 3, 2014, claimant criticized a coworker for not doing his share of the work in the kitchen. The coworker responded by calling claimant names including "cracker" and "white trash." Audio Record ~ 20:00 to 20:45. Claimant took offense, grabbed the coworker by his work coat and attempted to drag him outside "to settle the matter." Audio Record ~ 30:00 to 30:30. Claimant's supervisor and another coworker broke up the fight and the supervisor sent both workers home before the end of their shifts. On June 9, 2014, the employer discharged claimant for fighting.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected claimant to refrain from engaging in physical confrontations with coworkers at work. At a minimum, claimant understood this expectation as a matter of common sense. See *Glen W. Ross* (Employment Appeals Board, 12-AB-3215, January 14, 2013) (a claimant's awareness of the employer's expectation against instigating a physical fight with a coworker is inferable as a matter of common sense); *Justin D. Leddin* (Employment Appeals Board, 12-AB-0501, March 22, 2013) (same). Claimant violated that expectation on June 3 when he physically confronted his coworker in the employer's kitchen for comments the coworker directed at claimant that claimant considered offensive. Claimant's assertion at hearing that his coworker was the aggressor and that he was only defending himself was not persuasive. Claimant's supervisor testified that both claimant and the coworker had engaged in name-calling and that claimant was the physical aggressor. Audio Record ~ 31:50 to 32:20. Moreover, claimant did not dispute the general manager's testimony that claimant admitted at the time of his discharge that he was provoked by his coworker's "comments" and made the "wrong decision" by physically confronting him. Audio Record ~ 15:15 to 15:50. There was no evidence that claimant raised the issue of self-defense at that time. On these facts, claimant consciously violated the employer's common sense expectation that he avoid physical confrontations at work and chose to physically confront a coworker over words rather than seek non-physical alternatives to resolve their dispute.

Claimant's June 3 conduct is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. Under that rule, an "isolated instance of poor judgment" is conduct that does not exceed mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant chose to resolve his anger over his coworker's comments by physically confronting him rather than by attempting to resolve the matter without violence. Viewed objectively, claimant's choice caused an irreparable breach in the employer's trust that claimant would attempt to resolve future disputes with coworkers without violence. Accordingly, claimant's conduct exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(3)(b).

Claimant's conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, or present evidence showing, that he had a good faith belief that the employer would condone his actions in physically confronting a coworker on the employer's premises over words. Claimant's actions were not based on a mistaken understanding of the employer's common sense expectation that employees refrain from physical altercations at work.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-22704 is affirmed.

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

DATE of Service: September 10, 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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