

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1752

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154827). Claimant filed a timely request for hearing. On October 20, 2014, ALJ Clink conducted a hearing, and on October 23, 2014, issued Hearing Decision 14-UI-27477, affirming the Department's decision. On November 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Loomis Armored US, Inc. employed claimant as a coin processor from January 1, 2012 to August 20, 2014.

(2) The employer expected its employees to treat coworkers and supervisors with respect and courtesy and conduct themselves in a professional manner while at work. Claimant understood the employer's expectations as a matter of common sense.

(3) In approximately April 2013, claimant had a verbal altercation with a coworker at work. A day or two later, that employee brought his service weapon to work and showed claimant, which alarmed him. Claimant complained to his supervisor, who directed the coworker to remove the weapon from the premises. Neither the coworker nor claimant received any discipline or warning following the incident.

(4) On August 14, 2014, during a break, claimant approached his supervisor about leaving work early because he had finished his assigned tasks and his supervisor directed him stay and help other coworkers finish their work. Claimant did not refuse but believed those coworkers were not productive at their jobs and complained to the supervisor that the supervisor never corrected them for their poor work habits. A heated argument ensued and both participants yelled at each other. No profanity, bad language or threats were made but claimant was sent home for the remainder of the day. The next day, a manager notified claimant that he was being suspended for three days. When claimant asked the manager if he was being "fired" for the incident, the manager responded, "No...you're not being fired at all." Audio Record ~ 30:00 to 30:45.

(5) On August 20, 2014, a different manager notified claimant that he was being “let go” and the only explanation he gave was it “didn’t work out.” Audio Record ~ 11:30 to 12:00. During the 16 continuous years claimant had worked for both the employer and its predecessor company, claimant had never been disciplined or warned for his conduct at work.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-27477, after finding “the employer told claimant that his employment was terminated because it was not working out”, the ALJ concluded claimant was discharged for misconduct, reasoning that claimant was discharged for the August 14 incident, that incident was not an isolated instance of poor judgment in light of claimant’s verbal altercation with a coworker in 2013 and “claimant committed an act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest.” Hearing Decision 14-UI-27477 at 2, 3. However, it was undisputed that claimant’s manager told him he was “not being fired at all” for the August 14 incident and being discharged because the employer later concluded, for unstated reasons, the employment relationship was “not working” out is not being discharged for a conscious disregard of an employer expectation or interest under ORS 657.176(2)(a).

Moreover, even if claimant was discharged for his involvement in the August 14 incident, on this record it was no more than an isolated instance of poor judgment. An exercise of poor judgment is isolated if it 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). Here, there is no evidence in the record that claimant’s involvement in the prior verbal altercation was instigated by him, involved disrespectful, discourteous or unprofessional conduct on his part or that the employer warned or disciplined him for willful or wantonly negligent behavior in that instance. Assuming, *arguendo*, that claimant exercised poor judgment during that incident, it occurred approximately fifteen months earlier, and therefore does not show that claimant’s conduct on August 14, 2014 was a repeated act or pattern of willful or wantonly negligent behavior, rather than an infrequent occurrence.

Some acts, even if isolated, such as those 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). In *Weyerhaeuser Co. v. Employment Division*, 103 Or App 143 (1990), the Court of Appeals held that the claimant’s conduct exceeded mere poor judgment where he argued with his supervisor for almost 30

minutes, swore at him and called him obscene names, at times within inches of his face, and later threatened to harm him. In *Columbia Plywood v. Employment Division*, 36 Or App 469 (1978), the Court held that the claimant's verbal outburst toward his foreman exceeded mere poor judgment where it was part of a larger incident in which he knowingly disregarded his foreman's instructions, engaged in a loud, extended argument with him, and insulted him. In *Double K Cleaning Service, Inc. v. Employment Department*, 191 Or App 374 (2004), however, the Court held that a male claimant's heated argument with the employer's female owner could be excused as mere poor judgment where he used only mild profanity, did not persist in prolonging the argument, and did not insult or curse the supervisor after being told to stop. Here, the record fails to show that claimant called his supervisor obscene names, threatened to harm him or knowingly disregarded his instructions. Nor is there evidence that he persisted in prolonging the incident, or continued his behavior after being told to stop. Viewed objectively, the record fails to show that claimant's conduct on August 14, 2014 was so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Accordingly, we conclude claimant's conduct on August 14, 2014 did not exceed mere poor judgment.

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). It failed to meet its burden here. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-27477 is set aside, as outlined above.

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

DATE of Service: December 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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