

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1800

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75734). Claimant filed a timely request for hearing. On November 7, 2014, ALJ M. Davis conducted a hearing, and on November 12, 2014 issued Hearing Decision 14-UI-28507, affirming the Department's decision. On November 21, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Rainbow Garden Inc. employed claimant as a cook at its childcare center from October 11, 2013 to September 1, 2014.

(2) On July 31, 2014, a state certifier from the Department's Child Care Division was scheduled to conduct its annual inspection of the employer's premises. Claimant was not scheduled to work that day, but decided to go to work and give the state certifier a letter stating his concern that the employer's kitchen was being mismanaged.

(3) When claimant arrived at work on July 31, the state certifier was speaking to the employer's director in its parking lot. Claimant approached them and asked the state certifier if she was a state employee. The state certifier did not answer, and claimant repeated the question several times until the state certifier asked who was asking. Claimant stated that he was a citizen. The director greeted claimant by name and asked him what he was doing. Claimant stated that he had a letter for the state certifier and attempted to hand it to her. The director put up her hand to prevent claimant from handing the state certifier the letter. The state certifier asked claimant to place the letter on her clip board. Claimant did so, and the state certifier placed the letter in the back seat of her automobile. Claimant then left the employer's premises.

(4) The employer discharged claimant for his behavior toward the state certifier on July 31, 2014.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was not 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. 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 are not misconduct. OAR 471-030-0038(3)(b). A decision to willfully violate, or take an action that results in a wantonly negligent violation of, an employer's reasonable standard of behavior is poor judgment. OAR 471-030-0038(1)(d)(C). Acts that violate the law, that are tantamount to unlawful conduct, and that create irreparable breaches of trust in the employment relationship or otherwise 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).

In Hearing Decision 14-UI-28507, found that the employer discharged claimant because he made the state certifier "feel unsafe" when he approached her in the employer's parking lot on July 31, 2014.¹ The ALJ concluded that claimant's conduct was wantonly negligent because, "By confronting a state employee outside the employer's location when claimant was not working, he demonstrated an indifference to the standards of behavior the employer had a right to expect of him."² The ALJ further concluded that claimant's conduct was "too serious" to be considered an isolated instance of poor judgment because the manner in which claimant approached the state certifier created an irreparable breach of the employer's trust in claimant to behave in a "respectful and non-threatening manner."³

We disagree with the ALJ's analysis. First, the record shows that the employer discharged claimant for his "treatment" of the state certifier and his "unstable and unpredictable behavior," and not merely because he arrived at work on his day off and attempted to give the state certifier a letter stating his concerns that the employer's kitchen was being mismanaged. Exhibit 2 at 3; Transcript at 6. We therefore focus on claimant's behavior toward the state certifier on July 31, 2014 as the reason for his discharge. Second, a conclusion that claimant's conduct was willful or wantonly negligent requires a showing that he was conscious of his conduct, just as a conclusion that he exercised poor judgment requires a showing that he made a conscious decision to act as he did. At hearing, the employer's

¹ Hearing Decision 14-UI-28507 at 3.

² *Id.*

³ *Id.*

director asserted that claimant approached with a “very agitated energy” and “loudly” asked the state certifier several times if she was a state employee, his voice becoming “elevated and more agitated” each time the she did not answer, and his “body language startl[ing] her. Transcript at 6-7; Exhibit 2 at 2. However, claimant testified that he “remained calm” during the incident and did not raise his voice. Transcript at 14. Assuming *arguendo* that the director’s version of events is correct, the record nevertheless fails to show that claimant was conscious of his demeanor, the volume or tone of his voice, or his body language, or that he made a conscious decision to act in the manner described by the employer’s director. Absent such showings, the record fails to establish that claimant’s conduct was willful or wantonly negligent, or that he exercised poor judgment, let alone that his conduct exceeded mere poor judgment.

We therefore conclude that claimant’s discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-28507 is set aside, as outlined above.

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

DATE of Service: December 31, 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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