

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1889

*Reversed
Disqualification*

PROCEDURAL HISTORY: On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135653). Claimant filed a timely request for hearing. On December 8, 2014, ALJ R. Davis conducted a hearing, and on December 10, 2014 issued Hearing Decision 14-UI-30158, concluding that the employer discharged claimant, but not for misconduct. On December 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kahut Waste Services LLC employed claimant as a tire technician from March 3, 2009 to September 11, 2014.

(2) The employer had a written policy prohibiting off-duty conduct that created friction between employees, including “outbursts of temper” directed at other employees. Exhibit 1. Claimant received and signed a copy of the policy on May 30, 2013.

(3) In April 2014, claimant suffered a back injury at work, and was restricted to light duty. The employer offered claimant work as a sorter. Claimant accepted the offer and worked as a sorter for two days. Claimant then informed the employer that he could not continue working as a sorter because doing so caused him back pain. Claimant also provided a doctor’s note prohibiting him from working as a sorter. In July 2014, the employer offered claimant work operating a bailer. Claimant accepted the offer, but did not return to work.

(4) In August 2014, the employer had a fire on its premises. Two days later, claimant sent his supervisor a text message stating that he heard about the fire, and asking if the bailer was working, and if the employer needed claimant to return to work. Claimant’s supervisor replied that the bailer was working, and that the employer needed claimant to return to work. Claimant did not return to work.

(5) At 4:03 a.m. on September 8, 2014, claimant sent his supervisor a text message, in which he also addressed the employer’s manager, Ray Kahut. The text message stated:

You have lied to me, and that's why I don't give a fuck. I can prove it, too, so tell me, fucking bailer up and running, probably not, like when there was a fire. Why I don't say nothing, you're full of shit, you're replacing the cylinder, I know it's not up and running, why play games, this is bullshit, just like the plant wasn't running for four days after the fire and you flat out lied to me. Hmm. Hi Ray, eat my ass LOL. Hey, Ray, it's so nice to be able to shop in Canby, there is absolutely no need to be an asshole, but you're too stupid to realize the entire town hates you. Oh wait, got to give you some credit 'cause I never see you and I think you realize what shithead you are. Must suck sending your wife to Woodburn to buy groceries. Get off your fat fucking ass and make amends. Not a single person in 20 mile radius likes you, sadly you know it. Ha, so is it running? You all are full of shit but hey you've got a kid on the way. No, it's not running, I already know. Stupid, small, Podunk town. Maybe when you wake up you'll find this funny probably around 7 or 9 normal hours! I'm pushing the limits 'cause I know you won't respond because you're a big fat pussy!!! Vagina!! Smelly hole!!! Ants have bigger balls than you. Could have had back surgery 6 weeks and I would have been fine, but you all want to play games. Ha, think about how much time has been wasted. Pathetic.

Audio Record at 13:50. Claimant knew sending the text message to his supervisor violated the employer's expectations.

(6) The employer discharged claimant for sending the text message to his supervisor.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ that claimant's discharge was 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from sending the September 8, 2014 text message to his supervisor. Claimant knew sending the text message violated the employer's expectations, and therefore willfully violated those expectations. Claimant's conduct cannot be excused as a good faith error because he did not sincerely believe, or have rational basis for believing his conduct complied with the employer's expectations.

The primary issue in this case is whether claimant's conduct can be excused as an isolated instance of poor judgment. Acts that violate the law, acts that are tantamount to unlawful conduct, acts 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-30158, the ALJ concluded that claimant's conduct did not exceed mere poor judgment because it did not violate the law and was not tantamount to unlawful conduct, and claimant did not threaten his supervisor, the employer's manager or their families.¹ However, the record fails to show that claimant had any recent interaction with his supervisor or the manager that provoked his text message, in which he repeatedly accused his supervisor of dishonesty, made personal attacks against the manager, and used extremely foul language. Claimant concluded the text message by indicating that he was deliberately attempting to provoke his supervisor, essentially daring him to respond, and repeatedly calling him foul names. Viewed objectively, claimant's conduct in sending the text message was sufficient to irreparably damage his relationship with his superiors, making a continued employment relationship impossible. Claimant's conduct therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

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

DECISION: Hearing Decision 14-UI-30158 is set aside, as outlined above.

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

DATE of Service: January 30, 2015

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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¹ Hearing Decision 14-UI-30158 at 4.