

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1931

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93316). The employer filed a timely request for hearing. On December 5, 2014, ALJ S. Lee conducted a hearing, and on December 12, 2014 issued Hearing Decision 14-UI-30333, concluding claimant's discharge was for misconduct. On December 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Holiday AL Management Sub LLC employed claimant as a sous chef from September 18, 2012 to September 24, 2014.

(2) Claimant was responsible for cooking meals for residents of the employer's assisted living facility. The employer expected claimant to serve food that was appealing and edible, and to continue cooking food until the residents had all eaten. He was required to interact with the residents as part of his daily job duties. The employer also expected claimant to maintain a clean and sanitary working environment, adhere to the timelines the employer established concerning his duties, and comply with reasonable instructions from his managers. As the second-highest ranking person in the employer's kitchen, the executive chef held claimant to a high standard of conduct.

(3) On repeated occasions, claimant served food that was not appetizing or edible. Claimant allowed his work environment to become so dirty that it included greasy, slippery floors, black and greasy dishwater, and he did not clean his environment as he worked, resulting in a backlog of pots and pans to wash. Claimant regularly failed to perform his duties in accordance with the employer's timelines. On many occasions, claimant was counseled and warned to improve his work performance, and adhere to the employer's timelines.

(4) Between September 11, 2014 and September 15, 2014, claimant served residents burned bread, overcooked eggs, eggs with broken yolks, and cold, unappetizing food. He prepared a pudding cake

dessert that was inedible because it was undercooked, and served hash browns that were cooked until they were black. In the kitchen he was using greasy and black dishwater to pre-wash pots and pans and his work area was dirty. Twenty-five of the residents complained about the quality of the food. The employer issued claimant a final warning based on those issues, and, on September 18, 2014, the executive chef met with claimant to explain his expectations and instruct claimant to improve the quality of his work and to work in compliance with the employer's timelines.

(5) On September 19, 2014, claimant prepared food for residents until 8:40 a.m. He stopped cooking at 8:40 a.m. even though he knew some of the residents had not yet ordered or received all of their meals. At approximately 8:40 a.m., some waitresses approached claimant to order eggs for some of the residents whose egg orders had not yet been filled. Claimant told the waitresses that the timeline for breakfast service ended at 8:40 a.m. and that he was not going to serve any additional breakfasts. The waitresses told claimant that some of the residents still needed to be served, but claimant refused, stating that management told claimant he was not to serve beyond 8:40 a.m. because of the timelines.

(6) Thereafter, one of the co-managers repeatedly asked claimant to cook eggs for the residents and claimant refused. At that point, knowing residents had not yet been served and having been instructed by a manager to serve the residents, claimant began to clean up his work area and to discard some food that could otherwise have been served to residents. The co-manager notified the community manager that claimant had refused to continue cooking for the residents, after which the community manager instructed claimant to continue cooking. Claimant again refused. At some point, claimant went into the dining room to address the residents with the timelines in hand, told them they would not be served that day, and suggested if they had an issue with that they should see the community manager about it.

(7) After having refused waitresses' and managers' requests to serve the approximately twenty-five residents who had not yet had their egg orders filled at least eight times, the community manager told claimant he was suspended and escorted claimant off the premises. On September 24, 2014, the employer discharged claimant for insubordination and failing to perform his job duties.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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. 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.

The employer had the right to expect claimant to cook edible and appetizing food, to maintain a clean and sanitary work environment, and to perform his job duties with respect to cooking for the residents. Claimant knew or should have known the employer's expectations based on his history of prior warnings for violating those expectations, and as a matter of common sense. Claimant also should have

understood as a matter of common sense and based on prior experience that he was expected to comply with his managers' reasonable instructions.

In the final incident, claimant violated the employer's expectations by repeatedly refusing to cook for approximately 25 residents even though he knew they had not yet been served their egg orders. Claimant argued that he refused to finish cooking for the residents because "was stuck between a rock and a hard place" and did not want to violate the timeline in order to finish serving breakfast. Transcript at 47-48. However, claimant was not in a position that he had to make that choice. Rather, claimant was in the presence of two separate managers, each of whom specifically and repeatedly instructed claimant to continue cooking regardless of the timelines, and claimant repeatedly refused to do so. Under those circumstances, claimant's refusal to comply with their instructions to finish serving the residents whose egg orders had not been completed constituted a willful violation of the employer's expectation that he cook for the residents and comply with managers' reasonable instructions.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Given the specific instructions from two managers to finish cooking the residents' breakfasts in the final incident, claimant did not sincerely believe or have any factual basis for believing the employer would consider his repeated refusal to cook those breakfasts as acceptable or excusable behavior.

Nor may claimant's conduct be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant's conduct was part of a pattern of other wantonly negligent conduct. For instance, claimant knew the employer expected him to serve edible, appetizing food, but he knowingly served hash browns he had cooked until they were black, a pudding cake that was inedible because it was undercooked, broken eggs, overcooked eggs, cold food, and, on more than one occasion, burned rolls. Claimant's conduct in each of those instances was wantonly negligent, as each decision claimant made to serve the residents burned, unappetizing or inedible food showed his conscious indifference to the standards of behavior the employer expected of him. His willful conduct in the final incident was part of a pattern of that other wantonly negligent conduct.

Moreover, even if claimant's conduct in the final incident had been considered isolated, the outcome of this decision would remain the same. OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that some isolated conduct exceeds mere poor judgment, including conduct that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. Claimant's conduct in the final incident was that egregious because, not only did claimant repeatedly refuse two managers' instructions to continue cooking even though he knew he had not completed all the residents' orders, claimant took his dispute with those managers into the dining room to air in front of a vulnerable population of assisted living facility residents, told them that he was intentionally refusing to complete some of their orders, and told them to speak with the community manager if they had a problem with that. Objectively considered, claimant's conduct in that respect was willfully insubordinate, involved residents in a personnel or policy dispute in which they did not need to be involved, and served to undermine the managers' authority with the residents in the employer's facility. Given claimant's conduct, and the fact that claimant's job duties required that he interact with the residents on a daily basis, a reasonable employer could conclude that they could no longer trust claimant to perform his job duties or interact with the residents in a professional manner.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-30333 is affirmed.

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

DATE of Service: February 4, 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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