

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0086

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 24, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 85742). The employer filed a timely request for hearing. On January 8, 2015, ALJ Frank conducted a hearing, and on January 15, 2015 issued Hearing Decision 15-UI-31837, reversing the Department's decision. On January 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he presented much new information about the facts surrounding his discharge and prior complaints made about his behavior in the workplace. Claimant contended that it was necessary to present this new information because "the [hearing] decision was reached without fully understanding the circumstances referenced during the phone hearing." However, claimant was given an ample opportunity during the hearing to explain his actions and invited to offer any additional information that he considered important in understanding the events that culminated in his discharge. Transcript at 25-30, 31. Several witnesses testified at the hearing about those events, and claimant chose not to question those witnesses or to directly challenge their testimony. Transcript at 12, 13, 19. Because claimant did not show that factors or circumstances beyond his reasonable control prevented him from eliciting or offering this new information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006), EAB did not consider it when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) E. J. Bartells employed claimant as a fabrication supervisor from November 15, 2006 until September 18, 2014.

(2) The employer expected that claimant would not harass other employees, and would refrain from making jokes or slurs, or engaging in physical behaviors based on race, national origin, gender, sexual orientation, ethnicity, disability status, religion or any other characteristics protected under the law. In

2013, claimant attended an employer-sponsored training on behaviors that violated the employer's anti-harassment policy. Claimant was aware of the employer's expectations.

(3) In 2010, an employee that claimant supervised complained to the employer that claimant was regularly "yelling" at employees and using "offensive" language. Transcript at 11, 27. The employer issued a verbal warning to claimant telling him to stop that behavior.

(4) After 2010, claimant regularly and routinely used slurs and offensive language in his workplace conversations with other employees. Transcript at 15, 17, 21. On a daily basis, claimant called his subordinates "fags" or "retards" when their workplace behavior displeased him. Transcript at 14, 15, 16, 17, 26. When an employee once asked claimant what he would do if he discovered that an employee was a homosexual, claimant stated "that is what our trash compactor is for." Transcript at 15. As matter of course, on a daily basis, claimant used the term "nigger" in the workplace. Transcript at 15, 17. Claimant regularly referred to an employee who was of Vietnamese origin as "Charlie," an apparent reference to the slang term "Charlie Cong" used by the United States military for a Viet Cong guerilla during the Vietnam War era. Transcript at 15. Claimant finally stopped calling that employee "Charlie" when the employee did not appear to understand the term. Transcript at 15. Claimant developed the verb "kiked" to refer to items missing from the workplace and to connote that they had been stolen. Transcript at 15. He routinely used this expression in the workplace. Claimant also made repeated workplace references to "beaners," a derogatory term for Latinos. Transcript at 15.

(5) After 2010, employees on multiple occasions complained to claimant's supervisor about claimant's behavior in the workplace, his yelling and the racially and ethnically offensive terms he used in regular conversations. Transcript at 20, 21. Until September 3, 2014, the supervisor did not document any warnings that she issued to claimant. Transcript at 21. However, between 2010 and September 3, 2014, the supervisor told claimant on numerous occasions to "stop yelling," stop "calling [employees] names," "stop that behavior" and "you can't do that." Transcript at 20, 21. When the supervisor would speak with claimant about the complaints she had received, he did not deny what he had done, and would say "okay." Transcript at 21. However, the complaints about claimant continued.

(6) Sometime in August 2014, an employee complained to claimant's supervisor that claimant had touched her in a sexual way. On September 3, 2014, claimant's supervisor issued a warning to claimant for violating the employer's harassment policy.

(7) On September 17, 2014, the employer's human resources manager was discussing an issue with an employee that claimant had supervised. That employee told the human resources manager in detail about claimant's offensive behavior and the slurs that he habitually used in the workplace. Transcript at 17. The human resources manager told claimant's supervisor about the employee's statement and stated that she was going to come to the workplace the next day to interview the employees there about claimant's behavior. On September 17, 2014, claimant's supervisor issued a warning to claimant for "yelling" at the employees that he supervised and for "call[ing] them names." Transcript at 11.

(8) On September 18, 2014, the human resources manager went to the workplace and interviewed eight employees. She interviewed each employee individually. Most of the interviewed employees referred to claimant's "negative behavior," "yelling" and "using profanity." Transcript at 6. Two of the employees stated that claimant routinely used the homophobic slur of "fag" in the workplace in addition

to the employee who had recounted its use to the human resources manager on the previous day. Transcript at 8. Many of the interviewed employees were intimidated by claimant's behavior in the workplace and had concluded that the "best way to deal with [claimant] was just to agree with him." Transcript at 6.

(9) On September 18, 2014, the employer discharged claimant for violating its harassment policy by using slurs in the workplace based on protected characteristics.

CONCLUSIONS AND REASONS: 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).

While claimant initially took the position that he was not aware of the specific prohibitions in the employer's harassment policy, he ultimately agreed that he knew as a matter of common sense that the employer prohibited him from using the types of slurs that the employer's witnesses described at hearing. Transcript at 25. Claimant flatly denied that he had used the language the employer's witnesses recounted, except for unapologetically admitting that he "probably" called at least one employee a "retard" when he or she did not perform a work task correctly. Transcript at 26. Although claimant denied having called the employee of Vietnamese origin "Charlie," he admitted that he had heard his subordinate employees use this term and that he thought the reference was "not a big deal" and it was probably intended as a "joke" Transcript at 29-30. Accepting claimant's testimony, it does not appear that he corrected his subordinate employees for using the offensive term, and indeed it seems that he condoned it. When it was unguarded, claimant's testimony provides insight into his workplace attitudes and language.

A former employee who was supervised by claimant provided first-hand testimony of the language that he had personally heard claimant habitually use in the workplace. Transcript at 13-19. The former employee's testimony was specific and detailed, with numerous references to the exact and distinctive circumstances under which claimant had used particular slurs. Transcript at 15, 16, 17, 18. The detail of the witness's recollection tends to suggest its reliability. Moreover, the testimony of this witness was corroborated in large part by the independent statements that the employer's human resources manager obtained from the eight employees who worked with claimant, which included their accounts that claimant often used the term "fag" in the workplace. Transcript 6, 7, 8. In addition, claimant's supervisor testified that in the past she had received numerous complaints about claimant's use of offensive terms in the workplace, including homophobic slurs, which also tends to corroborate both the former employee's testimony at hearing and the statements from the interviewed employees. Transcript at 21. Although claimant contended that the former employee who testified at the hearing was a "disgruntled employee" as an explanation for why the employee might have presented fabricated information to the employer's human resources manager and at the hearing, claimant never alluded to any circumstances that would account for that witness having a bias against claimant, such as alleged problems or conflicts between claimant and the former employee or claimant's involvement in the

decision to discharge the former employee. Transcript at 25. In fact, the former employee did not appear disgruntled at the hearing. In addition, the former employee's credibility is strengthened by his willingness to cooperate with the employer by testifying at the hearing in spite of his discharge by the employer. Transcript at 15-16. Without explanation, claimant also contended that the eight interviewed employees presented false information about him because they did not "like" him. Transcript at 26. It is implausible that eight witnesses independently interviewed without advance notice, as well as the former employee, would have conspired or had an opportunity to conspire to concoct consistent, false statements about claimant's customary behavior in the workplace and the language that he habitually used. On this record, it is more likely than not that claimant engaged in the workplace behavior that the employer's witnesses recounted. Because claimant was aware that the employer prohibited this type of behavior, it was at a minimum a wantonly negligent violation of the employer's standards, if not a willful violation.

Although claimant's behavior was willful or wantonly negligent, it is excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(c). Behavior is an "isolated instance of poor judgment" if, among other things 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). In this case, claimant's wantonly negligent behavior shows a pervasive and continuing pattern of racial, ethnic and sexual orientation slurs that occurred on many, many occasions since at least 2010. Because claimant's behavior was repeated, rather than isolated, it cannot be excused as an isolated instance of poor judgment. Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present any evidence showing or tending to show that he sincerely believed that the employer would condone his workplace use of slurs based on race, ethnicity or sexual orientation. There is no evidence from which it can be inferred that claimant's wantonly negligent violation of the employer's standards arose from a good faith error in understanding the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-31837 is affirmed.

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

DATE of Service: March 17, 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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