

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0137

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82006). Claimant filed a timely request for hearing. On January 28, 2015, ALJ Micheletti conducted a hearing, and on February 3, 2015 issued Hearing Decision 15-UI-32816, affirming the Department's decision. On February 11, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Roadhouse 101, a restaurant and brewery, employed claimant as a manager from July 5, 2013 to November 10, 2014.

(2) In 2014, the employer's owner received several employee complaints and a warning letter from Oregon OSHA, the state agency authorized to enforce the state's workplace safety and health rules, about claimant's "abusive" behavior, some of which reportedly involved elements of sexual harassment, toward employees. On September 9, 2014, the owner specifically warned claimant in writing that he was not to engage in any behavior toward employees that could be construed as either "abusive" or of a "sexual" nature. Transcript at 7-8; Exhibit 1. The warning described complaints about claimant touching employees in an unprofessional manner, making a sexual comment to a female employee and degrading an employee in front of coworkers for a minor mistake. The warning stated that "such conduct will not be tolerated in the future" and that continued similar behavior could be grounds for "removal." Exhibit 1.

(3) In October 2014, the owner received an employee report that the employee saw claimant snapping cooking tongs at the chest of a waitress that had made her uncomfortable. The owner questioned the waitress who confirmed the behavior and added that claimant had also told her that "if he was 40 years younger, they would have hot dates...and babies in her tummy", that she looked "really hot", that he wanted to meet with her outside of work and that he regularly hugged and kissed her on top of her head at the start of her shift. Transcript at 11-12. The owner also learned that claimant had yelled at and

degraded a male server in front of coworkers for putting cheese on a salad and later struck that employee hard on his buttocks and stated, “nice ass.” Transcript at 84.

(4) On November 10, 2014, the owner discharged claimant in part, for his October conduct toward the female waitress and male server which he concluded violated his September 9 warning.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

After September 9, the employer had the right to expect claimant to refrain from engaging in any behavior toward employees that could be construed as “abusive” or sexual.” The owner’s written warning was specific and claimant did not dispute that he received it. Claimant violated that expectation by snapping cooking tongs at the chest of a waitress, telling her that “if he was 40 years younger, they would have hot dates...and babies in her tummy”, regularly hugging and kissing her and striking the male server hard on his buttocks and commenting that he had a “nice ass.” Claimant did not dispute that he made the described comment to the waitress and stated that he apologized to her for it after the employer discharged him. Transcript at 50, 78. Although claimant disputed striking the male server as described and stating “nice ass”, the server testified to that conduct under oath and the co-manager confirmed the server reported it to him the day after it occurred. More likely than not, claimant struck the server as described and made the comment in question. Claimant’s October conduct was at least wantonly negligent, because after the September 9 warning, his actions and statements demonstrated that he was indifferent to their consequences for the employer, under circumstances where he knew or should have known the conduct would probably violate the owner’s expectations.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered “isolated,” it must be a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant’s October conduct was not isolated, his actions were wantonly negligent for the reasons described and were not excusable as an isolated instance of poor judgment.

Nor was claimant’s October conduct excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant failed to show that he sincerely believed, or had a factual basis for believing, the owner would condone the described actions toward his subordinates after being clearly notified of the owner’s expectations on September 9.

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

DECISION: Hearing Decision 15-UI-32816 is affirmed.

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

DATE of Service: March 27, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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