

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0182

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #135919). The employer filed a timely request for hearing. On January 27, 2015, ALJ R. Davis conducted a hearing, and on February 4, 2015 issued Hearing Decision 15-UI-32934, concluding the employer discharged claimant for misconduct. On February 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Portland Habilitation Center, Inc. employed claimant from October 7, 2013 to May 13, 2014 as a janitor.

(2) The employer expected employees to refrain from yelling at coworkers and engaging in other threatening behavior toward them. Claimant understood the employer's expectations.

(3) On February 18, 2014, claimant had an envelope containing important personal documents with him while he was taking his break. Claimant's supervisor called claimant and the rest of the janitorial crew back to work before their break ended to assist with an emergency cleanup after sewage backed up in a bathroom. Claimant took his documents with him to the site, and set them down in the bathroom while he worked. The supervisor moved the documents to avoid soiling them, and the documents later fell on the floor. Claimant picked up the documents, stood close to the supervisor, and began to yell at him that he would have to pay for the documents. The supervisor told claimant to leave the bathroom and report to the office. Claimant's manager and supervisor gave claimant a warning and advised him that yelling or acting angry toward a coworker was unacceptable at work.

(4) On May 7, 2014, claimant's coworker reported that claimant had yelled at her. Claimant's manager and supervisor met with claimant to discuss the coworker's report. Claimant denied having yelled at the coworker, and began to argue with the manager and supervisor and yell at them. Claimant told the manager he did not have to listen to the supervisor. The manager directed claimant to return his key to a key box on the wall, and go home for the rest of the day. The supervisor was sitting in a chair near the

key box. As claimant walked toward the key box, he shoved the supervisor in the thigh with his knees, pushing the supervisor backward in his chair against his desk. The manager told claimant again to go home. Claimant made a sexual gesture toward the supervisor and then left the workplace.

(5) On May 13, 2014, the employer discharged claimant for arguing and engaging in threatening behavior toward his coworkers.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. 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).

Claimant and the employer disagreed about what occurred during the final incident on May 7, 2014 that resulted in claimant's discharge. Claimant asserted that he did not yell at his coworkers or shove the supervisor or his chair. Transcript at 57, 42-43. However, the firsthand testimony of the supervisor was corroborated by that of the manager, who testified that claimant argued, yelled, and stated he did not have to listen to the supervisor. Transcript at 68. Thus, the employer's evidence outweighed claimant's uncorroborated testimony. We therefore found facts in accordance with the employer's evidence on matters in dispute regarding the final incident. The preponderance of evidence shows claimant became angry with the manager and supervisor, yelled at them, and aggressively shoved the supervisor. The employer had a right to expect claimant to refrain from yelling and engaging in threatening behavior at work. Claimant understood the employer's expectations. On May 7, 2014, claimant consciously and willingly engaged in conduct that he knew violated the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence, rather than a repeated act. OAR 471-030-0038(1)(d)(A). In addition, acts that create 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 the present case, claimant exercised poor judgment by yelling at his coworkers on February 18, 2014 and May 7, 2014. Claimant's exercise of poor judgment therefore was a repeated act and not a single or infrequent occurrence. In addition, claimant's act of shoving a supervisor on May 7 was sufficiently threatening that, objectively considered, the employer could reasonably conclude that a continued employment relationship was impossible. Claimant's conduct therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's actions were not the result of a good faith error in his understanding of the employer's expectations. Claimant did not assert or show that he sincerely believed or had a factual basis for

believing the employer would condone his conduct toward his manager and supervisor in the final incident.

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

DECISION: Hearing Decision 15-UI-32934 is affirmed.

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

DATE of Service: April 2, 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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