

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0418

Affirmed
Disqualification
(Descalificación)

PROCEDURAL HISTORY: On November 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90716). Claimant filed a timely request for hearing. On December 22, 2014, ALJ M. Davis conducted a hearing, and on December 24, 2014 issued Hearing Decision 14-UI-30929, affirming the Department's decision. On January 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On February 23, 2015, EAB issued Appeals Board Decision 2015-EAB-0010 reversing Hearing Decision 14-UI-30929 and remanding this matter to the Office of Administrative Hearings (OAH) for further development of the record. On March 24, 2015, ALJ M. Davis conducted a hearing, and on March 25, 2015 issued Hearing Decision 15-UI-35745, again concluding that the employer discharged claimant for misconduct. On April 14, 2015, claimant filed an application for review of Hearing Decision 15-UI-35745 with EAB.

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Fleetwood Homes Inc. employed claimant from June 23, 1989 to October 15, 2014 as a fabricator in the employer's roof department.

(2) The employer expected claimant to treat his coworkers with dignity and respect, and to refrain from striking his coworkers at work. Claimant understood the employer's policy that he treat his coworkers with dignity and respect and understood he should not strike a coworker as a matter of common sense.

(3) The employer had not disciplined claimant before October 15, 2014 for mistreating his coworkers.

(4) On October 15, 2014, claimant asked a coworker about a piece of wood he was using while assembling a roof. The coworker became upset with claimant and called him a “son of a bitch.” Transcript at 10-11 (December 22, 2014). Claimant and the coworker continued to argue, removed their tool belts, and moved away from the assembly table. Claimant struck the coworker in the face. The coworker grabbed his tool belt, left the area, and reported claimant’s conduct to his supervisor.

(5) On October 15, 2014, the employer discharged claimant for striking a coworker during an argument at work.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to refrain from striking a coworker while at work. Claimant understood the employer’s expectation as a matter of common sense. It is undisputed that claimant and a coworker were engaged in an argument on October 15, 2014. The employer’s two witnesses, present at the argument, testified that claimant hit the coworker in his face during the argument. Transcript (December 22, 2014) at 14-15; Transcript (March 24, 2015) at 10-16. Claimant testified that he did not hit the coworker, and argued at hearing that the employer’s witnesses were too far away to see what occurred during the final incident, and that he could not have hit the coworker because the coworker had no mark on his face after the argument. Transcript (December 22, 2014) at 11-12; Transcript (March 25, 2015) at 18-20. However, the employer’s two witnesses testified that they were within twenty feet of the arguing employees, and saw claimant hit the coworker in the face. Transcript (December 22, 2014) at 14-15; Transcript (March 24, 2015) at 10-12, 14-16. Additionally, one of the witnesses saw the coworker’s head “moved very sharply” when claimant struck him. Transcript (March 24, 2015) at 12. The employer’s combined testimony outweighs claimant’s uncorroborated testimony. The weight of the evidence indicates that claimant struck the coworker out of anger at work, and in doing so, willfully disregarded the employer’s expectation that employees refrain from striking each other at work.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. OAR 471-030-0038(1)(c) specifies that acts that violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Under ORS 166.065, a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting the other person to offensive physical contact. At minimum, claimant intentionally annoyed his coworker by striking him. Claimant’s decision to use physical force

toward his coworker was tantamount to harassment, and therefore exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(1)(d)(D).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, and the record does not show, that he had a sincere belief, or rational basis for believing, that the employer would condone striking a coworker out of anger or frustration, regardless of whether the coworker used foul language toward him. Claimant's conduct was, therefore, not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation from the employer.

DECISION: Hearing Decision 15-UI-35745 is affirmed. *Decisión de la Audiencia 15-UI-35745 queda confirmada.*

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 3, 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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en **courts.oregon.gov**. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.