

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0437

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 165712). Claimant filed a timely request for hearing. On April 6, 2015, ALJ Seideman conducted a hearing, and on April 7, 2015 issued Hearing Decision 15-UI-36457, affirming the Department's decision. On April 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant 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 did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Allen & Gibbons Logging employed claimant as a choker setter from December 20, 2012 to February 6, 2015.

(2) The employer prohibited employees from engaging in verbal abuse or aggression toward their coworkers. The employer notified claimant of that policy when it hired him. However, in claimant's experience, coworkers scuffled with each other, called each other stupid or yelled at each other. Claimant had some prior history of behavioral issues, but nothing since June 2014.

(3) On approximately February 4, 2015, claimant learned that his cousin was missing. On February 5, 2015, claimant learned that his cousin had died. Claimant was emotionally distraught. He did not want to report to work on February 5, 2015, but his wife talked him into going to work.

(4) The employer picked up its employees for work using a company van that carried five or six employees. There was often a lot of noise in the van, including voices and music. Shortly after the van stopped for claimant on February 5, 2015, claimant realized that he was not fit to work because of his emotional state, and feared that he could cause injury to himself or others if he went to the job site. Claimant wanted the driver's attention because he wanted the driver to either stop and let him out so he could go home, or turn the van around and drop claimant off at his home. Claimant began to yell, bang

on the roof of the van and slap the windows to try to get the driver's attention. He also engaged in a verbal dispute with another passenger that included foul language and invitations to fight. The driver decided to drop claimant off at his home.

(5) The employer did not know that claimant had acted as he had because of his heightened emotional state over his cousin's death or because he wanted the driver to let him out of the van, and concluded that claimant had behaved unreasonably. On February 6, 2015, the employer discharged claimant based on his behavior in the van on February 5th.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was not 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 refrain from engaging in aggressive behavior and verbal disputes with his coworkers. Claimant was informed of, and knew or should have known, the employer's expectation. On February 5, 2015, he consciously violated that expectation when he banged on the roof of the van, slapped the windows of the van, and made comments about fighting with a coworker. Claimant's conduct was wantonly negligent.

In Hearing Decision 15-UI-36457, the ALJ concluded that claimant's conduct on February 5, 2015 could not be excused as an isolated instance of poor judgment because his "acts," which were not described in the decision, "happened somewhat frequently and this last incident creased [*sic*] a breach of trust which made a continued employment relationship impossible."¹ We disagree.

Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct.² In this case, although claimant's conscious decision to violate the employer's behavioral expectations involved poor

¹ Hearing Decision 15-UI-36457 at 2-3.

² OAR 471-030-0038(1)(d) defines an "isolated instance of poor judgment":

As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

judgment, the most recent incident prior to February 5th occurred approximately eight months earlier, and the employer's witnesses did not describe claimant as having thereafter engaged in a pattern of other poor judgments, making claimant's exercise of poor judgment on February 5th, at worst, an infrequent occurrence, and, therefore, isolated. Under the circumstances, including that the working environment was one in which coworkers customarily engaged in aggressive behavior and fights, claimant's conduct did not exceed mere poor judgment. It was not unlawful or tantamount to unlawful conduct. Considering that claimant's behavior was unusual for him, was triggered by a particularly traumatic emotional upset related to his cousin's recent disappearance and death, and was intended only to make the driver either stop to let claimant out or turn around and take claimant home, rather than out of a desire or intent to be disruptive to the work environment, the record fails to show that claimant's behavior in the final incident was the type of egregious behavior that would cause the employer to lose trust in claimant, or otherwise make a continued employment relationship impossible.

For the foregoing reasons, we conclude that the employer discharged claimant because of an isolated instance of poor judgment. Isolated instances of poor judgment are not misconduct. Therefore, claimant's discharge was not for misconduct, and he is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-36457 is set aside, as outlined above.

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

DATE of Service: June 10, 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.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

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