

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0523

Hearing Decision 15-UI-37947 Affirmed
Disqualification
Hearing Decision 15-UI-37961 Affirmed
Ineligible

PROCEDURAL HISTORY: On April 6, 2015, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant voluntarily left work without good cause (decision # 123307) and the second concluding claimant was not available for work during the week of March 1, 2015 through March 7, 2015 (decision # 131253). Claimant filed timely requests for hearing on both the administrative decisions. On April 27, 2015, ALJ R. Davis conducted a consolidated hearing, and on May 5, 2015 issued two decisions, the first concluding the employer discharged claimant for misconduct (Hearing Decision 15-UI-37947) and the second concluding claimant was not available for work during the week of March 1, 2015 through March 7, 2015 (Hearing Decision 15-UI-37961). On May 6, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-37947 and 15-UI-37961. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0523 and 2015-EAB-0524).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Azure Standard employed claimant was a warehouse worker from July 23, 2013 until March 6, 2015.

(2) Absent exigent circumstances, the employer expected claimant to report for work as scheduled and not to leave his shift early without permission. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On Monday, March 2, 2015, claimant reported for work as scheduled at 9:00 p.m. Claimant told the shift lead that he thought the lead was drunk and the abruptly left work, at approximately 9:05 p.m. Shortly thereafter, the lead reported to the employer's operations director that claimant had left work without permission after accusing him of being intoxicated at work. The lead told the operations director that he was willing to take an alcohol and drug test, and the operations director arranged for the lead to submit a urine sample for testing in the presence of another manager as a witness. The operations director and the other manager did not smell any alcohol on the lead's person and did not observe any behaviors or physical actions that suggested the lead was under the influence of alcohol or drugs. The operations director spoke to claimant's lead about his condition, and the lead denied that he was or had been intoxicated or impaired while at work.

(4) Sometime on Tuesday, March 3, 2015, the employer received the results of the lead's urinalysis and it was negative for the presence of drugs. The employer did not have the sample tested for the presence of alcohol because the employer did not usually have urine samples tested for alcohol. Later in the day, on March 3, 2015, claimant reported for work as scheduled at 9:00 p.m., but immediately after arriving went to speak with the operations director. Claimant told the operations director that he left work on March 2, 2015 because the lead was intoxicated and he was not comfortable working with him. Claimant then began speaking in a disjointed way about unrelated past incidents and the drug use of several different managers as well as referring to \$20 that he had loaned to the lead several months before and which had not been repaid. The operations director thought that claimant's "primary, front-burner issues" with the lead were his belief that the lead had been drunk at work the day before and his belief that the lead had not paid him money that was owed. Transcript at 51. The operations director asked claimant if he would return to work if he was able to resolve these issues, and claimant agreed to do so. Transcript at 50, 74. The operations director called the lead to his office and asked claimant to wait outside while he spoke with him. After a discussion with the lead, the operations director asked claimant to come into his office to discuss matters with himself and the lead. The operations director told claimant about the lead's negative drug test results and his own and the other manager's observations of the lead on March 2, 2015, which did not corroborate claimant's contention that the lead had been drunk. The operations director told claimant that the lead had agreed to pay him back the \$20. Having resolved what he thought were claimant's concerns, the operations director was under the impression that claimant was going to work his shift that night. Claimant returned to the warehouse floor but left work without notice or permission at approximately 9:15 p.m.

(5) Sometime after 9:15 p.m. on March 3, 2015, claimant's girlfriend, who also worked for the employer, tried to speak with the operations director in his office, but the operations director could not meet with her. Shortly after, the operations director called claimant to apologize for not being able to speak with claimant's girlfriend. During this call, claimant told the operations director that the lead had been asking him to have sex with the lead and the lead's wife. The operations director had not been previously aware of claimant's allegations about the lead making sexually suggestive and inappropriate comments to him. The operations director told claimant he would confer with other employer representatives about how to proceed in light of claimant's most recent allegations and would contact claimant when it was determined how to proceed. The operations director then called the lead into his

office and asked him if he had made the comments that claimant contended he made or made any other sexually explicit comments in the workplace. The lead denied that he had. The operations director told the lead to finish the shift without any “drama” and to refrain from any discussions of personal matters with any employees. Transcript at 53.

(6) On Wednesday, March 4, 2015 at approximately 9:40 a.m., the employer’s human resources representative and the operations director had a conference call with claimant. The representatives told claimant that the employer was going to investigate his allegations of inappropriate sexual comments by the lead. Claimant identified two employees whom he said had overheard the lead’s sexually explicit comments to him and would confirm his complaint of sexually inappropriate behavior in the workplace. Claimant told them he would return to work only if the lead was not scheduled to work the same shift that he was scheduled or was discharged. When claimant said that he did not want to report for work while the investigation was ongoing, the representatives excused him from his scheduled work that night and until the investigation was concluded.

(7) After speaking on March 4, 2015, the employer’s human resources representative began the employer’s investigation. She interviewed the operations manager and the other manager about their observations of the lead on March 2, 2015 and they stated they had observed nothing that indicated the lead was drunk, such as slurred speech, erratic behavior or an odor of alcohol. The representative also interviewed the two employees claimant had identified as having witnessed the lead’s sexually inappropriate comments to him. Both employees stated that they had not heard the lead make the comments claimant alleged the lead had made in their presence or any other type of sexually inappropriate comments to anyone. Based on these interviews, the employer concluded that claimant’s allegations did not have legitimate reasons to justify leaving work early on March 2 and March 3, 2015.

(8) On Thursday, March 5, 2015, claimant spoke with the human resources representative and the operations director. The human resources representative told claimant that she had investigated his allegations against the lead and could not substantiate or corroborate them. She told claimant that the investigation was concluded with no finding that the lead had engaged in drunken or sexually inappropriate behavior in the workplace or that the lead had made sexually-based comments to him or anyone. The representative told claimant that the employer expected him to report for work at 9:00 p.m. as scheduled in view of the negative results of the investigation. Claimant did not report for work as scheduled on March 5, 2015 and did not call in to report his absence.

(9) On March 5, 2015, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the week of March 1 through March 7, 2015 (week 09-15), the week at issue.

(10) On Friday, March 6, 2015, the operations director called claimant and told him that the employer had discharged him for not reporting for work as instructed on March 5, 2015, as well as for leaving work early without permission and without a legitimate reason on March 2 and 3, 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct. Claimant was not available for work during the week of March 1 through March 7, 2015.

The Work Separation. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The parties' testimony about the work separation and the events leading to it was in irreconcilable conflict. The testimony of the employer's witnesses was straightforward, coherent, and logical. In contrast, claimant's testimony was confusing, contradictory and at times, implausible. For example, claimant testified that the employer told him they were going to discharge the lead who he accused of harassing him. Transcript at 23. Claimant's contention did not make sense since he testified that he did not report for work on March 3, 4 and 5, 2015 because he did not want to work in the presence of the lead. If claimant thought the lead was going to be discharged, he would have no reason to stay away from work, however. While claimant contended that he contacted another lead on March 2, 2015 to report that his own lead was making sexually inappropriate comments to him and suggested that lead gave him permission to leave work early, the employer's witnesses testified that the particular lead whom claimant supposedly called was suspended from work on March 2, 2015. Claimant also testified that he believed that lead was on vacation on March 2, 2015. Transcript at 12, 13, 35, 56, 63. If claimant's testimony is to be believed, it is not at all clear why he would try to reach an absent lead, who was off from work for some days, to make such a report when the operations director and presumably other managers were on the premises and claimant knew that. Transcript at 84, 85. After the operations director and the human resources representative testified that in their March 4 and 5 conversations, claimant repeatedly asked them to terminate his employment so he could receive unemployment benefits, claimant contended in his rebuttal testimony that it was the operations director, and not him, who brought up unemployment benefits in those conversations. According to claimant, the operations director suddenly and unexpectedly told claimant that he thought it might be a "great idea" to fire him so he could receive benefits. Transcript at 61, 64. If claimant's testimony was accurate, this was, at the very least, an unlikely statement for the operations director to have made. Claimant testified in great detail about the lead's sexually inappropriate comments to him over the two months preceding claimant's discharge. It was not clear, however, why claimant did not report such comments, if they had indeed been made, earlier than March 3, 2015, when first told the operations director about these remarks. It is also notable that no other employees heard those alleged comments. Transcript at 17, 19, 21, 31.

Claimant contended that the operations director "lied" when he told him that the lead did not appear to have been intoxicated in the workplace on March 2, 2015 and that the employer was engaging in the pretext of investigating his sexual harassment allegations in order to cover-up the lead's s harassment of him. Transcript at 21, 22, 63. However, claimant did not present any reason for such a cover-up. As a matter of common sense, it is implausible that in a warehouse environment where there was a great deal of ongoing physical activity by employees, who were lifting and moving heavy boxes, that an operations director would allow a person such as the lead to remain at work if he had been as obviously intoxicated (and unsafe) as claimant contended he was. Transcript at 10-11, 21, 35, 36, 45, 49, 50. Claimant suggested no reason why the two independent witnesses whom the employer interviewed and who observed the lead closely on March 2, 2015 would fabricate information about the lead's level of sobriety on that day. Claimant also did not dispute that the two witnesses he identified as having witnessed the lead's alleged sexual harassment of claimant did not corroborate claimant's allegations.

Transcript at 40, 41. Claimant offered no reason why these two witnesses would conspire to provide fabricated information to the employer. As a final example of the inconsistencies in claimant's testimony, he initially did not dispute that he was scheduled to work on March 3, 4 and 5, 2015. When it became clear that the employer was focusing in on his failure to work a complete shift on March 3, 2015 and his failure to report for work on March 5, 2015, claimant reversed his testimony. Suddenly, for the first time, claimant contended that the operations director or the human resources representative or both had actually told him that he was suspended from work on those days. Transcript at 24, 84. Viewed as a whole, claimant's testimony was so fraught with unlikely, illogical occurrences and inconsistencies that it cannot be considered reliable. As a result, where the testimony of the parties could not be reconciled, we have relied on the employer's more logical, consistent and plausible evidence in making sense of the relevant events.

On this record, there was insufficient evidence to support claimant's assertion that he was subjected to drunken and sexually inappropriate conduct on the part of the lead, or that such alleged ongoing behavior constituted an exigent circumstance excusing claimant from remaining at work during his entire shift or from reporting for work. Claimant left his shifts early on March 2 and 3, 2015 without permission or a legitimate exigent circumstance and failed to report for work on March 5, 2015, after he was told that the employer had completed its investigation of his sexual harassment allegations, determined them to be unfounded and instructed him to report for work on March 5, 2015. Claimant's failure to do so was at least a wantonly negligent violation of the employer's standards and explicit instruction

Claimant's wantonly negligent violation of the employer's instructions on March 5, 2015 was excusable as misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused as an "isolated instance of poor judgment" if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. Here, claimant's failure to report for work on March 5, 2015 was preceded by his wantonly negligent failure to work complete shifts on March 2 and 3, 2015, without permission to leave early and without legitimate exigent circumstances. In light of these prior wantonly negligent violations of the employer's standards, claimant's wantonly negligent behavior on March 5, 2015 was neither isolated nor infrequent. For this reason, claimant's conduct on March 5, 2015 is not excused as an isolated instance of poor judgment.

Nor was claimant's behavior on March 5, 2015 excused as a good faith error under OAR 471-030-0038(3)(b). It is implausible that claimant's failure to report for work was the result of a sincere belief that the employer had excused him from work on that day, or a belief that the employer would condone his absence from work based on allegations of a harassment that had not occurred.

In his written argument, claimant asserted that he should have been excused from leaving work early or not reporting for work at all on March 2, 3 and 5, 2015 because the employer did not adequately investigate his allegations of sexual harassment. However, the employer promptly took steps after claimant reported the alleged harassment after his shift on March 3, 2015, both by excusing him from work on March 4, 2015 and undertaking an investigation. Although claimant contended that the employer did not take the necessary "temporary step" of ordering the lead to stay away from claimant after claimant alleged that the lead harassed him, claimant made these allegations after his March 3, 2015 shift. Claimant was not at work or in workplace contact with the lead on March 4, 2015. Claimant's Written Argument at 2-5. Under these circumstances, there was no need for the employer to

instruct the lead to stay away from claimant if claimant was not at work and did not need protection. By the end of the working day on March 4, 2015, the employer had concluded its investigation and determined that there the lead had not harassed claimant. The employer reasonably concluded that it had no obligation to keep claimant and the lead separated after it had conducted an adequate investigation and correctly determined, as we did above, that the harassment that claimant alleged had not, if fact, occurred.

Claimant also asserted in his written argument that the employer's investigation of his harassment allegations was a bad faith investigation intended only to reach a pre-determined conclusion that the lead had not harassed claimant. Claimant's Written Argument at 4-7. In addition, claimant contended that the investigation was undertaken in bad faith because the employer interviewed only two witnesses. However, the two employees the employer interviewed were the same employees that claimant had identified as having witnessed the lead's inappropriate behavior. Those identified employees should reasonably been able to provide the strongest evidence to support the legitimacy of claimant's allegations. When they did not corroborate claimant's claims, it was not incumbent on the employer to exhaustively interview all employees present during claimant's shift to attempt to find if any would buttress claimant's allegations. On these facts, the employer did not act in bad faith when it stopped investigating claimant's claim of sexual harassment after it found that the two employees whom claimant stated would support his claims had no knowledge of any sexual harassment.

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

Claimant's Availability. To be eligible to receive unemployment benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable full time, part time and temporary suitable work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

Although claimant's attorney contended that claimant left his shifts early on March 2 and 3, 2015 because he was being harassed by his shift lead and therefore his work for the employer was no longer "suitable" for him, we have concluded, as discussed above, that there was insufficient evidence to establish that the lead sexually harassed claimant. Transcript at 78. Based on this conclusion, the evidence does not establish that the work for the employer was unsuitable for claimant on those days, or that claimant had pressing or legitimate reasons for leaving work early on those days and for not reporting to work on March 5, 2015. Because claimant did not complete his full shifts on March 2 and 3, and did not report for work on March 5, claimant was not willing to report for all suitable work opportunities during the week of March 1 through March 7, 2015 (week 09-15). Accordingly, claimant was not available for work during week 09-15, and was not eligible to receive benefits during that week.

DECISION: Hearing Decisions 15-UI-37947 and 15-UI-37961 are affirmed.

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

DATE of Service: July 1, 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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