

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0692

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143810). Claimant filed a timely request for hearing. On April 22, 2015, ALJ Vincent conducted a hearing, and on May 13, 2015 issued Hearing Decision 15-UI-38446, affirming the Department's decision. On June 2, 2015, the claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Connecting Point Inc. employed claimant from August 8, 2012 to February 14, 2015 as a service technician.

(2) The employer expected employees to refrain from engaging in threatening behavior, including making aggressive and violent comments, toward coworkers. Claimant understood the employer's expectations.

(3) On February 6, 2015, claimant was absent when the employer conducted a prescheduled cleaning of the service technicians' work areas. On February 10, 2015, claimant returned to work. Claimant appeared upset that the employer had cleaned his work area, and commented, "I want to stab you guys." Transcript at 42. Claimant also commented that he "needed to buy more ammo" if his coworkers were to clean his work area again. Transcript at 21.

(4) On February 11, 2015, claimant and two coworkers were repairing computers in the service department. Claimant went into one coworker's work area and began taking power adapters from his work bench. The coworker told claimant not to take the adapters. Claimant said they were his adapters.

The coworker told claimant to stay out of his work area. Claimant walked up to the coworker until he was face to face with the coworker, so close he was touching him, and said, "Fuck off." The coworker told claimant to "get out of [my] face," and claimant went back to his work area. Another coworker, occupied with a computer repair task, asked claimant to go out of the room to assist a customer who had rung the service bell. Claimant responded, "Fuck off." Transcript at 41. The coworker went to assist the customer.

(5) On February 14, 2015, the employer discharged claimant for making aggressive and violent comments to his coworker.

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 February 11, 2015 that resulted in claimant's discharge. Claimant asserted that he did not "get in the face" of his coworker or use foul language toward him. Transcript at 31. However, the store manager recounted the information he received from the employee who was threatened by claimant, and that information was corroborated by the testimony of another coworker who witnessed claimant walk up to the coworker and stare him in the face "pretty much body to body [and] touching at that point." Transcript at 41. 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 was angry with a service technician, used foul language toward him, and engaged in threatening behavior by standing close enough to touch the coworker while putting his face in the coworker's face, and saying "fuck off." The employer had a right to expect claimant to refrain from engaging in threatening behavior at work. Claimant understood the employer's expectations. On February 11, 2015, 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). The preponderance of the evidence shows claimant exercised poor judgment during separate incidents on February 10 and February 11, 2015. On February 10, 2015 claimant threatened his coworkers by stating, "I want to stab you guys," and that he "needed to buy more ammo" to harm them if they cleaned his work bench again. Claimant's exercise of poor judgment therefore was a repeated act and not a single or infrequent occurrence.

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 coworker 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-38446 is affirmed.

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

DATE of Service: July 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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