

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0695

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 15397). The employer filed a timely request for hearing. On May 20, 2015, ALJ S. Lee conducted a hearing, and on May 21, 2015, issued Hearing Decision 15-UI-38907, concluding that the employer discharged claimant for misconduct. On June 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Red Lion Hotel on the River employed claimant as banquet manager from August 4, 2014 until February 23, 2015.

(2) The employer expected that each week, claimant would schedule staff to work at the events for which claimant was responsible in such a manner that the cost of their salaries would not exceed the amounts budgeted for these events. The employer also expected that claimant would prepare weekly budgets for the events for which he was responsible, and provided claimant with the tools necessary to calculate staffing costs and prepare these budgets. Claimant knew and understood the employer's expectations.

(3) In November 2014, the staffing costs for claimant's events regularly exceeded the amounts budgeted for these events. On December 23, 2014, claimant's supervisor placed him on a 90- day performance action plan. In this plan, claimant's supervisor directed claimant to make certain improvements, including managing staffing costs and other expenses so they did not exceed amounts budgeted for events. The plan warned claimant that failure to make these improvements could result in his discharge. Exhibit 1 at 12 and Transcript at 9.

(4) Claimant met weekly with his supervisor to discuss his budgets and other matters. Claimant continued to have difficulty in ensuring that staffing costs for events did not exceed the amounts budgeted for these events.

(5) On February 5, 2015, claimant's supervisor directed him to prepare a performance action plan for one of the employees he supervised. Claimant did not do so; instead, he told his assistant to prepare the plan. After claimant's assistant sought help from claimant's supervisor, the supervisor prepared the performance action plan. Exhibit 1 at 12.

(6) On February 19, 2015, claimant and his supervisor inspected banquet rooms that had been set up for the next day. Claimant's supervisor noted a number of problems with the set up, and directed claimant to correct the problems. Claimant assured his supervisor that he would do so. On February 20, 2015, claimant's supervisor checked the banquet rooms that would be used on that day and discovered that claimant had not corrected problems with the set up that had been noted on the previous day. Exhibit 1 at 11-12.

(8) Also on February 20, 2015, claimant's supervisor met with claimant and the assistant banquet manager to review the budget and staffing schedule for the upcoming week. Claimant's supervisor noticed that claimant had assigned a food captain to work from 2 p.m. to midnight on February 22 and 23. Claimant's supervisor told him that assigning the food captain to work these hours was an unnecessary expense, because no food was being served at any events on February 22 and 23, and directed claimant to remove the food captain from the schedule for those dates. (The employer assigned food captains to supervise food servers' work; porter captains supervised employees who set up and arranged banquet furniture and equipment).

(9) On February 22, 2015, the food captain worked from 2.m. to midnight because claimant did not remove her from the schedule.

(10) On February 23, 2015, claimant's supervisor discharged him for failing to comply with her directive to remove the food captain from the work schedule on February 22.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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. 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.

Although claimant's supervisor was dissatisfied with a number of aspects of claimant's performance, she discharged him when she discovered that he had disobeyed her instructions to remove the food

captain from the work schedule for February 22, 2015. Because this incident triggered the supervisor's decision to discharge claimant, it was the proximate cause of his discharge and the proper focus of our misconduct analysis.

The employer expected that claimant would comply with his supervisor's directives. Claimant understood this expectation as a matter of common sense. Claimant's conduct in refusing to do what he knew his supervisor had told him to do was, at best, a wantonly negligent violation of the employer's expectations.

Claimant admitted that when he, his supervisor, and the assistant banquet manager met on February 20, they argued about the need to schedule the food captain to work on February 22 and 23. Claimant contended, however, that their argument ended when his supervisor told him that he "should do whatever is necessary." Transcript at 20. Claimant interpreted this comment as giving him authority to assign the food captain to work on February 22 and 23. Claimant's supervisor and the assistant banquet manager did not remember the comment claimant claimed the supervisor made. Transcript at 33, 37. Moreover, the assistant manager testified that claimant's supervisor was "very adamant [about] not scheduling Food Captains for non-food functions." Transcript at 36. Claimant's supervisor had been dissatisfied with claimant's inability to properly manage staff costs for a number of months, and had placed claimant on a performance plan designed to improve his abilities to appropriately budget his staffing needs. Given these circumstances, and given the supervisor's clearly expressed opposition to employing the food captain for events at which food would not be served, we find it implausible that the supervisor would suddenly change her mind and decide claimant could schedule the food captain to work on February 22 and 23. We therefore find it more likely than not that the supervisor never indicated that claimant could assign the food captain to work on February 22 and 23.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). An act is isolated if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). In addition to refusing to comply with his supervisor's order on February 22, claimant also failed to comply with his supervisor's directives on February 20, 2015, when he did not correct problems in the banquet room set up, and on February 11, 2015 when he did not prepare a performance action plan for an employee claimant supervised. Claimant's insubordination on February 22 was therefore a repeated act, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). For the reasons discussed above, we do not find that any comments made by his supervisor at the February 20 meeting would cause claimant to believe in good faith that his supervisor would allow him to schedule the food captain to work on February 22.

The employer discharged claimant for misconduct. He is disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-38907 is affirmed.

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

DATE of Service: July 29, 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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