

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0752

Reversed
Disqualification

PROCEDURAL HISTORY: On May 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90844). Claimant filed a timely request for hearing. On June 2, 2015, ALJ Murdock conducted a hearing, and on June 5, 2015 issued Hearing Decision 15-UI-39667, concluding claimant's discharge as not for misconduct. On June 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Ameritel Inns, Inc. employed claimant as a cook from January 20, 2015 to April 1, 2015.

(2) On March 31, 2015, two guests reported to the employer that claimant was "rude and confrontational" with them.¹ One of claimant's coworkers quit work, reporting that he quit because the environment felt "too hostile." Another coworker reported that s/he had felt uncomfortable because of claimant's "state of agitation." Claimant's supervisor attempted to discuss the complaints with claimant, but claimant became hostile and confrontational and engaged in a "tirade" about working conditions. Another manager stepped in, and the supervisor and manager told claimant he had to calm down.

(3) Claimant continued to express anger over certain working conditions, including his belief that the employer had not paid him tips he was owed. The manager showed claimant records showing that he had been paid properly, and warned claimant to improve his attitude with guests and coworkers. Claimant complained about his breaks, even though the supervisor offered to relieve him for breaks every day, complained about his workload, and complained to the manager that he had to wash dishes, even though all the employees were required to wash dishes at various times. The supervisor offered to

¹ See Exhibit 1. All quoted materials in these findings of facts refer to witness statements found in Exhibit 1.

let claimant take a few days off work to deal with issues that he was experiencing in his personal life, but claimant did not accept the offer.

(4) When the manager arrived in the kitchen the following day, April 1, 2015, claimant began yelling at the manager and again accused him of failing to pay him some banquet tips. The manager told claimant that he had just showed claimant records proving he had been paid properly the day before. Claimant continued to yell at the manager and seemed to get angrier at him. The manager left the kitchen, and claimant followed him into the hallway yelling about tips and using foul language. The manager offered to show claimant again that he had been properly paid. He also reminded claimant that he had just been warned the day before about his attitude and that he needed to change his attitude if he wanted to continue his employment. Claimant responded that he was not going to clean, do dishes, or cater. He also stated that the manager "must not know how to count" since he "can't seem to pay" the tips claimant claimed he was owed. The manager then discharged claimant.

(5) After the manager told claimant he was discharged, claimant engaged in behavior the manager characterized as a "belligerent, psychotic tirade." Claimant stormed off, "screaming profanities" at the manager threatening "I am going to kick your fucking ass, you asshole!" The manager told claimant he was no longer allowed on the premises and had to leave immediately or he would call police. Claimant "was in [the manager's] face shouting more insults and profanities," and the manager feared claimant would strike him. The manager had another worker call 9-1-1 to have claimant removed from the property. Claimant then started to leave, "grumbling[]," using foul language, and "blowing snot from his nose onto the hallway flooring and walls."

(6) Approximately 10 minutes after claimant left, claimant repeatedly called the manager on the phone to "belittle" and "curse" at him. A police officer arrived at the employer's facility. The police officer couriered a piece of claimant's personal property to claimant, and warned him that he could be arrested for trespassing if he returned to the employer's property.

CONCLUSIONS AND REASONS: We disagree 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.

The employer had the right to expect claimant to maintain a professional demeanor while at work. Claimant knew or should have known that expectation as a matter of common sense and because of warnings by the employer for displaying an unprofessional attitude at work, and displayed his understanding through comments to the employer and apologies for his March 31 and April 1 behavior.

In Hearing Decision 15-UI-39667, the ALJ concluded that claimant's discharge was not for misconduct, reasoning that although claimant's conduct on April 1st was insubordinate and a wantonly negligent violation of the employer's expectations, his conduct did not exceed an isolated instance of poor judgment because it was infrequent and "not so egregious as to render a continued employment relationship impossible, perhaps under strict warning that refusing to perform his assigned work duties would result in future discipline or discharge." Hearing Decision 15-UI-39667 at 3. We disagree.

We first disagree with the ALJ's conclusion that claimant's conduct on April 1st was merely wantonly negligent. Claimant chose to begin yelling at the manager upon the manager's arrival to the kitchen despite having been warned the previous day about his attitude after a hostile tirade about his complaints. The manager tried to diffuse the situation at least three times, offering to show claimant records to relieve claimant's concerns about his tips, leaving the kitchen, and warning claimant to stop if he wanted to continue his employment, but claimant continued in his aggressive behavior, ultimately refusing to perform assigned duties. Claimant's behavior was willful, and violated the employer's expectations.

We also disagree with the ALJ that claimant's conduct was isolated, or did not exceed an isolated instance of poor judgment. An isolated instance of poor judgment is defined as 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). The day before the April 1st incident, claimant had also engaged in conduct constituting at least a wantonly negligent violation of the standards of behavior the employer had the right to expect of him. He engaged in such a protracted period of agitation throughout his shift that two customers and a coworker complained about him, and a second coworker quit work rather than continue working in the environment claimant created. When confronted about it, his behavior grew so hostile and confrontational that a manager had to intervene. We infer from the nature of the complaints that claimant was, more likely than not, conscious of his demeanor on March 31st, and exercised poor judgment when he chose to display it. He knew or should have known that his conduct would probably violate the standards of behavior the employer had the right to expect of him, making the March 31st conduct wantonly negligent, and his behavior on April 1st a repeated act or pattern of willful or wantonly negligent conduct.

We also disagree with the ALJ because, even if we had concluded that claimant's conduct on April 1st was isolated, claimant's conduct on April 1st could not be excused as an isolated instance of poor judgment because it exceeded mere poor judgment by making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's decision to willfully engage in a protracted tirade against the manager despite the manager's warning to stop, and to refuse to perform assigned duties, was the sort of behavior that a reasonable employer would conclude made a continued employment relationship impossible, thus exceeding poor judgment.

We also disagree with the ALJ's implicit decision to disregard the portion of claimant's behavior that occurred after the employer was discharged, and conclude that behavior also made a continued employment relationship impossible. Although conduct that occurred after the discharge cannot be considered in reaching the initial misconduct determination, except to the extent that it corroborated the employer's reports about the severity of his misconduct, it was work-connected conduct despite occurring after the discharge because it was a continuation of an on-the-job tirade, occurred in the workplace, was in the vicinity of coworkers, affected the employer's opinion of claimant's ability to

behave respectfully toward the facility he worked in and the people with whom he worked, and affected the ability and willingness of other employees to continue working with claimant.² It was also work-connected because it is the type of behavior that any reasonable employer would consider when determining whether or not a continued employment relationship with an employee was possible. As such, claimant's conduct immediately after his discharge should not be ignored.

The record shows that, immediately after discharge and before leaving the premises, claimant continued to yell insults and foul language, made threats of physical harm to the manager, placed the manager in fear of physical assault, refused to comply with instructions to leave until the employer called the police, and, when he ultimately left the premises, did not do so without "blowing snot from his nose onto the hallway flooring and walls" as he exited. Thereafter, he continued to harass the manager he had threatened by repeatedly calling the manager. We conclude that no employer would allow an employee who had made threats of physical harm, placed a manager in fear of assault and intentionally blew "snot" onto the walls and floors of the building to return to the building or the vicinity of the individual he had threatened, and his decision to engage in that behavior made a continued employment relationship impossible.

For all those reasons, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-39667 is set aside, as outlined above.

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

DATE of Service: August 6, 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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² Claimants may only be disqualified from benefits because of work-connected misconduct. ORS 657.176(2)(a). We note that the employer did not discharge claimant because of his off-duty conduct, but for conduct that occurred before his discharge. We also note, however, that off-duty conduct that affects the workplace may be considered work-connected, and, therefore, may affect whether an individual should be disqualified from benefits. See *accord Glide Lumber Products Co. v. Employment Division*, 86 Or App 669, 741 P2d 9 (1987); *Muscatell v. Employment Division*, 77 Or App 24, 711 P2d 192 (1985).