

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0970

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 94015). The employer filed a timely request for hearing. On July 24, 2015, ALJ Shoemake conducted a hearing, and on July 29, 2015 issued Hearing Decision 15-UI-42188, concluding that claimant's discharge was for misconduct. On August 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Vitamin Shoppe Industries, Inc. employed claimant from January 3, 2009 to May 4, 2015, last as a "key holder." Transcript at 5. As a key holder, claimant's duties included sales and customer service, opening and closing the employer's store, counting money and preparing bank deposits.

(2) The employer had written policies prohibiting employees from engaging in unprofessional or inappropriate language or behavior, intimidating other employees, refusing to follow any management instructions, creating conflict with coworkers or managers, disregarding the employer's personal appearance policy, and treating coworkers in a discourteous, inattentive or unprofessional manner. Claimant was aware of the employer's policies.

(3) On April 1, 2015, claimant asked a coworker to switch shifts with him. The coworker consulted the employer's store manager, and told claimant that based on her conversation with the store manager, she could not switch shifts with claimant. Claimant later confronted the coworker in the back room of the employer's store, approached very close, and called her a "turncoat." Transcript at 24. Claimant later confronted the coworker about the situation again, telling her that she was not supposed to "lose people's trust." Transcript at 24.

(4) On April 2, 2015, the employer's district manager attempted to coach claimant regarding the employer's annual "buy one get one" sale. Transcript at 26. Within hearing distance of customers and coworkers, claimant commented, "Look at you in your power stance," and "You've got that stern look

in your face.” Transcript at 25. When the district and store managers attempted to discuss the incident with claimant, he became agitated, interrupted them, and raised his voice. When the district manager attempted to coach claimant about “appropriate facings for a planogram,” claimant repeatedly asserted that it was not his “first rodeo.” Transcript at 25-26; Exhibit 1 at 20. When the managers noted that claimant had repeatedly asserted that, claimant yelled, “You’re lying.” Transcript at 25; Exhibit 1 at 20. As claimant left the area, he pointed his finger close to the store manager’s face and stated, “You’re rude.” Transcript at 26; Exhibit 1 at 20.

(5) On April 17, 2015, the employer gave claimant a written warning, in part, for his behavior on April 1 and 2, 2015, and reviewed the warning with claimant. However, claimant refused to sign a written statement acknowledging that the warning had been reviewed with him, called the store manager a “soul-crushing and spirit-dampening manager” who called employees into her office and made them cry, and stated that he believed that was how the store manager controlled and “brainwash[ed]” people. Transcript at 32.

(6) On April 20, 2015, claimant told a coworker that he had seen a documentary about a rock band whose lead singer performed naked, and commented that the lead singer had a small “member.” Transcript at 33. On April 21, 2015, the store manager attempted to have a conversation with claimant about the comment being inappropriate, but as she started to do so, claimant stated, “Yeah, yeah keep it G-rated,” and walked away. Transcript at 33; Exhibit 1 at 10.

(7) Also on April 21, 2015, the store manager posted the work schedule for the next few weeks, but notified employees that the schedule was tentative due to the needs of another store that was short-staffed. Claimant rolled his eyes and said, “Oh, here we go again.” Transcript at 34. When the store manager asked claimant what he meant by that, claimant shrugged his shoulders and walked away.

(8) On April 25, 2015, claimant reported for work with his hair down and unsecured, which claimant knew violated the employer’s personal appearance policy. The store manager instructed claimant to comply with the policy. Before complying, claimant stared at the store manager and stated, “But I look so good.” Transcript at 35-36.

(9) Also on April 25, 2015, the district manager telephoned the store manager while store manager was assisting a customer. Claimant answered the call, and the district manager instructed him to tell the store manager to call her as soon as the store manager finished assisting the customer. When the store manager finished assisting the customer, she asked claimant if she had missed a call. Claimant replied, “Lisa [the store manager]. Nobody important.” Transcript at 37.

(10) Also on April 25, 2015, the store manager noticed that claimant had left a roll of clearance stickers out at the cash register. The store manager told claimant she was putting the clearance stickers in a drawer, explaining that someone could take and use them. Claimant told the store manager she had a “criminal mind.” Transcript at 37. When the store manager attempted to discuss the matter further, claimant interrupted her and walked away.

(11) Also on April 25, 2015, the store manager neglected to log out of the employer’s cash register when she left the register to assist a customer. When the store manager returned, claimant stated loudly in front of the customer and another customer that he was going to document the store manager’s failure to

log out of the cash register. With the customers still present, claimant took a piece of receipt tape from the register and wrote down the time. After the customers left, the store manager told claimant that his behavior in front of the customers was inappropriate. Claimant stated that he was just doing his job. The store manager asked claimant if he thought it was acceptable to behave that way in front of customers. Claimant smiled and walked away.

(12) Also on April 25, 2015, claimant notified the store manager that he was taking his lunch break. The store manager instructed claimant to wait until a coworker returned from her break. Claimant argued with the store manager, stating that the coworker had been on break too long. Claimant then informed the store manager that he already had clocked out for his lunch break, went to the break room, and lectured the coworker about taking too long of a break.

(13) The employer discharged claimant for inappropriate workplace behavior on April 25, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. 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) (August 3, 2011).

The employer discharged claimant for his inappropriate workplace behavior on April 25, 2015. The employer had the right to expect claimant to refrain from such conduct, and claimant knew or should have known from the warning for similar conduct he received on April 17, 2015 that his conduct on April 25 probably violated the employer's expectations. Claimant's conscious decisions to engage in such behavior demonstrated indifference to the consequences of his actions, and therefore were, at best, wantonly negligent.

Claimant's conduct on April 25, 2015 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 or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant engaged in inappropriate workplace behavior on five separate occasions on April 25, 2015. He also engaged in inappropriate workplace behavior on three prior occasions after receiving the April 17, 2015 written warning for similar behavior. Claimant's exercise of poor judgment on April 25, 2015 therefore was a repeated act and pattern of willful or wantonly negligent behavior, and not a single for infrequent occurrence.

Claimant's conduct on April 25, 2015 cannot be excused as a good faith error. Claimant received a written warning for similar behavior on April 17, 2015. The record fails to show claimant sincerely believed, and had a rational basis for believing, his conduct on April 25, 2015 complied with the employer's expectations.

DECISION: Hearing Decision 15-UI-42188 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 22, 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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