

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1091

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 105336). The employer filed a timely request for hearing. On August 21, 2015, ALJ Vincent conducted a hearing, and on August 27, 2015 issued Hearing Decision 15-UI-43618, reversing the Department's decision. On September 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's written argument also contained information that was not part of the hearing record, and he failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider claimant's written argument when reaching this decision. EAB considered only information received into evidence at the hearing. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Stein Oil Co., Inc. employed claimant as a cashier and fuel attendant at its service station from January 13, 2014 until May 28, 2015.

(2) The employer expected claimant to refrain from using racial epithets or racially derogatory terms toward coworkers or customers. Claimant understood the employer's expectations.

(3) On May 26, 2015, claimant and a coworker were working outside waiting on customers who arrived to purchase fuel. An African-American man who was a regular customer at the employer's service station drove into the parking lot and stopped his vehicle, with the apparent intention of entering the store at the station. Claimant, who was a Caucasian, interacted with the customer briefly at his vehicle and spoke the word "nigger" in an audible voice to the customer. Audio at ~7:17, ~27:39, ~33:05. Claimant's coworker, who was also outside, heard claimant use the racially negative term. Although the coworker had not heard the conversation preceding the use of the term, the coworker did not perceive

that claimant had used the term as a jokingly or as a non-insulting reference to the customer. Audio at ~29:11, ~29:48. After claimant referred to the customer as a “nigger,” the customer’s demeanor became angry and the customer immediately drove away from the station. Audio at ~30:05, ~31:04.

(4) On May 26, 2015, after his interaction with claimant, the customer called the employer’s office and spoke with the operations manager. The customer told the operations manager that claimant had called him a “nigger” and was very upset. The operations manager contacted claimant’s supervisor and asked her to investigate the customer’s allegation. The supervisor spoke with claimant’s coworker and learned that he had heard claimant use the term “nigger” directed toward the customer on May 26, 2015 and thought it had been used in an insulting way.

(5) On May 28, 2014, the employer discharged claimant for calling the customer a “nigger.”

(6) After the incident on May 26, 2015, the customer stopped coming to patronize the employer’s service station.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute that, as a matter of common sense, he understood that the employer prohibited him from calling African-American customers racially disparaging names, such as “nigger,” in the workplace. Audio at ~39:34. However, claimant purported not to recall interacting with an African-American customer on May 26, 2015, and disputed that he used the term “nigger” to the customer, whether the intention was to disparage or was a good-natured one. Audio at ~36:44, ~38:32. Notably, claimant did not dispute that the customer made a complaint to the operations manager about the language that claimant had used when interacting with him. Claimant also did not dispute that his coworker told the supervisor that claimant used the term “nigger” toward the customer on May 26, 2015 in what appeared to have been a disparaging way, and the customer’s behavior and demeanor immediately after its use and when he spoke to the operations manager indicated that it had offended the customer and he took it as an intended disparagement. Although these apparently two disinterested individuals both independently corroborated claimant’s use of the racially disparaging epithet, claimant did not provide any reason for them to have fabricated this allegation against him, and no grounds on which to conclude that the witnesses were conspiring against him. Indeed, rather than contending that his coworker had a motive to give a false statement against him both in his interview with the supervisor and in his testimony at hearing, claimant testified that he had an “absolutely” good relationship with his coworker and that the coworker was “a good guy.” Audio at ~43:05. On this record, the preponderance of the evidence shows that, most likely, claimant called the African-American customer a “nigger.” Although there could be circumstances in which the cross-racial use of what is generally considered a

racially charged and derogatory term would not be intended as a disparagement, the customer's reactions to the claimant's use of the term strongly suggests that claimant's use of it likely was not with an innocent intention. There is insufficient evidence in the record to conclude that claimant used the commonly understood epithet in a racially neutral way. By calling an African-American customer a racially derogatory name, claimant willfully violated the employer's standards.

Claimant's behavior on May 26, 2015 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means that, among other things, the behavior that violated the employer's standards did not exceed "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant knew what he was saying when he said the racial epithet, and his state of mind when could only have been deliberate and willful. Claimant conceded that a large number of the employer's customers were of a non-Caucasian heritage. Audio at ~43:21. By deliberately using a term that is generally considered offensive and was deeply insulting to one such non-Caucasian group, claimant evidenced a profound disregard of common sensibilities, which the employer understandably did not want to have associated with it. A reasonable employer would objectively conclude that claimant's use of a racially derogatory epithet to a customer on May 26, 2015 exceeded mere poor judgment and caused an irreparable breach of trust in the employment relationship. For this reason, it is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on May 26, 2015 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that he thought the employer would condone his use of a racial epithet, or he used the epithet because he misunderstood the employer's standards. For this reason, there is insufficient evidence in the record to conclude that claimant's behavior was the result of a good faith error.

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

DECISION: Hearing Decision 15-UI-43618 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 7, 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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