

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1098

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102656). Claimant filed a timely request for hearing. On August 25, 2015, ALJ Monroe conducted a hearing, and on September 11, 2015 issued Hearing Decision 15-UI-43753, affirming the Department's decision. On September 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) St. Charles Health Systems, Inc. employed claimant as an audio/visual coordinator from July 9, 2012 until May 28, 2015.

(2) The employer expected claimant to refrain from behaviors that reasonably disrupted a safe workplace, including verbally or physically threatening other employees. Claimant understood the employer's expectations.

(3) On May 27, 2015, early in the work day, claimant was sitting at a desk completing his work schedule when a coworker addressed him from the doorway. The coworker told claimant that he had received several phone messages about work that claimant had been asked to perform on the previous work day and had not responded to those requests. Claimant became very angry because the coworker was not a supervisor and he thought only a supervisor should question him about his work performance. Claimant told the coworker to stop questioning him and to get out of the doorway so he could leave the room to take a break. The coworker persisted and kept asking claimant to explain why had had not performed the requested work. Claimant angrily told the coworker to "fuck off," called the coworker a "fucking chump" and told the coworker that "he was going to kick [the coworker's] ass and get [the coworker]". Exhibit 1 at 6. Claimant then tried to leave the room through the doorway in which the coworker was standing and started pushing his shoulder into the coworker. Claimant, still very angry, told the coworker that "he wanted to go outside and fight [the coworker]." Exhibit 1 at 6. The coworker let claimant pass and then went to speak to the executive chef about the interaction with claimant.

(4) After leaving the room in which he had interacted with the coworker, claimant went to his vehicle in the parking lot to take smoke a cigarette. The executive chef, accompanied by a security officer, approached claimant while he was in the vehicle and asked claimant to leave work for the day as a result of his behavior with his coworker. Claimant was still very upset at the coworker and asked the chef, “because [the coworker was] up in my face hassling me?” Exhibit 1 at 5. The chef said “yes,” and asked claimant several times to leave the workplace. Claimant finally agreed to leave, shouting “tell that fucker [the coworker] I am going to get him” and slamming his vehicle door shut. Exhibit 1 at 5. Claimant then drove away from the workplace.

(5) On May 28, 2015, the employer discharged claimant for threatening the coworker on May 27, 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant or 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. 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 agreed that he understood that the employer prohibited him from issuing physical threats against coworkers in the workplace. Audio at ~ 21:32. To demonstrate claimant issued threats to his coworker on May 27, 2015, the employer relied on a statement from the coworker written very shortly after his interaction with claimant, a contemporaneous incident report from the security officer addressing claimant’s statements to him and the executive chef immediately before he drove away in his vehicle, and the live hearing testimony of the executive chef. Exhibit 1 at 4, 5, 6. While claimant testified that he did not recall exactly what he had said when he speaking with the coworker or afterward when he was in his vehicle, he also testified that he was not denying the accuracy of the statements that the employer obtained or the testimony of the executive chef, and agreed that “I may have said something along those lines.” Audio at ~ 24:08, ~25:40. Given their contemporaneous and detailed nature, coupled with claimant’s failure to dispute their accuracy and his concession that it was quite possible he said the things they recounted, it is most likely that claimant made used foul language in talking to his coworker, told the coworker that he wanted to “kick his ass” and “get him” and that he wanted to go outside and fight the coworker. It is also likely that claimant told the security officer and the executive chef to “tell that fucker [the coworker] that I am going to get him.” Exhibit 1 at 4, 5. In the context of the extreme anger that claimant conceded he was experiencing at the time, it was reasonable for the coworker and the employer to construe claimant’s statements as active threats to harm the coworker. Audio at ~25:40, ~28:40. At a minimum, claimant’s statements were a wantonly negligent violation of the employer’s expectation that he refrain from issuing threats against coworkers.

Claimant's wantonly negligent violation of the employer's standards on May 27, 2015 cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior constitutes an "isolated instance of poor judgment, if among other things, it does 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, the employer's two witnesses testified that the employer took very seriously its obligation to provide a safe workplace for its employees and, based on claimant's behavior on May 27, 2015, it could not ensure that its workplace would be safe in the future if the employer allowed claimant to return to that workplace. Audio at ~10:00, ~13:30, ~17:02. The statements that claimant made to the coworker during their interaction, and afterward to the executive chef and security officer about what he was going to do to the coworker, plainly threatened the coworker with a physical attack. Although claimant was angry when he made those threats, there was no guarantee that he did not intend to carry out those threats while he remained angry. In addition, the interaction among claimant, the executive chef and the security officer occurred some minutes after claimant had initially threatened the coworker, and claimant's anger still had not receded when he made the second set of threats toward the coworker. Finally, from claimant's testimony at hearing, where he explained his behavior as a consequence of the coworker having questioned his work ethic and having "intimidated" him, it is inferable that three months after the incident leading to his discharge, claimant continued to think that his behavior on May 27, 2015 had been justified and he did not experience any remorse over it. Based on the employer's concerns about maintaining a safe workplace environment and claimant's apparent lack of remorse over the encounters on May 27, 2015, a reasonable employer would objectively conclude that it could not trust claimant to refrain from issuing workplace threats in the future if he had an angry outburst and could not trust him not to follow through on those threats if he remained angry long enough. *See* Audio at ~14:05. Because claimant's behavior on May 27, 2015 caused an irreparable breach of trust in the employment relationship, it cannot be excused from constituting misconduct as an isolated instance of poor judgment.

Claimant's behavior also is not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that he behaved as he did on May 27, 2015 because he thought the employer would condone it or because he misunderstood the employer's standards against threatening behavior. Accordingly, there is insufficient evidence in the record to excuse claimant's behavior as a good faith error.

The employer met its burden to show that it discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-43753 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 12, 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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