

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1292

Reversed
Disqualification

PROCEDURAL HISTORY: On August 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 101728). The employer filed a timely request for hearing. On October 8, 2015, ALJ Frank conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46086, affirming the Department's decision. On October 30, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the written arguments submitted by the employer and claimant.

FINDINGS OF FACT: (1) Stone Cliff Inn LLC employed claimant from March 5, 2015 to July 16, 2015 as an assistant manager and wine steward.

(2) The employer expected all staff to arrive ten minutes before their scheduled shifts and to notify a manager if unable to report to work. The employer also expected managers to speak to coworkers and guests in a calm, polite and professional manner and to refrain from yelling or using a raised voice or foul language at work. Exhibit 1 at 7-8. Claimant understood the employer's expectations.

(3) In early June 2015, a manager sent claimant a text message stating some employees were upset because claimant did not ensure all the preparation work for the morning of June 16 was completed when claimant closed the restaurant the night before. When claimant reported to work later that day, he walked into the front of the restaurant and stated, in front of guests and coworkers, "All these fucking prima donnas. I'm sick of getting these text messages and not – they're not getting their work and I'm the one getting in trouble for it." Transcript at 25-26.

(4) On June 12, 2015, at a managers' meeting, the managers discussed several incidents when claimant allegedly spoke to coworkers in an unprofessional manner. Claimant was warned to control his frustration during busy times and to refrain from raising his voice toward staff and in front of guests. Claimant agreed to speak to staff in a professional manner. Exhibit 1 at 7-8.

(5) On June 14, 2015, claimant raised his voice and used foul language toward a coworker in the dining area of the employer's restaurant. A family with children overheard claimant, were offended by his behavior, and posted a negative review regarding the incident on an internet review site about local businesses. The employer warned claimant about the incident. On June 17, 2015, claimant apologized to the employer for his conduct. Exhibit 1 at 12, 13.

(6) On June 19, 2015, the employer gave claimant a final written warning that any additional unprofessional behavior would result in immediate termination. Exhibit 1 at 7-8.

(7) In or about June 2015, the employer changed its scheduling format. As a result, the managers' schedules changed frequently. Claimant was most often scheduled to begin work at noon, but sometimes began at 9:00 a.m. or 10:30 a.m.

(8) Claimant had failed to report to work in a timely manner multiple times. On July 5, 2015, the employer warned claimant that it expected him to report promptly for work.

(9) On July 10, 2015, the employer sent claimant and its other managers an email stating the schedule for the next week had been posted for their reference in the employer's office. The posted schedule showed claimant was scheduled to begin work at 9:00 a.m. on July 14, 2015. Claimant did not check the schedule or otherwise determine when he was scheduled to work on July 14, 2015.

(10) On July 14, 2015, having failed to check the work schedule, claimant assumed he was scheduled to begin work at noon. He reported for work at 11:44 a.m., almost three hours later than his scheduled arrival time, and did not notify the employer he would be late for work.

(11) After reporting to work late on July 14, 2015, the employer's restaurant became busy and was understaffed. Claimant became frustrated with the situation, yelled and scowled at his coworkers, and toward the end of his shift, went to the office and played solitaire while there were still guests in the restaurant.

(12) On July 16, 2015, the employer discharged claimant for reporting to work late and being rude toward his coworkers on July 14, 2015.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he violated the employer's attendance policy and yelled and treated his coworkers in an unprofessional manner. The employer had the right to expect claimant to report to work on time and to treat his coworkers with respect at work. Claimant understood the employer's expectations.

In Hearing Decision 15-UI-46086, the ALJ concluded that the employer did not meet its evidentiary burden to show claimant's conduct on July 14, 2015 was misconduct because claimant testified that he had been accustomed to arriving at 11:45 a.m., and did not know he was scheduled to start work at 9:00 a.m., and provided firsthand testimony that outweighed the employer's hearsay evidence, asserting that he could not recall having been rude to other employees that day.¹ We disagree.

We first disagree that claimant's failure to report to on time was not misconduct. Claimant testified that he assumed he was scheduled to work at noon that day because a manager told him she was "keeping the same schedule," and he did not check the schedule. Transcript at 30-31. The record does not show that the manager's statement that she was "keeping the same schedule" would have reasonably caused claimant to assume he was scheduled to work at noon. On the contrary, claimant knew the employer had created a new schedule format after recently hiring a new manager, and testified that the employer had been scheduling him for shifts beginning at 9:00 a.m., 10:30 a.m. or noon. Transcript at 30-32. The employer's general manager testified that the managers' schedules had been changing frequently. Transcript at 21. Moreover, the employer sent claimant and the other managers an email four days earlier reminding them to check the newly posted schedule, and claimant did not do so. By assuming he was scheduled to begin work at noon, and not checking the schedule for July 14, claimant consciously engaged in conduct he should have known would probably result in his failure to comply with the employer's attendance expectations. As a result, he appeared more than two hours late for his scheduled shift, and did not call to report he would be late. The record does not show that his reliance on a prior schedule that was subject to change justified his failure to report to work under those circumstances, and his resulting tardiness was a wantonly negligent violation of the standard of behavior that the employer had a right to expect of claimant.

We also disagree that claimant's firsthand testimony regarding his behavior toward his coworkers on July 14, 2015 outweighed the employer's hearsay evidence and showed he did not engage in misconduct by behaving in an unprofessional manner toward his coworkers. First, regarding the prior incidents, before July 14, 2015, claimant admitted that he has an "abrupt manner" that could be construed as "rude or belittling," and that he occasionally used foul language without intending others to overhear it, but that others sometimes did overhear it because "his voice carries." Transcript at 29-30. Claimant argued that his abrupt delivery of orders in high-pressure situations were "coming across" as "barking" orders,

¹ Hearing Decision 15-UI-46086 at 4.

but did not amount to a willful or wantonly negligent disregard of the employer's expectations. Claimant's Written Argument. However, the employer warned claimant in June 2015 to refrain from such conduct and that it would discharge claimant if he engaged in that conduct again. Claimant apologized and assured the employer his behavior would improve. However, despite claimant knowing his job was in jeopardy, the record shows it is more probable than not that claimant yelled, scowled, and "snapped" at his coworkers because he was frustrated after he reported to work late on July 14, 2015. Exhibit 1 at 14. Although claimant testified that he did not recall any specific negative interactions with his coworkers that day, claimant admitted that he "would have been frustrated" because he was the only manager there that day and was "playing catch up" due to his tardy arrival to work, and that he was "not generally a subtle person, and so it would have been obvious that [he] was frustrated and [a coworker] very easily could have picked up on [his frustration]." Transcript at 32-33. Claimant's testimony about his own behavior on July 14, together with the testimony of a manager who witnessed claimant's behavior under similar circumstances in the past, and a written statement from an employee who witnessed claimant yelling and scowling at employees on July 14, establish by a preponderance of the evidence that, more likely than not, claimant consciously engaged in rude behavior toward his coworkers on July 14. Claimant's behavior on July 14 was, at best, a wantonly negligent disregard of the employer's expectations of professionalism in the workplace.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's assumption that he was scheduled to start work at noon was not an isolated instance of poor judgment because it was a separate instance of poor judgment from his unprofessional conduct toward his coworkers on July 14, 2015. Moreover, it is undisputed that claimant consciously used foul language to complain about and yell at his coworkers on at least two separate occasions in June 2014 even though he knew at the time that doing so violated the employer's expectations of him. Those incidents were willful or wantonly negligent violations of the employer's standard of behavior, making his behavior on July 14, 2015 a repeated act and a pattern of other willful or wantonly negligent behavior.

For conduct to be considered a good faith error, the record must show claimant sincerely believed, and had a factual basis for believing, that the employer would condone his failure to report to work on time or treat his coworkers in a professional manner on July 14, 2015. The employer had notified him that his schedule was subject to change and instructed him to check his work schedule in advance of his July 14th shift and claimant ignored those admonitions. Claimant also understood the employer's expectations and, based upon his prior warnings, did not sincerely believe, or have a factual basis for believing, that the employer would excuse or condone his conduct on July 14, 2015.

Therefore, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-46086 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 2, 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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