

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1346

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 113447). Claimant filed a timely request for hearing. On October 29, 2015, ALJ Vincent conducted a hearing, and on November 6, 2015 issued Hearing Decision 15-UI-47334, concluding claimant was discharged for misconduct. On November 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Inspired Nutrition employed claimant from January 4, 2013 until approximately August 14 or 15, 2015. Claimant was last employed in the storage area, organizing and packaging orders and making liquid soaps.

(2) The employer expected claimant to report for work even if he disagreed with the employer's business decisions or actions. Claimant understood the employer's expectation. The employer also expected claimant to refrain from exhibiting an unreasonable opposition to or unwillingness to comply with the employer's policies and instructions, an unreasonable opposition or unwillingness to comply with legal standards governing the employer's operations and behavior that unreasonably disrupted the workplace or caused other employees to reasonably perceive that the workplace was not safe. Claimant understood these latter expectations as a matter of common sense.

(3) When claimant was hired, he initially worked out of a shop and the employer's office location was in the house in which the employer's chief executive officer (CEO) resided. Some months before August 13, 2015, the employer consolidated its operations and moved them to one location. The employer also hired four or five employees in addition to claimant, and hired a business manager to oversee, among other things, the employer's compliance with legal requirements.

(4) While claimant worked in the shop, he was not closely supervised. Claimant decided when he was going to start work and when, or if, he would take rest breaks and meal breaks. Claimant was very displeased when the employer began requiring him to start work at a scheduled time each day and to

take rest and meal breaks as state laws specified. Sometime before August 13, 2015, claimant became angry because he did not agree some of the employer's operational decisions and did not want to be told when to start work and when to take his breaks. The day after claimant became angry, he notified the employer that he was going to be absent from work because he was displeased with the manner in which the employer was operating, he did not like being told what to do in the workplace and he was too angry to report for work. A few days later, when claimant returned to work, the employer's CEO met with him. The CEO told claimant that displeasure with, or anger about decisions the employer made in connection with its operations or its need to comply with legal requirements was not an acceptable reason for an absence from work. The CEO told claimant never again to miss work for that reason.

(6) On August 13, 2015, near the end of his work day, the employer told claimant he needed to take a lunch break and required him to do so. Claimant did not want to do so because, after he returned from the lunch break, there was only approximately fifteen minutes left for him to work. Claimant was very upset that he had to take a lunch and thought it was unfair.

(7) On August 14, 2015, claimant called in to work and spoke with the CEO. He told the CEO that he did not like being told when he needed to report for work and being required to take rest or meal breaks, when he had only a short time remaining to work. Claimant told the CEO that he was not going to report for work that day because he was "mad" or "really upset." Audio at ~7:42, ~20:10. Claimant was very animated in voicing his opposition to the employer's requirements when he spoke to the CEO. At some point in the call, the CEO interrupted claimant, told claimant that "it seems like you need another job" and hung up on claimant. Audio at ~28:30. At that time, the CEO was unsure whether he wanted claimant to continue working for the employer.

(8) On August 14 or 15, 2015, claimant called the employer and left a voicemail message following up on his conversation with the CEO. The employer's business manager accessed the message. From the message, it appeared that claimant had been drinking. In the message, claimant was very angry and vocal about his dislike of being told what to do at work. The language that claimant used was foul, "crude," "extremely vulgar" and "incredible." Audio at ~29:22, ~34:22. In the course of the message, claimant stated "out of the blue" and for no apparent reason that if "she [the CEO's wife] were my wife, I would kill her." Audio at ~31:52, ~33:22. After hearing the message, some employees felt threatened and became concerned about what claimant might do if he came to the workplace while still emotional. Audio at ~35:02. Before the CEO was told about the message, the business manager called claimant and told him to "take a few days off" and that he would call claimant. Audio at ~8:00. Shortly thereafter, the business manager played the recorded message for the CEO. At that time, the CEO determined that he was not willing to allow claimant to return to work. The business manager never contacted claimant as he had said he would do in his earlier conversation with claimant.

(9) On August 14 or 15, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

Although claimant contended that he was discharged, the employer's witness testified that he did not know how to characterize the work separation. Audio at ~7:30, ~20:42, ~25:09, ~28:48. The standard for determining the nature of a work separation is set out at OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time when the work

separation occurred, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Here, it appeared that claimant was willing to continue working for the employer after he left the message for the employer on August 14 or 15, 2015, but was waiting for the business manager to contact him after he received the message from the manager to “take the next few days off.” From the record, it can be inferred that the CEO might have been undecided about that status of claimant’s employment after claimant spoke to him on August 13, 2015 expressing his displeasure with the employer’s instruction that he comply with legal standards. Audio at ~28:30. However, after the CEO listened to the phone message that claimant left on August 14 or 15, 2015, it appears, most likely, that the CEO was not willing to allow claimant to return to work. Audio at ~30:00, ~37:36. It can reasonably be inferred that the reason the business manager did not contact claimant about returning to work as he had promised to do in his voicemail message was because of the CEO’s desire that the employer have no further dealings with claimant. Claimant’s work separation was a discharge on August 14 or 15, 2015, after the CEO heard the voicemail message that claimant had left for the employer.

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) 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 show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

When claimant told the CEO why he was not going to report for work on August 14, 2015, the reason he gave - anger and displeasure with the employer’s policies and instructions - was the same reason he had given to justify an earlier absence. At that time, the CEO had clearly forbidden him from ever again missing work for that particular reason. Evidence in the record shows that the reason claimant reported that he was going to be absent on August 14, 2015 was his desire to express his opposition to the employer’s attempt the day before to make him comply with the legal standards for meal breaks. In other words, claimant wanted only to register a protest against the employer’s reasonable instructions that he comply with legal standards, and to engage in some type of single employee job action. Claimant’s failure to report for work on August 14, 2015 and the reason that he gave to the CEO for not doing so was at least a wantonly negligent violation of the employer’s standards.

Moreover, it was apparent from claimant’s hearing testimony that he thought the employer’s attempts to have him comply with a structured work schedule and to take the legally required rest and meal breaks were misguided. He referred to the employer’s efforts as being “just stupid” and “ridiculous” attempts to “be a legit business” that “I didn’t like.” Audio at ~7:38, ~9:20, ~10:53, ~18:40. Claimant repeatedly expressed his anger about the employer’s imposition of these requirements and this structure

on him. Audio at ~10:20, ~10:53, ~11:00, ~11:51, ~13:15, ~13:54~15:05, ~15:33, ~18:40~18:56, ~20:10. It appeared from the record that claimant had repeatedly expressed this attitude to both the business manager and the CEO; although these employer representatives tried to explain the reasons for their insistence on compliance, claimant remained dissatisfied. Audio at ~9:00 ~10:29, ~10:53, ~14:00, ~14:16, ~16:16, ~17:34, ~18:40, ~18:56~25:09, ~26:15, ~27:33, ~28:03. As a matter of common sense, claimant understood that such expressions of intense resistance and opposition to the employer's attempts to run its business in a structured manner and to comply with all legal requirements, as he exhibited in his phone call with the CEO on August 14, 2015 was also contrary to the employer's standards and expectations. As well, claimant left a phone message for the employer on August 14 or 15, 2015 in which he again expressed intense resistance to the employer's policies, and used foul language that caused some of the employer's employees to reasonably believe that the workplace was unsafe. Claimant's knew or should have known that, as a matter of common sense, his behavior in leaving this phone message was contrary to the employer's standards. By his actions on August 14, 2015 and on August 14 or 15, 2015, claimant also violated the employer's standards with at least wanton negligence.

Claimant's wantonly negligent behavior on August 14 and August 14 or 15, 2015, was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused under this exculpatory provision only if it was a single or infrequent occurrence and not a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). To constitute an isolated instance of poor judgment, claimant's behavior also must not have been, among other things, the type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant violated the employer's standards with at least wanton negligence when he spoke with the CEO on August 14 to say he would not report for work because he was angry about the employer's insistence he take his lawfully required breaks. On August 14 or 15, claimant left a phone message for the employer in which he again protested the employer's standards using foul language and made comments that claimant reasonably should have known would cause other employees to fear for their safety. Because claimant's wantonly negligent behavior was repeated, it may not be excused as an isolated instance of poor judgment. In addition, claimant's behavior caused an irreparable breach of trust in the employment relationship. By his consistent attitude and behavior, claimant continued to exhibit angry recalcitrance to complying with legal standards governing workplace conditions, like rest and meal breaks after particular hours have been worked. Based on this consistency, a reasonable employer would conclude that it could not trust claimant in the future to comply with these legally mandated standards. For either of these reasons, claimant's wantonly negligent behavior was not excused as an isolated instance of poor judgment.

Nor is claimant's wantonly negligent behavior on August 14 and August 14 or 15, 2015 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). While claimant contended during the hearing that he thought that at some time previous to August 14, 2015, the employer had agreed not to require that he take the legally required work breaks, it is implausible that claimant believed that he was exempt from these requirements after the CEO told him, sometime before August 14, 2015 that he could not miss work because he was angry over, among other things, the requirement that he take his breaks. Moreover, claimant did not contend that he thought that the employer would condone his August 14 or 15 phone calls, in which he expressed disdain for compliance with legal requirements, told the employer that he was not going to follow those legal standards, used

foul language, and made statements that caused other employees reasonably to feel threatened in the workplace. For this reason, claimant's behavior on August 14, 2015 and August 14 or 15, 2015 was not a good faith error.

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

DECISION: Hearing Decision 15-UI-47334 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 30, 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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