

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1375

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110744). Claimant filed a timely request for hearing. On November 4, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 18, 2015. On November 18, 2015, ALJ Wymer conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 15-UI-47858, concluding claimant's discharge was not for misconduct. On November 23, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer asked for another hearing on the grounds that it missed the first one. The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of its request, the employer asserted that its witness was prevented from attending the hearing because he was "processing payroll, this activity could not have taken place any other time and potentially affects the finances of 50+ individuals," and the witness was the only person who could have completed the task. However, the employer likely had well over a week's notice of the date and time of the scheduled hearing, and presumably knew that it conflicted with the scheduled payroll processing. Given that the employer had notice of the hearing and knew of the conflict, the employer did not assert or show what, if any, attempt he made to either participate in the hearing despite the conflict, nor did the employer show what, if any, attempt was made to secure a postponement of the hearing. The employer's request to have EAB consider new information is, therefore, denied.

FINDINGS OF FACT: (1) Broken Top Club employed claimant as a pool supervisor from May 1, 2013 to August 14, 2015.

(2) Claimant's ex-girlfriend also worked for the employer. Claimant did not supervise her. Their relationship had ended in approximately January 2015.

(3) On August 12, 2015, claimant and his ex-girlfriend engaged in a verbal argument during which claimant yelled. Claimant's ex-girlfriend told claimant she was going to report him to human resources. Claimant then used expletives toward her, after which she ran out of his office. Claimant knew he should not yell at his ex-girlfriend or use expletives toward her at work.

(4) After the incident, the general manager asked to speak with claimant about the incident. On August 14, 2015, the general manager discharged claimant, stating the employer could not condone his behavior during the argument with his ex-girlfriend.

(5) Prior to the August 12 incident, claimant had not been disciplined by the employer. He had not yelled at, engaged in arguments with, or used expletives toward others.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not 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.

The employer had the right to expect claimant not to yell at or use expletives toward his coworkers, including his ex-girlfriend. On August 12, 2015, claimant violated the expectation. It does not appear on this record that claimant's violation was intentional, but, given that he knew or should have known the expectation and engaged in the violation anyway, it is more likely than not that the conduct was wantonly negligent.

However, some wantonly negligent conduct may be excused if it was an isolated instance that did not exceed mere poor judgment. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is a single or infrequent exercise of willful or wantonly negligent poor judgment. OAR 471-030-0038(1)(d)(A). Here, claimant did not have any history of discipline and had never before engaged in conduct that constituted a willful or wantonly negligent violation of the employer's expectations. His conduct was, therefore, isolated. Conduct only exceeds mere poor judgment if it is unlawful or tantamount to unlawful conduct, causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant briefly yelled at and used foul language toward a coworker. The record fails to show that there was any physical component to the argument, or that claimant made any threats of violence or threats to his ex-girlfriend's employment status, or that he was in any position of authority from which he could make such threats. The record also fails to show that claimant's conduct was unlawful or tantamount to

unlawful. The employer did not appear at the hearing or allege that claimant's conduct otherwise exceeded mere poor judgment, and, objectively considered, claimant's single, non-threatening argument with a coworker he did not supervise, in the context of an otherwise discipline- and violation-free three-year employment relationship, would not be so egregious that no employer would be able to have a continued relationship with him based on the argument with his ex-girlfriend.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-47858 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 29, 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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