EO: 200
BYE: 201631

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1380

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 85207). Claimant filed a timely request for hearing. On October 27, 2015, ALJ M. Davis conducted a hearing, and on November 3, 2015 issued Hearing Decision 15-UI-47042, concluding the employer discharged claimant, but that claimant is not disqualified from receiving benefits based on the discharge. On November 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

FINDINGS OF FACT: (1) Pump Pipe & Tank Services LLC employed claimant as a service technician from July 11, 2011 to August 10, 2015.

(2) The employer had a written employee handbook, which it last provided to claimant on August 3, 2015. The employee handbook contained a drug and alcohol policy prohibiting the effects of drugs or alcohol in the workplace, and provided for drug and alcohol testing of employees reasonably suspected of using drugs or alcohol in violation of the policy. The policy further stated that an employee would be discharged for refusing to cooperate with any and all tests required by the policy.

(3) The employee handbook also contained a policy stating that the employer expected its employees to adhere to a standard of professional conduct that included being respectful, courteous and mindful of others' feelings and needs, and generally cooperating with coworkers and supervisors. The policy further stated that individuals who acted in an unprofessional manner might be subject to disciplinary action. Claimant was aware of the policy.

(4) On August 5, 2015, claimant was on his lunch break when he had a family emergency. He notified the employer that he would be returning to work late that day. It took claimant approximately 2.5 hours to address the emergency and return to work. While claimant was on his way back to work, he became involved in an argument with one of the owners. That owner informed claimant that he did not need to report to work and that he should not report to work on August 6, 2015.

(5) On Friday, August 7, 2015, claimant notified the employer that he would be absent from work and he would return on Monday, August 10, 2015.

(6) On August 10, 2015, the owner informed claimant that he would have to submit to a drug and alcohol test before he could return to work. Claimant refused and the owner discharged him.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is not disqualified from receiving benefits based on his work separation from 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) (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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A).

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(B) states that a claimant is considered to have committed a disqualifying act if he fails or refuses to take a drug or alcohol test as required by an employer's reasonable written drug or alcohol policy. A written employer policy is reasonable if the policy prohibits the effects of drugs or alcohol in the workplace; the employer follows its policy; the policy has been published and communicated to the individual or provided to the individual in writing; and when the policy provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3) (March 12, 2006). An employer has probable cause to require an employee to submit to a test for drugs and/or alcohol if the employer has observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs or alcohol in the workplace. OAR 471-030-0125(4). Such evidence may include, but is not limited to, bizarre behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property. *Id*.

In a discharge case, the employer has the burden to establish that the claimant is disqualified from receiving benefits based on the discharge. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In the present case, the employer discharged claimant, at least in part, for refusing to take a drug and alcohol test on August 10, 2015. However, claimant had not yet reported for work that day, and had not performed services for the employer since August 5, 2015. The employer's owner testified that he did not believe claimant was under the influence of drugs or alcohol on August 10,[1] and the record fails to show that the employer had observable, objective evidence that gave it a reasonable basis to suspect that claimant would have reported for work impaired or affected by drugs or alcohol. The employer therefore failed to establish that that it had probable cause for requiring claimant to submit to a drug and alcohol test when he reported for work. We therefore cannot conclude that the employer's drug and alcohol policy was "reasonable" as defined under OAR 471-030-0125(3), or that claimant committed a disqualifying under ORS 657.176(9)(a)(B). Claimant is not disqualified from receiving benefits under ORS 657.176(2)(h). The remaining issue is whether claimant was discharged for misconduct OAR 471-030-0038(3)(a), and therefore is disqualified from receiving benefits under ORS 657.176(2)(a).

In written argument, the employer asserts that it also discharged claimant for failing to comply with its attendance policies on August 5 and 7, 2015, and violating its policy against unprofessional behavior on August 10, 2015 by telling the owner to "fuck off" after the owner informed claimant that he would be required to submit to a drug and alcohol test before returning to work. Employer's Written Argument at 1-3. At hearing, however, the owner testified that he had no intention of discharging claimant prior to their telephone conversation on August 10, 2015. Transcript at 14. We therefore focus on claimant's allegedly inappropriate behavior on August 10 as a second reason for his discharge, and address his alleged violations of the employer's attendance policies on August 5 and 7, 2015 only if necessary to determine whether his behavior on August 10 was an isolated instance of poor judgment.

At hearing, the employer's owner testified that claimant told him to "fuck off" after the owner informed claimant that he would be required to submit to a drug and alcohol test before returning to work. Transcript at 19. However, claimant denied that allegation, asserting that he only replied, "You gotta be shittin' me." Transcript at 24, 30, 42. We find the evidence on that issue equally balanced, and the employer therefore failed show claimant told the owner to "fuck off." With respect to claimant's admission that he replied, "You gotta be shittin' me," he further testified that the use of such language at work was common and tolerated by the employer. Transcript at 25, 41. The employer failed to show otherwise.

The employer therefore failed to show that claimant knew or should have known his use of foul language on August 10 probably violated the employer's expectations regarding workplace behavior. Absent such a showing, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence. It therefore is unnecessary to address claimant's alleged violations of the employer's attendance policies on August 5 and 7, 2015. Claimant's discharge was not for misconduct. He is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-47042 is affirmed.

Susan Rossiter and J. S. Cromwell

[1] Transcript at 18-19.

DATE of Service: December 28, 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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