

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0125

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101810). Claimant filed a timely request for hearing. On January 15, 2016, ALJ Vincent conducted a hearing, and on January 22, 2016 issued Hearing Decision 16-UI-51550, affirming the Department's decision. On February 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant each submitted written arguments in which they attempted to present information about the work separation that they did not present at the hearing. Neither party explained why they did not offer the information during the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond their reasonable control prevented them from doing so. For this reason, EAB did not consider the new information that either party offered when reaching this decision. In his argument, claimant also presented a December 31, 2015 letter he received from the Department stating that, after investigation, it had concluded that claimant had not engaged in misrepresentation when he made a claim for unemployment benefits. The Department's determination is not relevant to whether the employer discharged claimant for misconduct, or whether claimant accurately characterized the facts underlying the work separation to the Department. It was a determination only that claimant did not, with a fraudulent intent, mischaracterize the separation when he filed his claim. As such, the finding in the Department's December 31, 2015 letter is not pertinent to EAB's review of Hearing Decision 16-UI-51550.

FINDINGS OF FACT: (1) Mt. Hood Vacation Rentals employed claimant as a maintenance technician from September 8, 2014 until July 16, 2015.

(2) The employer expected claimant to wear a work uniform at all times when he was on duty. The employer also expected claimant to refrain from treating vendors disrespectfully or using foul or abusive language to them. Claimant was aware of the employer's expectations.

(3) Throughout his employment, claimant was required to wear one of two work shirts while on the job, a green polo-type shirt or a black polo-type shirt. Some employees complained that the material used in the green shirt was heavy and they became hot when wearing it at work. At least approximately every other week, the employer's business manager observed claimant not wearing one of the required work shirts and orally reminded him that the employer expected him to do so. In April 2015, the business manager documented in an employee log she maintained that she had issued to an oral warning to claimant for not wearing one of the required work shirts. In June 2015, the business manager again warned claimant that he was required to wear one of the employer's work shirts when he was on duty.

(4) On July 15, 2015, claimant was on duty and performing tasks at one of the employer's vacation rentals that had recently been renovated. When the employer's owner saw claimant during the morning, he was wearing a work shirt. In the afternoon, the owner was at the rental and observed that claimant was there and not wearing a work shirt. Claimant left the rental when he saw the owner. Later, claimant had a conversation with the business manager and the manager told claimant that the owner wanted him to put on a work shirt and return to the rental to clean up the yard; she would then walk through the rental with claimant to determine if the work at the rental was done. Claimant and the business manager went to the rental, and claimant began using a leaf blower to clean the yard. A locksmith who was cutting new keys for the rental was parked in her van at the rental house, with the van door open. The business manager heard claimant "yell" at the locksmith to "close the fucking [van] door." Audio at ~16:04, ~26:39. The business manager observed that claimant was "irate" toward the locksmith. Afterward, the business manager reported claimant's behavior to the owner.

(5) On July 16, 2015, the employer discharged claimant for his behavior on July 15, 2015, including his failure to wear his work shirt when on duty and his use of foul and abusive language to the locksmith.

CONCLUSIONS AND REASONS: 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. 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).

Claimant did not dispute that the employer expected him to wear his work uniform while on duty and to refrain from using foul or abusive language to the locksmith, other vendors and people he interacted with when on duty. Audio at ~ 27:50, ~35:27. Claimant did not deny that he shouted at the locksmith to "close the fucking door" on July 15, 2015, and stated that he could have used that foul expression to locksmith. Audio at ~35:27. Claimant also did not deny that he was not wearing his work shirt on the afternoon of July 15, 2015, and that he knew the employer expected him to wear it when he was on duty. Audio at ~27:50, ~28:14. Claimant's justification for taking his work shirt off and not wearing it that afternoon was that the green work shirt was "very uncomfortable," tight" and "itched" and the black shirt was designed for a woman, which he found too "disrespectful" to wear. Audio at ~28:14, ~28:30. However, claimant did not directly contest the employer's testimony that the black work shirt that was issued to him was designed for a man, and, different from the green shirt, it was "baggy" and not

constraining. Audio at ~43:28. While claimant might have disliked wearing the green work shirt, he did not demonstrate that wearing the green shirt created a type of exigent circumstance that made it unreasonable for the employer to expect that him to comply with its expectation. In addition, if wearing the green shirt was bothersome to claimant, he provided no reasonable explanation for why he did not exclusively wear the non-confining black work shirt. Claimant's failure to wear a work shirt when he was on duty during the afternoon of July 15, 2015 and claimant's use of foul language when making a request of the locksmith were at least a wantonly negligent violations of the employer's standards.

Claimant's behavior on July 15, 2015 cannot be not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an "isolated instance of poor judgment," claimant's behavior must have been, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-020-0038(1)(d)(A). Here, claimant engaged in two separate wantonly negligent violations of the employer's standards on July 15, 2015: failing to wear his work shirt and using foul language when he addressed the locksmith. Since his behavior was not an isolated occurrence, but part of a pattern of wantonly negligent behavior, it cannot be excused as an isolated instance of poor judgment.

Claimant's wantonly negligent behavior on July 15, 2015 also cannot be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Behavior is generally excusable as a good faith error if a claimant sincerely but mistakenly believed that the employer would condone behavior that otherwise violated its standards. Here claimant did not contend that he thought the employer would allow him not to wear a work shirt, or would permit him to speak as he did to the locksmith. On this record, claimant's behavior on July 15, 2015, did not meet the threshold to be excused as a good faith error.

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

DECISION: Hearing Decision 16-UI-51550 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: March 3, 2016

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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