

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0636

Hearing Decision 16-UI-60056 Reversed
Hearing Decision 16-UI-60062 Affirmed

PROCEDURAL HISTORY: On April 16, 2016, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding the employer suspended claimant on February 13, 2016 but not for misconduct (decision # 132653) and the second concluding the employer discharged claimant but not for misconduct (decision # 131905. Claimant filed timely requests for hearing on both administrative decisions. On May 20, 2016, ALJ Vincent conducted a consolidated hearing, and on May 20, 2016 issued two hearing decisions, the first concluding claimant was not suspended from work and disaffirming decision # 132653 (Hearing Decision 16-UI-60062) and the second concluding claimant was discharged from work for misconduct and reversing decision # 131905 (Hearing Decision 16-UI-60056). On May 26, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Claimant submitted a written argument. However, claimant failed to certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained new information not presented during the hearing and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information at the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's argument or the new information that claimant sought to present. EAB considered only information received into evidence at the hearing when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-60056 and 16-UI-60062. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0636 and 2016-EAB-0637).

FINDINGS OF FACT: (1) Lebanon Rehab-Specialty Care employed claimant as a dietary aide from December 14, 2010 until approximately February 18, 2016.

(2) The employer prohibited claimant from bringing firearms into the workplace. Claimant had also taken classes to obtain a permit allowing him to carry a concealed weapon and learned at those classes “it was not a good idea to bring a gun into work.” Audio at ~ 36:30. Claimant reasonably understood the employer’s expectations.

(3) On approximately February 13, 2016, when claimant was at work, he discussed firearms with a coworker and told the coworker he had recently obtained a permit to carry a concealed weapon. Claimant later showed his coworker that he was carrying a handgun while at work in an ankle holster. The handgun was a Smith and Wesson .380 Auto Revolver. Claimant removed the gun from the ankle holster, handed it to the coworker and allowed her to hold it. Sometime after this interaction, the coworker told a second coworker what claimant had shown her and told her. On approximately February 14, 2016, the coworker to whom claimant had shown the handgun told a third coworker about her interaction with claimant. On approximately that same day, both coworkers to whom the first coworker had spoken reported to the dietary manager what the first coworker had told them. The dietary manager then spoke to the first coworker and she confirmed that she had personally observed claimant on the workplace premises in possession of a handgun.

(4) On approximately February 14, 2016, news spread throughout the kitchen workers that claimant had been in possession of a firearm in the workplace. Claimant did not report for work that day because his wife was in the hospital and claimant wanted to be with her. On that day, claimant received a text message from a coworker while he was at the hospital telling him that the coworker wanted to meet with him. The coworker came to the hospital and told claimant the dietary manager had been informed that he had taken a handgun onto the workplace premises and was going to discharge him for that infraction. Immediately thereafter, claimant called the dietary manager and first informed the manager that he was not going to be at work for at least the next day due to his wife’s illness and hospitalization. Claimant then asked the dietary manager if what the coworker had told him was correct. During the initial part of this conversation, claimant denied he had possessed a handgun on the employer’s premises. After further questioning by the dietary manager, claimant acknowledged that he had carried a concealed gun while on the workplace premises. The dietary manager then informed claimant that he probably was going to be discharged for having a gun while on the workplace premises.

(5) On approximately February 15, 2016, the dietary manager informed the employer’s administrator of the alleged incident involving claimant’s possession of the handgun, and what he had told claimant about his likely discharge for that behavior. The administrator told the dietary manager he was unwilling to discharge claimant until he had investigated the truth of the allegations against claimant. On that day, the administrator called claimant on his cell phone and left messages for him. Claimant returned the administrator’s calls. Claimant told the administrator he had brought a gun into the workplace and that he should not have done so. The administrator expected claimant to report for work the next day when the administrator intended to speak with claimant further about the handgun. However, on February 16, 2016, claimant did not report for work, and called the employer to state that he needed a couple of more days away from work to care for his ill wife. Audio at ~ 23:35. While claimant was away from work, the administrator investigated the circumstances surrounding claimant’s alleged possession of a gun in the workplace.

(6) On approximately February 18, 2016, after having investigated, the administrator decided to discharge claimant for having possessed a handgun on the workplace premises on February 13, 2016.

On that day, while claimant was still away from work tending to his ill wife, the employer discharged him. Claimant learned of his discharge when he picked up his final pay check on approximately February 25, 2016.

CONCLUSIONS AND REASONS: The employer did not suspend claimant before discharging him on for misconduct on approximately February 18, 2016.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer suspended or 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. Isolated instances of poor judgment are not misconduct, and do not disqualify a claimant from benefits. 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).

Hearing Decision 16-UI-60062 – The Suspension. Both of the employer's witnesses contended that the employer did not suspend claimant at any time before it discharged him. Audio at ~9:53, ~24:19, ~25:56, ~26:30. Claimant appeared to contend that the employer suspended him on February 15, 2016 ten days before he was discharged on February 25, 2016. Audio at ~25:56, ~26:30, ~32:25, ~35:58. Claimant did not dispute that after February 13, 2016 he needed to be away from work because his wife was ill and he had received the employer's permission to miss work after February 13, 2016. Audio at ~32:59, ~34:09. It makes sense the employer would not suspend claimant during a period of time when he was already away from work for another reason. In addition, claimant's testimony was, at times, confused about whether he was contending he was suspended on February 15, 2016 or discharged on that date and by whom or if these events occurred on some other date. Audio at ~25:46, ~32:59, ~35:58. Accepting that claimant meant he was suspended sometime around February 15, 2016, it is not plausible he thought the coworker who visited him at the hospital had the authority to suspend him from work or that, if he actually thought the dietary manager had suspended him in their later telephone conversation, it makes no sense that he would then seek that manager's permission to be away from work for an additional one or more days to tend to his ill wife. Audio at ~32:59, ~34:09. Further, if claimant believed either of these people had already suspended him, it is equally implausible that he would have notified the administrator the next day that he needed a few more days off from work because of his wife's continued illness. Audio at ~25:30. Because the testimony of the employer's witnesses was consistent and logical and claimant's was confusing and implausible, we give the employer's evidence the greater weight in determining that the employer did not suspend claimant.

On this record, the employer most likely did not suspend claimant on February 15, 2016 or at any time preceding claimant's discharge. Because there was no suspension, claimant is disqualified from receiving benefits based on a suspension.

Hearing Decision 16-UI-60056 – The Discharge. In Hearing Decision 16-UI-60056, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that the employer presented "credible evidence" of a policy prohibiting firearms in the workplace and that claimant had willfully or with wanton negligence violated that policy when he knowingly brought a firearm into the workplace. Hearing Decision 16-UI-60056 at 2. The ALJ further reasoned that, because claimant's

behavior on February 13, 2016 was a “repeated violation where the claimant refused to follow the employer’s firearms policies,” it was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Hearing Decision 16-UI-60056 at 2. We disagree.

For purposes of this decision, it is assumed that claimant’s behavior on February 13, 2016 was a willful or wantonly negligent violation of the employer’s standards. OAR 471-030-0038(3)(b) excuses behavior that would otherwise be considered misconduct from disqualifying a claimant from unemployment insurance benefits if the behavior qualifies as an isolated instance of poor judgment. To be considered an “isolated instance of poor judgment,” the behavior at issue must have been 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). To be excusable, the behavior also must not have “exceeded mere poor judgment” by, among other things, violating the law, being tantamount to unlawful behavior, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C).

At the outset, the testimony of the employer’s witnesses was clear that claimant had never allegedly violated the employer’s firearms prohibition in the past, nor had he ever before February 13, 2016 behaved in a manner that the employer considered a significant violation of its standards. Audio at ~16:25, ~16:35. The ALJ therefore erred in concluding that claimant’s behavior was outside of that which was excusable as an isolated instance of poor judgment because it was not a single or infrequent act in violation of the employer’s standards. *See* Hearing Decision 16-UI-60056 at 2. Claimant’s behavior on February 13, 2016 meets the first requirement to be excused from constituting misconduct.

As to whether claimant’s behavior “exceeded mere poor judgment,” and was beyond that which may be excused, we consider the relevant parts of OAR 471-030-0038(3)(C). First, while it is unlawful in Oregon for a person generally to possess a loaded or unloaded firearm in a “public building” or a “court facility,” a person, like claimant, who has a permit to carry a concealed weapon is exempt from the “public building” prohibition. *See* ORS 166.370(1) and (3)(d). Since the employer’s workplace does not appear to meet the criteria for a “public building” and is not a “court facility,” it was not against the law for claimant to bring a firearm into the workplace and his behavior was not tantamount to unlawful conduct. *See* ORS 166.360(4).

Second, there was insufficient evidence showing claimant’s behavior on February 13, 2016 caused an irreparable breach of trust in the employment relationship or made a continue employment relationship impossible. While the employer’s witness asserted that it was his perception that some of claimant’s coworkers felt threatened when they learned claimant had brought a gun into the workplace, there was no evidence that claimant had a history of volatile, unpredictable, aggressive or threatening behavior in the workplace and no evidence that he threatened anyone or behaved unsafely with the gun on the one occasion when he had it in the workplace. Audio at ~17:08, ~17:48. Notably, the coworker to whom claimant showed the gun on February 13, 2016 did not testify she was apprehensive after claimant showed her the gun, and her behavior in taking and holding the gun suggests that she was not. Audio at ~40:48, ~45:00. This record is devoid of evidence that claimant brought the gun into the workplace with a hostile or disruptive intention or to intimidate or threaten anyone. As well, the employer did not suggest that claimant’s statement to the dietary manager that he brought the gun into the workplace because the facility had recently received threats and he wanted to be able to protect himself and his coworkers was untrue. Audio at ~12:28. On this record, an employer would not have objectively

concluded that allowing claimant to return to work would place its employees in fear or disrupt its workplace in a way that could not be alleviated by simply telling them claimant had been forbidden to bring the gun onto its premises ever again. Also on this record, an employer would not reasonably conclude that it could not trust claimant not to bring a gun again into the workplace after having been warned, and that his behavior therefore had caused an irreparable breach of trust in the employment relationship. Having met all of requirements, claimant's behavior on February 13, 2016, assuming it was a willful or wantonly negligent violation of the employer's standards was excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not do so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-60056 is set aside, as outlined above. Hearing Decision 16-UI-60062 is affirmed.

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

DATE of Service: July 6, 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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