EO: 200
BYE: 201627

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

533
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0644

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 133557). The employer filed a timely request for hearing. On May 12, 2016, ALJ Wyatt conducted a hearing at which claimant did not appear, and on May 19, 2016 issued Hearing Decision 16-UI-59913, affirming the Department's decision. On May 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not presented during the hearing. The employer did not explain why it was unable to offer this information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the employer's new information. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) CRN Excavation, Inc. employed claimant as an extra hand at excavation job sites from January 13, 2016 until January 22, 2016.

(2) The employer expected claimant to refrain from arguing with coworkers. Claimant understood the employer's expectation as a matter of common sense and as he reasonably interpreted it.

(3) Before January 22, 2016, the employer had not issued any disciplinary warnings to claimant.

(4) On January 22, 2016, claimant and coworker were working together on an excavation job site. They disagreed about how to perform the task. They began yelling at each other in front of the client who had hired the employer. The foreman came over to the men, gave them his opinion about performing the

task and told them to "relax," "calm down" and "take a breather." Audio at ~8:27. The foreman separated the two men and they worked at different locations on the job site for the rest of the day.

(5) At the end of the work day on January 22, 2016, the excavation crew, including claimant, left the job site and returned to the employer's shop to retrieve their cars and go home. At the office site, claimant and the coworker again began to argue heatedly. Other coworkers thought claimant was "threatening and demeaning" toward the coworker with whom he was arguing. Audio at ~13:21. The foreman again approached claimant and the coworker and said to them, "It's over with now. Move on." Audio at ~9:17. Claimant then "yelled" or "screamed" at the foreman and began to move toward him. Audio at ~9:44, ~13:31. The foreman thought that claimant might do something to him. The foreman immediately told claimant, "No, that won't be happening." Audio at 9:57. The foreman then told claimant that he was discharged and asked him to turn over his work keys and work phone.

(6) On January 22, 2016, the employer discharged claimant for his argumentative behavior on January 22, 2016.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. 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).

The employer discharged claimant for arguing with his coworker two times on January 22, 2016 and for raising his voice to the foreman at the culmination of the second argument. No witness with first-hand information testified at hearing about claimant's behavior that day. The hearsay information the employer's only witness presented was conclusory as to claimant's behavior without specific detail about the observations on which the conclusions were founded. As examples, relying on hearsay, the witness recited that claimant was "combative," "causing a big scene," and "threatening," but presented no concrete facts to support these characterizations. Audio at ~7:55, ~13:21, ~18:40. Without exact and unambiguous facts about claimant's behavior, it is difficult to determine precisely what claimant did on January 22, 2016 that violated the employer's standards.

With respect to the first argument between claimant and his coworker at the job site, it does not appear it went beyond a few minutes of raised voices. Although the employer's witness stated the employer lost a customer due to the customer witnessing the argument, no evidence suggests claimant was aware of the presence of the customer during the argument. Audio at ~16:20. It does not appear that claimant should reasonably have known based on common sense that the employer prohibited him from raising his voice to a coworker whether a customer was present or not, or that his doing so on January 22, 2016 was a willful or wantonly negligent violation of the employer's standards. Since the employer did not offer more specific information as to its expectations of claimant, they must be predicated on the standard of

the common sense awareness of an ordinary person. The employer did not meet its burden to show claimant's behavior during the first argument on January 22, 2016 was misconduct.

As to the second argument between claimant and his coworker at the office site, the employer's witness made reference to claimant reportedly having "threatened" the coworker and other workers who were present, and the argument having "escalated." Audio at ~13:21, ~17:35, ~18:40, ~19:13. For purposes of this decision, it is assumed claimant's behavior during the second episode was at least a wantonly negligent violation of the employer's common sense standards of which claimant should have been aware. However, even if claimant's behavior on January 22, 2016 was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b).

To qualify under the excuse of an "isolated instance of poor judgment," claimant's 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). Claimant's behavior also must not have been the type that exceeded "mere poor judgment" by, among other things, being tantamount to a violation of the law, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Here, the employer's witness testified the employer had never before January 22, 2016 considered claimant's behavior to have violated its standards. Because claimant's wanton negligence on January 22, 2016 was a single occurrence it meets the first of the tests to be excused as an isolated instance of poor judgment.

As to whether claimant's behavior before his discharge on January 22, 2016 exceeded mere poor judgment, from the information supplied by the employer's witness, it does not appear to meet the elements of the crimes of assault or menacing or be an equivalent to them, since she did not allude to claimant physically accosting or injuring his coworker or placing his coworker in fear of imminent serious physical injury. ORS 163.160(1) (assault); ORS 163.190(1) (menacing). As to whether the second incident on January 22, 2016 caused a irreparable breach of trust or made a continued employment relationship impossible, there is insufficient evidence in this record to support either conclusion. Although the record supports that there was a verbal argument between claimant and the coworker, that claimant might have threatened the coworker or other coworkers, and that claimant yelled at the foreman when the foreman tried to defuse the situation, these occurrences in the context of an argument between laborers engaged in manual work, are not sufficiently aggravating to show that an objective employer would have reasonably concluded that claimant could not be trusted in the future to comply with the employer's workplace standards. While the employer's witness testified that after claimant was discharged he physically attacked his coworker, it cannot be reliably inferred that claimant would have attacked his coworker absent his discharge or that an objective employer would have reasonably thought claimant was likely to do so at the time it discharged claimant. Since the evidence the employer presented did not show, more likely than not, that claimant's behavior on January 22, 2016 exceeded mere poor judgment, that behavior meets all requirements to be excused as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 16-UI-59913 is affirmed.

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

DATE of Service: July 8, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.