

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0150

Reversed
Disqualification

PROCEDURAL HISTORY: On September 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 63306). Claimant filed a timely request for hearing. On October 26, 2016, ALJ Wyatt conducted a hearing, and on October 28, 2016 issued Hearing Decision 16-UI-70180, concluding the employer discharged claimant, but not for misconduct. On November 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB). On November 29, 2016, EAB issued Appeals Board Decision 2016-EAB-1244, reversing the hearing decision and remanding the matter to the Office of Administrative Hearings (OAH) for additional evidence. On December 21, 2016, OAH mailed notice of a hearing scheduled for January 5, 2017. On January 5, 2017, OAH mailed notice that the hearing was continued to January 19, 2017. On January 19, 2017, ALJ Wyatt conducted a hearing and on January 30, 2017, issued Hearing Decision 17-IU-75690, again reversing decision # 63306 and concluding the employer discharged claimant, but not for misconduct. On February 7, 2017, the employer filed a timely application for review of Hearing Decision 17-IU-75690.

FINDINGS OF FACT: (1) A & M Transport, Inc. employed claimant from June 4, 2009 until September 1, 2016 as a professional truck driver.

(2) The employer expected claimant to communicate with dispatch and other office personnel in a respectful manner, including refraining from displaying a poor attitude and using foul language. Exhibit 1 at 1. Claimant understood the employer's expectations.

(3) On August 1, 2016, the employer gave claimant a written warning that his communications with dispatch and other office personnel had been "unacceptable," during the prior "few months" and that the employer would not tolerate claimant's use of foul language with office personnel. Exhibit 1 at 1.

(4) On August 16, 2016, the personnel director called claimant to warn him to refrain from speeding after the employer received several notifications from the electronic log books in its trucks that claimant had exceeded the speed limit. Claimant yelled and used foul language toward the personnel director, stating, “Just get it over with and fire me. This is fucking bullshit. I don’t need you guys calling me and fucking harassing me about how I do my job. . . . Fuck you.” Audio Record (October 26, 2016) at 12:53 to 13:36; Exhibit 2 at 2.

(5) On August 18, 2016, in response to the August 16 telephone conversation with claimant, the personnel director met with claimant and gave him a second written warning that stated, “continued disrespectful communication habits” toward other employees, including “cussing, yelling, hanging up on [the employee]” would result in immediate termination. Exhibit 1 at 2.

(6) On August 26, 2016, claimant used foul language in a phone call during which the personnel director tried to call claimant back to work after dispatch told him he was finished for the week. Claimant told the personnel director, “That’s your fucking problem, not mine. This is fucking bullshit.” Transcript (January 19, 2017) at 15.

(7) On September 1, 2016, the personnel director called claimant because he believed claimant had not maintained proper contact with dispatch. Claimant became upset, argued that it was not his duty to maintain contact with dispatch and used foul language in his conversation with the personnel director. Audio Record (October 26, 2016) at 8:11 to 8:30. Claimant stated, “That’s not my fucking problem that you guys don’t call me back to tell me to work. If you want to fucking fire me, fire me. This is bullshit.” Audio Record (October 26, 2016) at 13:59 to 14:07. The employer’s chief financial officer was in the office with the personnel director during the telephone call, and overheard claimant using the word, “fuck,” repeatedly during the call. The personnel director discharged claimant for violating its communication conduct policy.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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 connected with work. 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected claimant to communicate with dispatch and other office personnel in a respectful manner, and refrain from using foul language. Based on the written warnings claimant received prohibiting such conduct, claimant knew or should have known the employer’s expectations.

In Hearing Decision 17-UI-75690, the ALJ concluded that the employer failed to meet its burden to show that claimant engaged in misconduct by using foul language in a telephone call with the employer's personnel director on September 1, 2016 because the evidence that claimant used foul language during the call was no more than equally balanced between the parties.¹

Although both parties each had two witnesses provide opposing testimony about the final incident, we disagree that the evidence was equally balanced regarding whether claimant used foul language during that incident. Claimant testified that he "cussed at nobody" at work other than saying "fuck you" to the personnel manager once prior to August 2016. Transcript at 36, 38-39. However, claimant's testimony is implausible in light of the employer's two August 2016 warning letters to claimant regarding his repeated use of foul language toward office personnel. The August 18 letter referred to claimant's "continued" disrespectful manner toward office personnel, including "cussing, blowing up at, and hanging up on office employees." Exhibit 1 at 1, 2. It is also implausible that the employer invented the multiple documented references in claimant's employee file of claimant using foul language toward office personnel and that the employer's chief financial officer lied about hearing claimant repeatedly use the word "fuck" during his telephone conversation with the personnel director on September 1. *See* Exhibit 2 (07/31/2015, 11/10/2015, 08/16/2016, 08/17/2016, 08/26/2016, 09/01/2016). Moreover, the testimony from claimant's wife, that claimant did not use foul language during the final incident, lacked credibility because she hesitated and did not answer the ALJ's questions about her own use of foul language during the telephone call until the ALJ asked her again after she returned from being disconnected from the hearing for almost two minutes. Audio Record (October 26, 2016) at 33:42 to 37:11, 37:25 to 37:44. For the foregoing reasons, we find it more likely than not that claimant used foul language during telephone calls with the personnel director on August 16 and September 1, 2016, thereby violating the employer's communication policy with at least wanton negligence.

Claimant's September 1 conduct is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. To be an "isolated instance of poor judgment," the September 1 behavior at issue 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 471-030-0038(1)(d)(A). Here, claimant used foul language during a communication with the personnel director on August 16, 2016, thereby previously violating the same employer standard. Given the prior incident on August 16, claimant's wantonly negligent behavior on September 1 was not a single occurrence. As such, it is not excusable as an isolated instance of poor judgment.

Claimant's behavior on September 1 also is not excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend he used the foul language because he mistakenly thought it was acceptable or tolerated to use such language toward office personnel. As well, any such contention would be implausible give the specific prohibition in the August 18 warning letter against foul language and "cussing" toward office personnel. For these reasons, claimant's behavior is not excused from constituting misconduct as a good faith error.

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

¹ Hearing Decision 17-UI-75690 at 4.

DECISION: Hearing Decision 17-UI-75690 is set aside, as outlined above.

DATE of Service: March 8, 2017

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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