

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0163

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 85217). Claimant filed a timely request for hearing. On January 26, 2017, ALJ Triana conducted a hearing, and on February 2, 2017, issued Hearing Decision 17-UI-75994, affirming the administrative decision. On February 7, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From June 27 until November 14, 2016, Lithia Motors, a car dealership, employed claimant as a sales representative.

(2) The employer expected that employees would behave in a professional and courteous manner in the workplace, and would avoid physical confrontations with his coworkers. Claimant understood the employer's expectations as a matter of common sense.

(3) On November 10, 2016, while claimant was completing the sale of a vehicle, sales manager D gave claimant a "hot lead," *i.e.*, the name of a potential customer that the corporate office sent the dealership. Claimant looked at the information he had been given and told D it was a "bullshit" lead that he could not use because it contained no email address or phone number for the potential customer. Transcript at 9. Although the employer's internet sales manager offered to help claimant obtain more information about the potential customer, claimant rejected his assistance and began to argue angrily with D, accusing D of mistreating him. Both D and claimant used foul language as they argued. Transcript at 11. At one point in the argument, D told claimant he needed to go home. Claimant then attempted to talk to R, the sales manager who supervised claimant's work. R said that he was "standing behind" D and would not talk to claimant. Transcript at 25. Claimant and D's argument was overheard by customers on the sales floor of the dealership. Transcript at 15.

(4) After D directed claimant to go home, claimant worked for approximately one more hour and left the dealership. As he walked to his vehicle in the parking lot, he saw D and approached him to continue

their argument. Claimant yelled at D, and threw his hands up in the air, within two to three inches from D's face. At some point in the argument, claimant took off his jacket and threw it to the ground. Transcript at 16-17. R, who was also in the parking lot and had witnessed the altercation, was afraid that claimant was going to assault D. R got between the two men in an attempt to break up the fight, and D told claimant to go home. Claimant continued to argue with D for a time, but eventually left the parking lot in his vehicle.

(5) On November 14, 2016, the employer discharged claimant for "unprofessional and inappropriate" behavior on November 10.

CONCLUSION AND REASONS: We agree 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. 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 has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected that claimant would behave in a professional and courteous manner in the workplace, and would avoid physical confrontations with coworkers. Claimant knew about and understood these expectations as a matter of common sense. Claimant failed to meet these expectations when, on November 10, 2016, he engaged in an angry argument with a manager, during which claimant used foul language which was overheard by customers, and when he continued the argument by physically confronting the manager in the employer's parking lot. Claimant consciously violated the employer's expectations regarding appropriate behavior in the workplace.

Claimant admitted that he argued with a manager and had a confrontation with the same manager in the parking lot, but insisted that he was not the aggressor, implying that he acted in self-defense and in response to provocation by D. According to claimant, the argument with D was started by D's statement to claimant, after D had paged him twice about a "hot lead," that "[i]f I ever have to page you twice again you'll never get another 'F'-ing lead." Transcript at 33. In regard to the confrontation in the parking lot, claimant testified that when he walked to the employer's parking lot to get his vehicle and go home,

...[R] was in the back of his truck getting a beer. And I said, 'So you won't even talk to me?' And then he jumped out of his truck and got in my face and looked around and asked me to come back into a darker area. I went back into that area and Derrick came out of nowhere. And I said, 'Oh, okay, so you guys want to double, you know, double up on me. Go ahead. Let's do it, you know.'" And then there was an argument. We argued back and forth. And I went home. Transcript at 36.

Claimant's version of his conduct on November 10 was contradicted by two employer witnesses who were not directly involved in the dispute. Both the employer's finance manager and internet sales manager testified that claimant engaged in an angry argument with D and used foul language, and that the argument was overheard by customers on the sales floor. The internet sales manager observed the parking lot incident, and testified that he saw

[claimant] was taking off his jacket trying to fight [D] and that's kind of when -- when I kind of started getting a little bit closer. At that point [R] stood in between them with his hands up in the air trying to you know, block anything from occurring. Transcript at 17.

The testimony of these two witnesses outweighed claimant's testimony about the events of November 10. We therefore find it more likely than not that claimant engaged in conduct on November 10 that violated the employer's expectations regarding employee behavior.

Claimant's November 10 conduct is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. Under that rule, an "isolated instance of poor judgment" is conduct that does not exceed mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant chose to persist in arguing angrily with a manager and physically confront the manager, rather than attempting to resolve his concerns in a nonviolent and less disruptive way. A reasonable employer would no longer be able to trust that an employee who did what claimant did would be able to perform his job duties without resorting to aggressive arguments or physical confrontation to resolve disagreements with his coworkers. Accordingly, claimant's conduct constituted an irreparable breach of trust in the employment relationship and cannot be excused under OAR 471-030-0038(3)(b).

Claimant's conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, or present evidence showing, that he had a good faith belief that the employer would condone his actions in arguing aggressively and physically confronting a manager. Claimant's conduct therefore did not result from a mistaken understanding of the employer's expectations regarding employee behavior.

The employer discharged claimant for misconduct. He is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-75994 is affirmed.

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

DATE of Service: February 27, 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.

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.