

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0210

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101040). On November 21, 2016, decision # 101040 became final, without a request for hearing having been filed. On December 16, 2016, claimant filed an untimely request for hearing. On January 25, 2016, ALJ Lohuis conducted a hearing, and on January 30, 2017, issued Hearing Decision 17-UI-75689, concluding that claimant demonstrated good cause for filing an untimely hearing request, and that the employer discharged claimant for misconduct. On February 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 17-UI-75689 concluding claimant had good cause for the late request for hearing. We therefore confined our review to the issue of whether the employer discharged claimant for misconduct.

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

EVIDENTIARY MATTER: At the hearing the ALJ admitted Exhibit 1, which consists of a two page memorandum claimant submitted with his hearing request, and Exhibit 2, which consists of a one page memorandum, a copy of a handwritten note, a copy of some text messages, and a job description for an assistant golf course superintendent position. The ALJ mistakenly marked Exhibit 2 as Exhibit 1, however. This mistake has been corrected in the record, and the documents that are included in Exhibit 2 are properly identified.

FINDINGS OF FACT: (1) Eugene Country Club employed claimant until September 26, 2016, last as assistant golf course superintendent.

(2) On March 15, 2016, claimant yelled at C, a new employee; this interaction was observed by another employee, who said that claimant “was out of line.” Transcript at 36. Claimant’s supervisor met with C and claimant; during the meeting, C accused claimant of harassing him. Claimant apologized to C, and also apologized to the employee who had witnessed claimant’s angry outburst. Transcript at 37.

(3) On May 6, 2016, claimant’s supervisor talked with claimant about issues related to his job performance. Claimant became “very defensive and combative” during this discussion, but eventually calmed down. Transcript at 35-36. On May 7, 2016, claimant became angry and “blew up again” in disagreeing with his supervisor about a directive claimant had given to an employee he supervised. Transcript at 35. Claimant’s supervisor orally counseled claimant about the need to control his anger on both of those occasions.

(4) On June 16, 2016, claimant concluded that his supervisor had failed to pay him a sufficient bonus for his work on a televised National College Athletic Association (NCAA) tournament. Claimant sent his supervisor the following text message: “I got cheated in pay on the NCAA tournament.” Exhibit 2. Claimant’s supervisor responded with the following text message: “OK. I’ll get ur hours” *Id.* After looking into the matter, claimant’s supervisor realized that claimant was a salaried employee and not eligible for overtime, that he had paid claimant a \$100 bonus, and that no other employee had received a bonus for work on the NCAA event. Transcript at 34, 62-63. When his supervisor attempted to explain to claimant the arrangements regarding his pay and bonus, claimant became very upset, and angrily argued with his supervisor, accusing him the supervisor of lying to and cheating him. The supervisor was disturbed by claimant’s reaction and told claimant he was fired. Claimant eventually calmed down, and the supervisor rescinded his decision to discharge claimant, but orally warned claimant that “one more time any outburst in the future and [you] will be terminated.” Transcript at 33. The supervisor also gave claimant a written warning about his behavior. Transcript at 34.

(5) Sometime prior to September 23, 2016, claimant concluded that another employee, C, had been talking critically about claimant to claimant’s supervisor; claimant believed that C was attempting to get claimant fired. Transcript at 28. On September 23, claimant and 7 or 8 employees were in the employer’s lunchroom when C walked in. Claimant yelled at C, saying that he heard that C had “been saying some stuff to the boss...Why couldn’t you just come to me as a man?” Claimant got out of his chair, approached C, and again loudly asked C “...why didn’t you come to me as a man? Why didn’t you come to me?” Transcript at 46. C responded that claimant seemed to be very angry, and that he did not think they should talk about “this.” One of the other employees present in the lunchroom got between claimant and C, told claimant to sit down, and also told C to leave the lunchroom, which he did. The employee who had intervened subsequently checked on C and found him to be “visibly shaken.” *Id.*

(6) On September 26, 2016, the employer discharged for improper conduct during the incident with C on September 23, 2016.

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 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.

The employer discharged claimant for engaging in an angry and aggressive confrontation with a coworker on September 23, 2016. Claimant knew, as a matter of common sense, that the employer expected him to treat his coworkers with courtesy and respect, and refrain from angry and threatening behavior when interacting with them. In addition, claimant's supervisor had orally counseled claimant and, after claimant angrily accused the supervisor of lying to and cheating him on June 16, 2016, warned claimant in writing that any further outbursts would result in his discharge. In spite of these warnings, claimant chose to confront his coworker C in the employer's lunchroom on September 23. During the incident, claimant yelled at C and accused him of talking to the supervisor in an attempt to get claimant fired. Claimant also got up from his chair, and stepped toward C in a manner that caused a coworker enough concern about a possible physical altercation that the coworker stepped between C and claimant. The encounter left C "visibly shaken." Claimant's conduct on September 23 demonstrated a deliberate and conscious disregard of the employer's expectation regarding appropriate behavior in dealing with coworkers.

Claimant, however, asserted that he did not lose his temper when he spoke to C in the lunchroom on September 23. According to claimant, he told C in front of 7 or 8 coworkers in the lunchroom that he had "heard you've been saying stuff behind my back" to the supervisor, because claimant wanted "people to know in the lunchroom that this guy was talking behind their backs and going to the boss." Transcript at 28. Although claimant admitted he "was a little upset," he insisted "there wasn't a confrontation" that required the intervention of his coworker. *Id.* Claimant testified, however, that at some point during the incident, a coworker told C he should leave the lunchroom. This assertion, which indicates that claimant was so visibly angry that it caused a coworker to take steps to defuse the situation, contradicts claimant's claim that he only "a little upset." Because claimant's testimony about the final incident is internally inconsistent, we conclude that it is outweighed by the first-hand testimony of the employee who was present in the lunchroom, and who stepped between claimant and C. As a result, we have found facts in accordance with the coworker's account of the events of September 23. We conclude it more likely than not that claimant angrily and aggressively confronted C on that date.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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 engaged in at least three inappropriate willful or wantonly negligent displays of anger – on May 6 and 7, 2016, and again on June 16, 2016. Claimant's behavior on June 16 was sufficiently antagonistic that his supervisor discharged him on that date, but subsequently rescinded his decision after claimant apologized. Because claimant's actions in angrily confronting his coworkers was not a single occurrence, it cannot be excused as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record

does not show, that he sincerely believed, or had a rational basis for believing, that he was acting appropriately during the angry interactions with his coworkers nor that the employer condoned those interactions.

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-75689 is affirmed.

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

DATE of Service: March 10, 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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