

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0315

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65545). Claimant filed a timely request for hearing. On March 7, 2017, ALJ Murdock conducted a hearing, and on March 8, 2017 issued Hearing Decision 17-UI-78439, affirming the Department's decision. On March 13, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not offered into evidence during the hearing, did not explain why he was unable to present the information at that time or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. He also failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Accordingly, under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090, EAB only considered the hearing record when reaching this decision. Pursuant to ORS 657.275(2), EAB performed a *de novo* review of the entire hearing record, including all testimony and the admitted exhibit.

FINDINGS OF FACT: (1) Riverview Terrace, a residential facility for seniors, employed claimant as a dish steward from July 10, 2014 to November 29, 2016.

(2) The employer's kitchen sanitation standards required kitchen workers to wash their hands at a washing station, rinse thoroughly and then sanitize them with a solution, whenever their hands came into contact with garbage or potentially unsanitary items or surfaces. Those standards also required kitchen workers to use gloves or sanitary utensils when handling ready-to-eat food items. The employer's kitchen sanitation standards were adopted to prevent cross-contamination of surfaces and foods by bacteria and the potential infection of residents. The employer's executive chef repeatedly counseled claimant orally about the employer's kitchen sanitation standards when he observed claimant violate them. Claimant was aware of the employer's expectations regarding kitchen sanitation.

(3) On August 11, 2016, the chef observed claimant scrape residual food from plates into a trash can with his bare hands and then handle clean dishes without first washing, rinsing and sanitizing his hands as he had been counseled to do. Claimant had only dipped his hands in the dirty dish water and then rinsed them off with a spray nozzle which he personally considered sufficient. The chef gave claimant a written warning about his failure to follow the employer's hand washing protocols and the risk of contamination such a failure creates. He warned claimant that repeating such conduct would result in termination. Exhibit 1.

(4) On November 24, 2016, a coworker observed claimant scoop ice cream out of an ice-cream container with his bare hand and then eat it. After the coworker reported the incident to the chef, the chef went into the cooler and examined the remaining ice cream in the container, saw four finger marks, and secured the container to later discuss with claimant. When claimant was confronted about his reported conduct by the executive chef, and shown the ice cream with visible finger marks in it, he had no explanation. After the chef reported the incident to the executive director, the employer discharged claimant, effective November 29, 2016, for violating its sanitation standards because it concluded it could no longer risk claimant's conduct potentially infecting its residents.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for contaminating food in violation of its kitchen sanitation standards. The employer had the right to expect claimant to refrain from contaminating ice cream by scooping it out with his bare hand as a matter of common sense and because claimant was aware of the employer's insistence that employees follow its sanitation practices in order to protect its residents. When confronted by the chef, claimant did not deny that he was responsible for the finger marks on the ice cream. The chef testified that when he spoke to claimant about it, he never received "a full explanation of how [claimant] said his fingers dragged across it. But when I asked, like it was full deep scoop, he really couldn't give that." Transcript at 6. At hearing, claimant admitted that he tasted the ice cream at the time and place in question, but denied scooping out ice cream with his bare hand. Transcript at 20-21. Claimant's attempt to explain how his fingers inadvertently made marks in the ice cream was implausible, as was his attempt to place blame for having done so on another person. We find it more likely than not that claimant contaminated the ice cream by scooping it with his bare hand with conscious indifference to the employer's standards and interests and in doing so, was at least wantonly negligent.

Claimant's conduct on November 24, 2016 cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(B). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's August 11 conduct in handling clean dishes after handling garbage with his bare hands, without washing them in accordance with the employer's sanitation practices, after repeated counseling, also demonstrated his indifference to the employer's interests in protecting its residents and also was at least wantonly negligent. Moreover, when the chef came to the executive director about the ice cream incident, they concluded, "we couldn't go on. I mean, we didn't want our residents to be affected by what was transpiring." Transcript at 13. Claimant's repeated violation of the employer's sanitation standards was not isolated and also created an irreparable breach of trust in the employment relationship and made a continued employment relationship impossible.

Claimant's November 24 conduct cannot be excused as the result of a good faith error. Claimant did not assert or show that he sincerely believed or had a factual basis for believing the employer would tolerate his conduct in putting his fingers into a ready to eat food item such as ice cream without sanitary gloves or using a sanitary utensil.

The employer discharged claimant for misconduct and he is disqualified from receiving unemployment insurance benefits on the basis of his work separation until he requalifies for benefits by earning four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-78439 is affirmed.

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

DATE of Service: April 4, 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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