

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0389

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 8, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104818). Claimant filed a timely request for hearing. On March 9, 2017, ALJ S. Lee conducted a hearing, and on March 13, 2017 issued Hearing Decision 17-UI-78810, reversing the Department's decision. On April 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Southern Oregon Goodwill employed claimant as a sales associate from August 28, 2013 until September 1, 2017.

(2) The employer expected that claimant would not threaten coworkers in the workplace. Claimant understood the employer's expectations.

(3) Before August 28, 2016, the employer did not consider that claimant had ever violated its expectations in any way or that he had ever threatened a coworker. Audio at ~11:40, ~11:57.

(4) On August 28, 2016, at around 7:00 p.m., the store was closing. At the time, claimant was acting as a key holder and his function was to ensure that customers left the store, the doors were locked and other closing tasks were performed. Claimant locked the store doors. One of claimant's coworkers was at a cash register waiting on a customer who was having difficulty deciding whether she was going to make a purchase. Claimant walked up to the register and told the coworker and the customer that they needed to "hurry up" because the store was closing and he needed to close the register. Audio at ~25:00. In front of the customer, the coworker lifted a finger at claimant to and told the customer, "Don't listen to him [claimant]." Audio at ~18:27, ~25:05. Claimant walked away and went to stand at the entrance

door, preventing new customers from entering the now-closed store and letting out customers that were leaving the store. Claimant was impatient at the delay in closing the store that was caused by the coworker continuing the transaction with the customer after the 7:00 p.m. closing time.

(5) After all customers had departed from the store, including the customer that the coworker had been helping, claimant went up to the coworker. Claimant told the coworker, "If you ever talk to me that way again in front of a customer, I'll slap the shit out of you." Audio at ~19:13, ~26:05. The coworker replied that claimant had been rude to interrupt him when he was waiting on a customer. Exhibit 1 at 3. The coworker walked away and claimant called him a "punk." *Id.* The coworker then went to the assistant manager and complained about claimant's behavior. Shortly thereafter, the assistant manager approached claimant and rebuked him for what he had said to the coworker. Claimant told the assistant manager that he had "lost it" at the coworker and that he knew his behavior had been "ridiculous." Audio at ~26:39. After speaking with the assistant manager, claimant left and went up to the coworker. Claimant told the coworker he wanted to apologize for what he had done and held out his hand to try to shake the coworker's hand. The coworker refused to take claimant's outstretched hand and walked away. Claimant then commented to the coworker, "You're being a baby." Audio at ~27:09. Claimant and the coworker had no further interactions that night.

(6) On September 1, 2017, the employer discharged claimant for threatening the coworker on August 28, 2017.

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 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. 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 statement that the employer's witnesses seized on as having constituted a threat was claimant's statement that he would "slap the shit out of the coworker" if the coworker ever again told a customer not to pay attention to him. Audio at ~14:04. Such a statement is best interpreted as a figure of speech expressing extreme displeasure and, without a showing as to additional or extenuating circumstances, is not reasonably construed as an actual threat to do harm to the person to whom it is directed. However, for purposes of this decision, it is assumed that the statement claimant made to the coworker on August 28, 2016 was at least a wantonly negligent violation of the employer's policy against making threats in the workplace.

While claimant's statement to the coworker may have been a wantonly negligent violation of the employer's standards, it is excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). A claimant's behavior may be excused as an isolated instance of poor judgment if it was single of infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To be excused,

the behavior at issue must also not have been of a type that exceeded “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). In this case, claimant had no history of violating the employer’s standards prior to the August 28, 2016 incident at issue. As such, claimant’s behavior on August 28, 2016 was isolated, and it meets the first prong of the test to be excused as an isolated instance of poor judgment.

Viewing the circumstances surrounding the statement that claimant made on August 28, 2016, claimant’s statement did not exceed mere poor judgment. First, claimant was understandably irritated that the coworker was delaying him in his duty to close the store and plausibly may have thought the coworker was undercutting his authority as key holder when the coworker instructed the customer to ignore him. While the second part of the interaction between claimant and the coworker resulted in claimant calling the coworker a “punk,” that was also understandable since it was reasonable for claimant to interpret what the coworker had just said to him as defending the coworker’s actions in instructing the customer to ignore claimant’s request to “hurry up.” In both instances, the statements that claimant made, while they should not be encouraged, were provoked in part by those of the coworker. In addition, shortly after the incident when the assistant manager spoke to him, claimant did not defend or try to justify the comments he made to the coworker, but stated they were “ridiculous,” “childish” and he “lost it.” Audio at ~26:39. Moreover, after claimant was rebuked by the assistant manager, he almost immediately attempted to apologize to the coworker, and called the coworker a “baby” only after the coworker conspicuously refused to shake his hands and smooth over the negative interactions that had just occurred between them. Audio at ~26:58. Given that the coworker took pains to reject claimant’s attempted apology, claimant’s final statement to the coworker was also understandable in light of the context and the coworker’s provocation. In sum, claimant’s statements were not such that they were reasonably interpreted as actual threats to harm the coworker, they were incited at least in part by affronts from the coworker, claimant tried to apologize to the coworker for having made the first two statements, claimant did not attempt to justify the statements he made to the coworker when the assistant manager spoke to him or at hearing, and the remorse claimant evinced at hearing for having made those statements to the coworker appeared sincere and credible. On these facts, a reasonable employer would not have concluded that the statements claimant made on August 28, 2016 were likely to recur or that it no longer could trust claimant to comply with its expectations in the future. As such, a reasonable employer would not have objectively concluded that by his behavior on August 28, 2016, claimant caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant’s behavior meets the second prong of the test to be excused as an isolated incident of poor judgment. Having met both prongs, claimant’s behavior on August 28, 2016, while constituting at least a wantonly negligent violation of the employer’s standards, was not misconduct.

The employer discharged claimant but not for unexcused misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-78810 is affirmed.

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

DATE of Service: May 5, 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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