

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0452

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On March 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95902). Claimant filed a timely request for hearing. On April 11, 2017, ALJ Lohr conducted a hearing, and on April 13, 2017 issued Hearing Decision 17-UI-80914, affirming the Department's decision. On April 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its written 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 the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Flurry Display employed claimant on and off after approximately 2007, with the last period of employment starting in April 2010 and ending on January 25, 2017. The employer was owned by claimant's sister and her husband and claimant was employed as a helper in the employer's plastic fabrication business. The employer's business operations were located in a workshop behind the residence of claimant's sister and brother-in-law.

(2) The employer expected claimant would refrain from making threats in the workplace, engaging in angry altercations in the workplace or deliberately damaging items that the employer had fabricated. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime before January 25, 2017, the employer entered into a contract under which it committed to fabricate 300 plastic shoeboxes for an upcoming sports event by January 25, 2017. Because the brother-in-law and claimant constituted the employer's entire workforce, the atmosphere in the shop became increasingly tense and stressful as the deadline approached. When the brother-in-law observed that

claimant was working no more than six hours each day on the shoeboxes, he became concerned about missing the deadline.

(4) On January 25, 2017, the day of the deadline, 50 shoeboxes remained to complete the order on time. That day, claimant arrived at the shop to begin working on shoeboxes with the brother-in-law. Claimant began talking to the brother-in-law about drinking and how drinking led to laziness. At some point, claimant stated that the brother-in-law was a lazy person. The brother-in-law told claimant, "You need to shut up." Audio at ~18:40. Claimant replied, "I don't have to shut up, you shut up." Audio at ~19:43. Despite the shoeboxes that needed to be completed to meet the deadline, the brother-in-law told claimant, "You're done here for today. You need to leave." Audio at ~20:28. Claimant refused to leave, became confrontational and asked the brother-in-law if he intended to call the police to remove claimant from the shop. Ultimately claimant agreed to leave voluntarily if the brother-in-law paid him the wages he was owed as of that day. Claimant added up the work hours for which he was owed pay and demanded that the payment be in cash. The brother-in-law told claimant he did not have the cash to pay claimant and that he would need to go to the bank to obtain the cash and would bring it to claimant's house. Claimant refused to allow the brother-in-law to come to his house, and the brother-in-law stated that he then would have to give claimant a check. As the brother-in-law left the shop to retrieve his checkbook from his adjacent residence, claimant shouted that he would not accept a check. The brother-in-law did not stop, but continued toward the residence.

(5) When the brother-in-law returned to the shop with his checkbook, he noticed that she shoebox on which claimant had been working was broken and he inferred claimant had deliberately damaged it because he was angry about having to accept a check. The brother-in-law told claimant he was going to deduct \$24.25 from the pay claimant was otherwise owed to take into account the cost of the broken shoebox. Claimant stated, "No you won't," to which the brother-in-law responded, "Watch me." Audio at ~24:40. Claimant jumped up out of the chair in which he had been sitting "in a rage" and yelled, "I'm going to break them all [the 50 shoeboxes they had worked on that day] up." Audio at ~24:45, ~25:38. The brother-in-law was concerned that claimant was going to physically assault him as he had done on one occasion before, or physically destroy the shoeboxes beyond repair. The brother-in-law went to the residence to call the police to remove claimant from the premises. Claimant followed him shouting, "I better not see you on the street or I'm gonna bash your face and give you two black eyes." Audio at ~27:05. After claimant had gone and the brother-in-law returned to the shop, the brother-in-law saw the claimant had destroyed over half the shoeboxes that were in production that day.

(6) On January 25, 2017, the employer was not willing to allow claimant to continue working after his altercation with the brother-in-law, and thereby discharged claimant on that day. The brother-in-law was unwilling to pursue a criminal action against claimant for his behavior on January 25, 2017. However, on January 30, 2017, the brother-in-law petitioned for and was issued a civil restraining order against claimant.

CONCLUSIONS AND REASONS: 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. 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).

Although claimant agreed that he deliberately broke one of the shoeboxes on January 25, 2017, he disputed most of the remainder of the brother-in-law's account of what happened on January 25, 2017. According to claimant's account, the brother-in-law inexplicably instructed him to "shut my mouth," called him a "punk" and then, still for no apparent reason, ran into the residence and called the police, despite the deadline looming that day for the completion of the final fifty shoeboxes. Audio at ~31:58. It makes no sense that the brother-in-law would for no reason and without provocation seriously jeopardize the employer's ability to meet the contractual deadline by sending claimant home, as would need to be accepted if claimant's testimony is assumed to be accurate. Because claimant's testimony was not consistent with common sense, and the testimony of the brother-in-law was plausible and made sense in light of the events on January 25, 2017, we accept it as, more likely than not, an accurate account of what happened that day. As such, claimant willfully violated the employer's standards when he threatened the brother-in-law with physical violence and deliberately destroyed at least some of the shoeboxes that the employer fabricated that day.

Claimant's behavior on January 25, 2017 may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior is excusable as an isolated instance of poor judgment if it was a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). For the behavior at issue to be excused it also must not have exceeded "mere poor judgment" by, among other things, violating the law or being tantamount to unlawful conduct, 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's behavior on January 25, 2017 likely constituted the crimes of menacing and criminal mischief or was at least tantamount to both. In Oregon, a person commits the misdemeanor crime of menacing if by words or conduct the person intentionally attempts to place another person in fear of imminent physical injury. ORS 163.190(1). In this case, claimant yelled in anger that he was going to "bash" the brother-in-law's face and blacken his eyes under circumstances from which it can only be inferred that claimant wanted to evoke apprehension in the brother-in-law. As well, a person commits the misdemeanor crime of criminal mischief if the person, with the intent of doing so or recklessly, damages the property of another in a specified amount without a reasonable ground to believe he has a right to do so. *See* ORS 164.345(1) (behavior constitutes criminal mischief in the third degree if one damages property with the intent to cause substantial inconvenience, has no right to do so and no reasonable ground to believe that such a right exists); ORS 164.354(1)(a) (behavior constitutes criminal mischief in the second degree if one intentionally damages the property of another in an amount exceeding \$500 and has no right to do so and no reasonable ground to believe that such a right exists or recklessly damages the property of another in an amount exceeding \$500); ORS 164.365(1)(a) (behavior constitutes criminal mischief in the first degree if damage exceeds \$1,000 and otherwise meets the intent elements). Here claimant could only have known he had no right to damage the shoeboxes he had been fabricating and he did so either intending to damage them or to inconvenience the employer. Although the degree of criminal mischief in which claimant engaged would depend on the amount of value of the damages he caused, his behavior at a minimum would meet the other elements of criminal mischief in

the first, the second or the third degree. Since claimant's behavior on January 25, 2017 violated or was tantamount to a violation of two criminal laws, it exceeded mere poor judgment and is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on January 25, 2017 excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he behaved as he did on January 25, 2017 as a result of failing to understand the employer's standards and, if he had made such a contention, it would have been implausible.

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

DECISION: Hearing Decision 17-UI-80914 is affirmed.

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

DATE of Service: May 15, 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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