

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0543

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75839). Claimant filed a timely request for hearing. On April 27, 2017, ALJ Wyatt conducted a hearing, and on May 3, 2017 issued Hearing Decision 17-UI-82471, affirming the Department's decision. On May 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ admitted Exhibit 1 into evidence at the hearing. However, the ALJ failed to mark those documents. Since the ALJ described the content of Exhibit 1 during the hearing and the documents were readily identifiable, EAB marked the documents as a clerical matter. *See* Audio Record at 9:58 to 13:27.

FINDINGS OF FACT: (1) Crescent Hotels & Resorts, LLC employed claimant from April 2015 until March 10, 2017 as a dishwasher.

(2) The employer expected its employees to treat each other in a respectful manner and refrain from coercing, intimidating or threatening coworkers. The employer also had a workplace violence prevention policy that prohibits, among other things, threatening behavior or conduct that is sufficiently severe, offensive or intimidating to create an abusive work environment for an employee. Such behavior includes conduct that is "provoking and unsafe," and "belligerent speech." Exhibit 1 at 7. Claimant understood the policy.

(3) On September 21, 2016, claimant confronted and argued with a coworker at work, with a raised voice, when she failed to pay him in a timely manner for a telephone she agreed to purchase from him. He told the coworker he knew where she lived and could go to her home. Transcript at 23-24. Another employee who witnessed the incident reported it to the employer. The employer gave claimant a written warning and reviewed the workplace violence prevention policy with claimant and instructed him to adhere to it in the future.

(4) On the morning of March 8, 2017, in the dishwasher work area, claimant discussed his frustration with his supervisor about not receiving a promotion to a different part of the kitchen. Claimant stated that he deserved and was promised the promotion by the former and current executive chefs. The supervisor had no knowledge of a promised promotion to claimant. Claimant became increasingly upset and referred to the chefs as “that motherfucker,” and “that son of a bitch.” Transcript at 6. The supervisor continued conversing with claimant to resolve the matter. The executive chef arrived at work. Claimant and the supervisor went to the chef’s office to discuss the promotion issue with him. Claimant and the chef disagreed about whether the chef had promised claimant a promotion. During the discussion, claimant’s supervisor asked claimant to calm down several times. Claimant would calm down, but his anger would “escalate” again. Transcript at 15. Claimant became angry, pointed at the chef from three feet away and stated, “You motherfucker, you’re a liar. You’re a fucking liar.” Transcript at 19. The chef felt intimidated by claimant. Claimant’s supervisor asked claimant to leave the restaurant.

(5) On March 10, 2017, the employer discharged claimant for using foul language and intimidating another employee at work.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant’s discharge was 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries 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 discharged claimant for behaving in a disrespectful, intimidating manner toward his supervisor and the executive chef. The employer had the right to expect claimant to be respectful of others while at work, and to avoid coercive and threatening language and behavior. The employer reminded claimant of that expectation and issued him a warning for a violation of that policy after he had an argument with a coworker at work in September 2016. Claimant therefore understood the employer’s expectations.

Claimant admitted using foul language directed personally at the executive chef on March 8, 2017, and admitted that it was a “highly charged” situation. Transcript at 28. However, he denied that his conduct was threatening and asserted that the supervisor and chef were “exaggerating” that they felt threatened by him so that claimant would be disqualified from receiving unemployment benefits. *Id.* However, the

chef's testimony was credible that claimant's conduct was "fairly intimidating" and that claimant displayed a "strong level of hostility" toward him. Transcript at 21. We conclude that the supervisor and chef's firsthand testimony about claimant's conduct and their reaction to it was more persuasive than claimant's denial. It is more likely than not that claimant use foul language to refer to the chef when he spoke with the supervisor, and that he pointed at the chef and used foul language personally directed at the chef while accusing him of being a liar, and that claimant intended his actions and language to intimidate or coerce the supervisor and chef regarding his desired promotion. In doing so, claimant consciously violated the employer's expectations and claimant's behavior was a willful violation of the employer's interest regarding claimant's treatment of coworkers.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused under this exculpatory provision only if it was a single or infrequent occurrence and not a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). To constitute an isolated instance of poor judgment, claimant's behavior also must not have been, among other things, the type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). On September 21, 2016, claimant engaged in conduct that constituted at least a wantonly negligent violation of the employer's expectations regarding the appropriate treatment of coworkers when he confronted a coworker and argued with her at work, and told her he knew where she lived. Claimant was upset because she had failed to pay a debt to him. Although claimant had the right to pursue payment of money owed to him, claimant knew or should have known that confronting the employee and using a raised voice to argue with her at work would violate the employer's expectations. Because claimant repeated that willful or wantonly negligent behavior on March 8, 2017, it may not be excused as an isolated instance of poor judgment.

In addition, a reasonable employer would conclude that claimant's behavior made a continued employment relationship with claimant impossible. Claimant's supervisor testified that he felt the employer could not continue to employ claimant because his behavior on March 8 was "scary," "the anger level was high," and the supervisor was concerned for the safety of the chef and others. Transcript at 13-14. Moreover, the employer could not resolve the situation to claimant's satisfaction, because it did not agree to promote claimant. Thus, there was a risk of future confrontation. Because claimant's behavior made a continued employment relationship impossible, it cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not allege or show that he sincerely believed or had any basis for believing the employer would excuse or condone his use of foul language and intimidating conduct toward his coworkers, especially given that the employer had disciplined him for similar behavior in September 2016.

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

DECISION: Hearing Decision 17-UI-82471 is affirmed.

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

DATE of Service: May 30, 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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