EO: 700
BYE: 201744

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

532
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0724

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 95131). On January 19, 2017, decision # 95131 became final, without a request for hearing having been filed. On March 8, 2017, the employer filed a late request for hearing. On March 9, 2017, ALJ Kangas issued Hearing Decision 17-UI-78590, which dismissed the employer's hearing request, subject to the employer's right to renew the request by responding to an appellant questionnaire within 14 days. The employer timely responded to the appellant questionnaire, and by letter dated March 23, 2017, the Office of Administrative Hearings (OAH) cancelled Hearing Decision 17-UI-78590. On March 28, 2017, OAH issued notice of a hearing scheduled for April 11, 2017. On April 12, 2017, ALJ Shoemake issued Hearing Decision 17-UI-80779, dismissing the employer's hearing request for failure to appear at the hearing. The employer filed a timely request to reopen. On May 15, 2017, ALJ Shoemake conducted a hearing, and on May 25, 2017, issued Hearing Decision 17-UI-84279, in which she allowed the employer's request to reopen and late hearing request, and concluded that the employer discharged claimant for misconduct. On June 9, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

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 included no explanation that any factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusions allowing the employer's request to reopen and late hearing request are **adopted**.

FINDINGS OF FACT: (1) Shopko Stores employed claimant as a GM Freight Teammate from February 27, 2015 until November 3, 2016.

(2) The employer's policy provided that employees could wear pierced jewelry only in their ears, and prohibited employees from wearing any other type of pierced jewelry while at work. Although claimant knew about and understood the employer's policy, he wore pierced jewelry in his bottom lip while at work for several months.

(3) Sometime during the week of October 15, 2016, the employer's apparel manager directed claimant to remove the pierced jewelry from his bottom lip. Claimant did not do so, however. Claimant believed that the manager's directive was unfair because he knew of two other employees who wore pierced jewelry but who were not told they must remove the jewelry. Audio recording at 36:51.

(4) Sometime during the week of October 22, 2016, the employer's assistant manager directed claimant to remove the pierced jewelry from his bottom lip. Claimant did so, but subsequently put the jewelry back in his lip. Audio recording at 37:52.

(5) On November 3, 2016, claimant reported for his assigned shift. After he had worked for approximately three hours, the store manager directed claimant to meet with him in his office. The store manager asked claimant if he would take the jewelry out of his lip, and claimant indicated he was unwilling to do so. The store manager then said that he would accept claimant's statement as a resignation. Audio recording at 39:47. Claimant then left the workplace, and never returned to work for the employer after November 3.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant for misconduct.

The employer considered that the statement claimant made at the at the November 3, 2016 meeting with the store manager to be an indication that claimant had resigned his position with the employer. Claimant, however, asserted that the employer discharged him. The first issue presented in this case is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation is a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). Based on the behavior and statement of the store manager at the November 3 meeting, we conclude that the employer was unwilling to allow claimant to continue working. Claimant's work separation was a discharge.

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) 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.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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).

The employer's policy prohibited employees from wearing any type of pierced jewelry, other than earrings, while at work. Claimant knew about and understood the policy regarding pierced jewelry, but understandably believed that the employer tolerated the jewelry he wore in his lip, since he had worn this jewelry on the job for many months without objection from a supervisor. The employer also reasonably expected that employees would obey the orders of a supervisor, an expectation which claimant understood as a matter of common sense. Sometime in October 2016, the employer began enforcing the rule against piercings and, on two occasions, told claimant to remove the jewelry from his lip; claimant refused to comply with these directives. The proximate cause of claimant's discharge, however, was his conduct at a November 3 meeting with the store manager. At that meeting, the store manager asked claimant if he would remove his lip jewelry; after claimant indicated his unwillingness to do so, the employer discharged him. Audio recording at 39:06. Claimant knew or should have known that his unwillingness to comply with the employer's policy regarding pierced jewelry violated the standards of behavior the employer expected of him. Claimant's actions were therefore at least wantonly negligent.

Claimant, however, argued that he did not refuse to remove his lip jewelry at the November 3 meeting, but only told the store manager that he would "rather not [remove the jewelry]." Audio recording at 39:06. Claimant would have us construe his statement as an indication of a personal preference rather than a refusal to comply with a manager's directive. Based on the orders he had received from two managers prior to his November 3 meeting, claimant knew, or should have known, that the employer did not want him to continue wearing his lip jewelry. At the November 3 meeting, claimant could have made it clear to the store manager that he would remove the jewelry, even though he did not wish to do so. Whatever statement claimant may have made at the November 3 meeting, his behavior indicated an unwillingness to remove his lip jewelry, conduct which he knew constituted a violation of the employer's policy and expectations.

Claimant also asserted that the employer's enforcement of the policy prohibiting pierced jewelry was selective. According to claimant, he wore pierced jewelry for many months without comment from his supervisor or other managers. In addition, claimant contended that a number of coworkers wore, and have continued to wear, pierced jewelry at work and have never been disciplined or discharged. Although the employer's rather sudden decision to require compliance with a policy that had been ignored for many months was somewhat unfair, it is within an employer's prerogative to determine the rules governing employees' workplace appearance, and to also determine how those rules will be enforced. In regard to claimant's contention that the employer arbitrarily singled him out for disciplinary action on account of his pierced jewelry, the employer's assistant manager provided unrebutted testimony that when claimant told her about coworkers who wore pierced jewelry, she directed these individuals to remove their jewelry and they did so. Audio recording at 43:23.

Claimant's actions – his unwillingness to obey a supervisor's directive and comply with the employer's policy regarding pierced jewelry – cannot be excused as an isolated instance of poor judgement under the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). On two occasions prior to the November 3 meeting with the store manager, claimant had refused to obey managers' directives to remove his lip jewelry. Claimant's unwillingness to comply with the employer's policy was therefore not a single or infrequent occurrence.

Nor can claimant's actions be excused as a good faith error. Claimant did not assert that he sincerely believed that the employer was willing to allow him to continue to wear his lip jewelry. To the contrary, the record shows that claimant understood the employer's prohibition against pierced jewelry: he testified that he did not tell the employer's human resource department that other employees were wearing pierced jewelry because he "did not want to possibly get someone else in trouble." Audio recording at 41:31.

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-84279 is affirmed.

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

DATE of Service: <u>July 10, 2017</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.