

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1099

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 160729). The employer filed a timely request for hearing. On September 1, 2017, ALJ L. Lee conducted a hearing, and on September 6, 2017 issued Hearing Decision 17-UI-91914, affirming the Department's decision. On September 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stark Firs Management, Inc. employed claimant from May 15, 2017 until May 23, 2017 as a laborer on a construction project.

(2) The employer expected employees to refrain from engaging in workplace violence and from being verbally abusive toward others at work. Claimant understood the employer's expectations as a matter of common sense.

(3) On May 23, 2017, claimant was working at a construction site in a common area of an apartment complex. Claimant and another employee (Jeff) saw a visitor arrive at the work site and talk to a third employee (Alex). Alex asked Jeff to give the visitor a bottle of Jeff's water, and Jeff refused. Alex and Jeff began to argue, and Alex then hit and threatened Jeff, and threw down a hammer. Claimant began to argue with Alex, and Alex slapped claimant on the head and face. Claimant called 9-1-1, and Alex hit him again, on his eye. Alex then kicked claimant, and the visitor threatened to get a gun. Alex and the visitor left the work site with another coworker. Claimant was highly upset by the incident. Claimant reported the incident to the police.

(4) Jeff went to the employer's office nearby and told the owner there was a problem at the construction site. Jeff and the owner went to the site, and claimant began yelling at the owner, who was of Middle Eastern descent, using foul language and calling the owner names, including "sand nigger." Transcript at 52. The owner then discharged claimant for allegedly fighting and for yelling at him.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ, and conclude that the employer discharged claimant, 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 employer discharged claimant because he allegedly engaged in a physical and verbal altercation with a coworker at work, and because he subsequently yelled and used an ethnic slur toward the owner. The employer had the right to prohibit physical and verbal abuse at work. Claimant understood the employer's expectations as a matter of common sense. The record contains no evidence to show that claimant was physically abusive toward the employee, Alex. However, the employer's witness asserted that "[the May 23, 2017 incident] was a mutual altercation and it would be unfair to . . . fire one of [the employees in the altercation] and not the other." Transcript at 8. The employer's other witness, who was present at the incident described claimant as "antagonizing" Alex. Transcript at 45. However, claimant's testimony was that Alex was the aggressor both verbally and physically. It is at least as likely as not that claimant's version of the events of the May 23 altercation occurred as he described as it is that events occurred as the employer's witness described. The employer has, therefore, not proven by a preponderance of the evidence that claimant engaged in physical or verbal abuse of his coworker, Alex. Therefore, to the extent the employer discharged claimant for engaging in physical or verbal abuse toward his coworker, the employer failed to show by a preponderance of the evidence that claimant violated its policy.

The record does show, however, that claimant more likely than not yelled and used an ethnic slur toward the owner. The employer provided hearsay testimony from the owner, and firsthand testimony from the employee who was present when the owner approached claimant, showing that claimant was verbally abusive toward the owner. Transcript at 50-52. Although claimant denied that he used an ethnic slur (Transcript at 55), weighing the evidence we conclude that claimant most likely acted as the employer alleged toward the owner, and, given what he said and the context in which he said it, that his conduct was willful or wantonly negligent. However, we also conclude that his conduct did not exceed an isolated instance of poor judgment. OAR 471-030-0038(1)(d) defines "isolated instance of poor judgment" to include "a single or infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior," which involves poor judgment, and does not exceed mere poor judgment by violating the law or being tantamount to a law violation, creating an irreparable breach of trust in the employment relationship, or otherwise making a continued employment relationship impossible.

Claimant's conduct toward the owner was isolated, as there is no evidence he had engaged in such behavior, or in other willful or wantonly negligent behavior, on prior occasions. Moreover, the record fails to show that claimant's conduct exceeded mere poor judgment. The employer did not allege or show that claimant's conduct toward the owner was unlawful or tantamount to unlawful conduct. Thus, for claimant's conduct to have exceeded mere poor judgment, it must be the type of conduct which,

considered objectively, caused an irreparable breach of trust in the employment relationship, making a continued employment relationship impossible. Claimant's conduct toward the owner, especially directing the term "sand nigger" toward him, was highly offensive. However, mitigating factors include that claimant was in a highly emotional state, having just been assaulted and then implicitly threatened with further, potentially lethal violence, and was, more likely than not, acting out in an unusual manner for him in the workplace. Moreover, considering the unusual nature of the incident that prompted claimant to engage in the hostile behavior toward the owner, it is unlikely the same conditions would occur and prompt similar behavior by claimant in the future. The record therefore fails to show that, viewed objectively, claimant's conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible. We therefore conclude that claimant's conduct did not exceed mere poor judgment.

The employer discharged claimant for conduct that is excusable as an isolated instance of poor judgment. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-91914 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 10, 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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