

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1102

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 65309). The employer filed a timely request for hearing. On August 31, 2017, ALJ Wymer conducted a hearing, and on September 1, 2017, issued Hearing Decision 17-UI-91816, concluding the employer discharged claimant for misconduct. On September 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Havasu Powersports employed claimant as a service advisor from April 24, 2017 to June 28, 2017.

(2) The employer expected its employees to refrain from physically aggressive or unlawful workplace behaviors. Claimant understood the employer's expectations.

(3) On Saturday, June 24, 2017, the employer's operation's manager sent an email to the service manager, who was claimant's supervisor, directing him to pull some work orders to be audited. Claimant, who was working that day and who generally was required to view service department emails and assist with any requests, viewed the email and then began fixing some of the notations on work orders before the operations manager saw what claimant was doing and instructed him to stop. He advised claimant that he and the owner wanted the service manager to do the work as a managerial exercise and that claimant "was not to do any of his work, period." Transcript at 21-22. Claimant then printed the email along with the work orders in question and placed them near the service manager's computer for his attention on Tuesday when he would next be at work.

(4) On Tuesday, June 27, when the service manager reported for work around 8:00 a.m. and saw

the email and work orders, claimant told him that the operations manager had sent the email requesting a work order audit and that he, claimant, was not allowed to do anything to help him out. However, the service manager instructed claimant to “jump right on in there and help him.” Transcript at 23. When claimant refused, the conversation got heated. The service manager came over to claimant and with his finger three to six inches from claimants face, stated, “I don’t fucking think that I like your tone.” “I don’t fucking think that I like your attitude.” “You’re not going to tell me how to do my fucking job.” Transcript at 28. Claimant smacked the service managers finger away and told the service manager, “Do not put your finger in my face...I can't help you out with your fucking job...[The operations manager] told me not to help you out, so there’s nothing I can do to help you except do my job today. Any work orders that come in today I’ll do my job, make sure that you have time to do them.” Transcript at 27-28. Claimant then said, “If we need to have this further conversation we can go outside away from the customers.” Transcript at 25. The service manager declined and the two returned to their computers, performed their jobs and kept their distance the remainder of the day.

(5) Around 10:00 a.m. that morning, claimant sent an email to the operation’s manager:

“I have lost my patience and temper with [the service manager]. Just letting you know in case [the owner] fires me today. I’m almost sure that you folks will have no choice but to can me after I jumped in the middle of Dan’s shit. Sorry, boss, I’ve had enough of him not doing his job and me having to cover up for him.”

Transcript at 37.

(6) The following day, when claimant reported for work, the owner discharged claimant for allegedly “physically assaulting someone and then threatening further assault [which is] a violation of law.” Transcript at 7.

(7) Prior to this incident, the employer, including the service manager, considered claimant a good employee who always did his job when asked and who had never been disciplined.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude 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. 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 bears the burden to establish each and every element of misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant's first-hand testimony about the facts relating to the June 27 confrontation that led to his discharge differed from that of the employer's service manager, who also participated in the confrontation. However, the service manager initially testified that claimant "slapped my [the service manager's] hand out of his [claimant's] face" before testifying that his hand was four to five inches in front of his own body which was three to four feet from claimant when claimant slapped it away. Viewed objectively, that would have been difficult as the service manager's hand would have been at least two and one-half feet from claimant's face. Transcript at 15. Claimant, however, maintained that the reason he slapped the service manager's hand away was that it was three to six inches from the bridge of his nose, which he considered an invasion of his personal space, and that the service manager had raised his voice and was using foul language when speaking to him. Transcript at 23, 27-28. On balance, claimant's testimony was at least as credible as the service manager's. Where the evidence is no more than equally balanced, the party with the burden of persuasion -- here, the employer -- has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's testimony.

The ALJ concluded that claimant's discharge was for misconduct, reasoning that claimant's act of smacking the service manager's hand away from him rather than telling him to remove it was at least wantonly negligent and that his conduct could not be excused as an isolated instance of poor judgment because the employer's owner "considered claimant's behavior to be so egregious that he was unwilling to maintain an employment relationship with him." Hearing Decision 17-UI-91816 at 4. We disagree.

Viewing the record as a whole, claimant's conduct did not rise to the level of an unlawful assault on a coworker, which was the conduct for which he was discharged. In claimant's words, given the service manager's escalated tone and volume of his voice, "when I had a finger put in my personal space I smacked it away." That description, which we accept as credible, amounted to a use of force which a person believes is reasonably necessary under the circumstances, which is justified as self-defense under ORS 161.209.¹ Even assuming, as the ALJ concluded, that claimant's conduct was at least wantonly negligent, we disagree with the ALJ's conclusion that his discharge was for misconduct, and not for an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. There was no dispute that prior to June 27, the employer considered claimant a good employee who had never been disciplined. However, OAR 471-030-0038(1)(d)(D) provides that some conduct, although isolated, may exceed poor judgment, including unlawful conduct, conducts tantamount to an unlawful act, and conduct that causes a breach of trust in the employment relationship or makes a future employment relationship impossible. Here, if the employer's owner or the service manager truly had considered claimant's conduct an unlawful assault, the employer likely would have reported the incident to the local police. And, as stated earlier, claimant's conduct likely was no more than an attempt to defend himself from the service manager's invasion of his personal space and potential physical contact given his anger at the time, which was not unlawful. Although the

¹ ORS 161.209. Use of physical force in defense of a person. Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose. [1971 c.743 §22]

employer's owner also asserted that claimant "threatened further altercation with the service manager outside" after their disagreement, other than the service manager's bare assertion that claimant threatened to "beat him down" in the future and claimant's denial, which was no more than equally balanced, there was no other evidence that claimant escalated the disagreement in any way. *Cf.* Transcript at 15, 23. Claimant also explained that his intent in suggesting the two of them go outside was to avoid their obviously unprofessional conduct in front of customers. Transcript at 23. Moreover, it was undisputed that claimant and the service manager worked closely together for the remainder of the day in question without incident and that claimant acted professionally after the incident up until he was discharged. Considering those additional facts, claimant's conduct was not of the sort that would *objectively* cause an employer to be unable to trust claimant to work without incident with the service manager or other coworkers in the future.

Accordingly, we conclude the employer discharged claimant because of an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-91816 is set aside, as outlined above.²

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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.