

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1358

Reversed
Disqualification

PROCEDURAL HISTORY: On October 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115700). Claimant filed a timely request for hearing. On November 8, 2017, ALJ S. Lee conducted a hearing, and on November 15, 2017, issued Hearing Decision 17-UI-96872, concluding the employer discharged claimant, but not for misconduct. On November 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Resource Management Inc. employed claimant as a dietary aide from April 22, 2015 to September 22, 2017. The employer provided human resource, payroll and benefit functions for its client, Mennonite Management Services, which operated Macdonald Residence, an assisted living facility for patients with physical and mental disabilities, at which claimant worked.

(2) The employer had a written “resident’s rights policy” which provided that residents at client facilities were to be treated with dignity and respect, free from both physical and verbal abuse even when the residents were rude and disrespectful, which often occurred. Transcript at 6, 39. The employer also had a written code of conduct that provided that dismissive or disrespectful behavior toward residents was prohibited. At hire, claimant was provided copies of the employer’s written policies and the employer regularly reviewed and discussed its policies with employees at staff meetings. Claimant was aware of and understood the employer’s policies and expectations.

(3) On September 20, 2017, claimant was working in the dining area at meal time where two of his job duties were to take a head count of the residents in attendance and to serve them. After claimant served drinks to the residents in attendance, he began to perform a head count. A resident (R1), who had just entered the dining area, sat next to another resident (R2) who had already been served his drink. After

R1 had been sitting for a couple of minutes without being served, he yelled to claimant, "I'm dying of thirst over here", to which claimant jokingly replied, "[but] you aren't dead yet" as he continued to perform the head count. Transcript at 19. R2 then became upset and said, "You can't talk to us like that. You're here to serve us", to which claimant loudly replied, "You can't talk to staff that way" and "I'm not your slave" as he approached the resident. Transcript at 19, 28. Claimant then said to R2, "Ain't he [R1] a man? He can talk for himself... Are you his boyfriend or something?" Transcript at 29. R2 then attempted to stand up out of his wheel chair and said "Let's take this outside" to which claimant agreed and moved toward R2 in a threatening manner. A charge nurse who witnessed the exchange and two staff members then positioned themselves between claimant and the residents to defuse the situation and redirected claimant to the kitchen area where he was told to stay. Claimant returned to the kitchen for a few minutes but then reentered the dining area to finish his head count. When R2 saw claimant return, he yelled something at him, claimant yelled something back and then R2 said "Shut the "f" up and serve us." Claimant responded, "Shut up" and stepped toward R2. Transcript at 30. The staff again got between them. The person in charge then sent claimant home for the day.

(4) Several other residents in the dining room witnessed the exchanges between claimant and R2, appeared shaken by what they saw and following the incident told the employer's representatives they were fearful of being in the dining area. Another resident who also observed the exchange between claimant and R2 while it was going on, moved toward R2 and stated that "he wanted to fight [R2] as well," necessitating another staff member to intervene with that resident. Transcript at 21. The employer was required to report the incident to a state Adult Protective Services agency, which commenced an investigation.

(5) The employer reviewed claimant's actions in the September 20th incident, and on September 22, 2017, discharged claimant for his actions toward the resident in question which it considered violations of its resident's rights policy and code of conduct.

(6) Prior to the September 20th incident, claimant had not been disciplined by the employer.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 17-UI-96872, the ALJ found that the employer discharged claimant for claimant's interactions with R2 on September 20th, which the ALJ considered at least a wantonly negligent

violation of the employer's reasonable policies regarding employee conduct toward residents. Hearing Decision 17-UI-96872 at 4. However, the ALJ concluded claimant's conduct was no more than an isolated instance of poor judgment, which was not disqualifying, reasoning, "Claimant disputed that he was threatening in his comments or actions, but admitted that he was inappropriate. With his long history of good conduct, I could not find this incident too egregious to be excusable as an isolated instance of poor judgment." *Id.* We disagree.

Some acts, even if isolated, that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d). Here, although R2 initially told claimant "You can't talk to us like that. You're here to serve us", it was claimant who inflamed the situation by responding that he was not their "slave" and inquiring if R2 was R1's "boyfriend" which caused an elderly resident in a motorized scooter to attempt to get up and fight claimant, and claimant then aggressively moved toward R2 in front of a large group of vulnerable residents, some of which became fearful and another of which wanted to join in a fight, all of which prompted other staff to intervene. After being directed to return to the kitchen area and encouraged to stay there, claimant nonetheless chose to return to the dining area where he re-engaged with R2, whose comments prompted claimant to respond "shut up" to R2 while again moving aggressively toward him, requiring the staff to again intervene and eventually send claimant home. Eventually, the employer was required to report the incident to a state agency, whose function is to provide protective services to vulnerable adults and which commenced an investigation.

At hearing, the administrator of the assisted living facility explained that she felt she was left with no choice but to discharge claimant from employment. She testified, "[Y]ou know, any type of like verbal altercation or aggression towards a resident is considered abusive [and] the State requires that we have very specific policies around that. And I personally didn't feel that it would be appropriate to have [claimant] come back to work especially because... we do work with a difficult population...they also have to trust us that... even in moments where maybe they're not behaving correctly that we're going to model the behavior that we would like to see." Transcript at 12-13. Under the circumstances, viewed objectively, claimant's behavior toward a vulnerable disabled resident, which included re-engaging with him in a threatening manner after being told to leave the area and thereby continuing to provoke him, was sufficient to create an irreparable breach of trust in the employment relationship that, objectively considered, made a continued employment relationship impossible. Accordingly, claimant's conduct exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct also was not the result of a good faith error. Claimant admitted that he understood the employer's policies and expectations regarding employee behavior toward residents, even in difficult circumstances where the resident is disrespectful and rude toward the employee. "They said we should just walk away or just take a minute. Go outside or something." Transcript at 30-31. Claimant's conduct was not the result of an error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-96872 is set aside, as outlined above.

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

DATE of Service: December 28, 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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