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BYE: 201902

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

846
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0267

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 31, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135133). Claimant filed a timely request for hearing. On February 23, 2018, ALJ McGorrin conducted a hearing and issued Hearing Decision 18-UI-103922, affirming the Department's decision. On March 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but 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). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Industry, Inc. employed claimant from January 2016 until January 14, 2018 as a bartender and server in its restaurant.

(2) The employer had zero tolerance policy against harassment in the workplace that prohibited, among other things, offensive comments or jokes of a racial or sexual nature, and statements that created an intimidating environment. Claimant understood the employer's policy.

(3) In late 2017, a female employee told claimant that she felt bloated. Claimant stated to the employee, "There are coat hangers in the back." Audio Record at 13:02 to 13:09.

(4) In December 2017, the same female employee told claimant that she had dated African American men. Several days later, claimant saw the female employee order a fried chicken sandwich from the employer's menu. He stated to her at that time, "With your lifestyle choices, I'm surprised you don't get a side of watermelon with that." Audio Record at 23:31 to 23:39. The employee complained to the employer's manager about that comment and claimant's prior comment when she had told him she felt bloated.

(5) On December 26, 2017, the employer gave claimant a written warning for making "discriminatory and unsettling remarks to some of his fellow coworkers." The warning stated that coworkers had reported the statements because they felt "offended and uncomfortable." The warning referred to the two comments he had made to the female employee, and warned him that the employer had a zero tolerance policy against offensive language at work and that any future comments of that nature would result in claimant's immediate termination. Audio Record at 16:40 to 17:15.

(6) On January 12, 2018, while working with the female employee who reported claimant's statements to the employer, claimant stated to her, "Part of me thought it would be funny to stick my write-up on the side of the espresso machine [at work]." Audio Record at 21:45 to 21:59. The employee complained to the manager that she felt claimant was harassing her for having reported his statements to the employer.

(7) On January 14, 2018, the employer discharged claimant for violating its policy against harassment in the workplace.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude 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. 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 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 because he stated to a coworker who had complained about his prior inappropriate comments that he "thought it would be funny" to post the written warning on the espresso machine at work, presumably where other employees would see it. The employer considered the statement to be retaliatory. Claimant understood that the employer expected him to refrain from making harassing comments at work. However, claimant asserted at hearing that he did not intend to post the warning, but thought it might be "amusing" to other employees that he got in trouble at work. Audio Record at 22:07 to 23:09. Regardless of whether claimant intended to post the warning, a reasonable person would construe claimant's comment as an attempt to show hostility toward the coworker for having complained about claimant's inappropriate comments, and would feel claimant's statement caused an offensive work environment and interfered with the coworker's ability to focus on her work. Moreover, claimant knew or should have known that his statement was unacceptable because he had already received warnings that clarified what type of jokes to avoid at work, and the employer had stated it had a zero tolerance policy for statements, like claimant's statement, that caused an intimidating work environment. We conclude claimant's conduct was at least a wantonly negligent disregard of the employer's zero tolerance policy against harassment at work.

Claimant's conduct on January 12, 2018 cannot be excused as an isolated instance of poor judgment under OAR 471-030- 0038(3)(b). For conduct to be considered an "isolated" instance of poor judgment,

it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's conduct on January 12 was not isolated because claimant had made prior statements that were also inappropriate and a violation of the employer's policy against harassment at work. Claimant did not dispute that his statements on two separate prior occasions referencing a non-surgical abortion and a racial stereotype violated the employer's reasonable expectations against harassment at work. Claimant's prior statements show that his statement in the final incident on January 12 was a repeated act and a pattern of willful or wantonly negligent conduct. It cannot, therefore, be excused as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. Claimant's implied assertion that any of his statements were good faith errors because other employees also made such comments and "there's a lot of jokes that go around [at work] that *shouldn't be said*," is rejected for that reason. *See* Audio Record at 23:50 to 23:55; (italics added). Claimant did not show that he had a good faith belief that the employer would condone such statements that "shouldn't be said" merely because other employees allegedly violate the same policy. The record does not show that claimant reasonably believed, or had a factual basis for believing, the employer would condone joking that could be construed as retaliatory, or that was regarding race or sexual topics.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation, and until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 18-UI-103922 is affirmed.

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

DATE of Service: <u>April 11, 2018</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.

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