

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0273

Reversed
Disqualification

PROCEDURAL HISTORY: On January 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 140258). The employer filed a timely request for hearing. On February 23, 2018, ALJ Shoemake conducted a hearing, and on March 1, 2018 issued Hearing Decision 18-UI-104224, affirming the Department's decision. On March 16, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument to the extent it was relevant, material, and based upon the hearing record.

FINDINGS OF FACT: (1) Cascade Warehouse Co. employed claimant as a forklift driver from August 9, 2017 to December 19, 2017.

(2) The employer had policies that prohibited employees from threatening violence, engaging in boisterous or disruptive activity, insubordination, and disrespect. The employer notified claimant of its policies.

(3) On December 18, 2017, claimant made a comment about allowing a forklift known to "flip[] back in gear" after the driver got off of it to drive through a door and off the loading dock. Transcript at 23. Claimant intended the comment as a joke.

(4) On December 19, 2018, the employer's operations manager learned of claimant's December 19th comment and approached claimant to discuss it. Claimant was "kind of annoyed" that the manager was treating his comment as though it was a "serious threat or something" when he had intended it as a joke. Transcript at 24.

(5) The manager asked claimant why he was not happy at the employer's business. Claimant responded that he had not received a three-month raise he had anticipated. The manager said he had not received the raise because of an accident that damaged materials. Claimant thought the accident was the result of

a lack of training, and thought that the employer withholding his raise to penalize him for something that occurred due to improper training was not fair. Claimant told the manager about the work he did and his contributions to the employer's business, his personal debts, and his belief that he was a better worker than many others. The manager commented that everyone thinks they are the best at their jobs but in reality are "not worth the money." Transcript at 25. Claimant became angry because he felt like the manager was "basically [] insulting me right now." Transcript at 25.

(6) At some point during his exchange with the manager, claimant became very angry. He had a "violent outburst" during which he used foul language, "became extremely upset, started yelling, screaming." Transcript at 5, 13. Claimant got louder, used more foul language, and began using his hands in an "aggressive manner." Transcript at 15. He said things including "[f]uck this place," "[f]uck you guys," and "[y]ou're only here because your dad fucked a millionaire." Transcript at 8.

(7) The manager began to feel "extremely threatened" by claimant's behavior and tried to walk away. Transcript at 15. Claimant followed him, "again yelling, cussing, screaming." *Id.* The manager told claimant's direct supervisor that claimant was "out of control right now" and asked that he try to calm claimant down. *Id.* The manager contacted the general manager, said he felt threatened and needed backup, and asked that the general manager call the police. The general manager did so.

(8) Claimant's supervisor told claimant to leave the workplace. Claimant went to gather his belongings in preparation to leave but continued his outburst, accusing the employer of doing "illegal stuff here . . . cheat . . . cut corners . . . don't buy equipment that the employees need . . ." Transcript at 28.

(9) As claimant left, he encountered the general manager and operations manager; he told them that working for the employer was "the worst job I ever had." Transcript at 29. Claimant felt the general manager then made fun of him for having to ride a bicycle, which caused claimant to feel very upset, and claimant was "still yelling and it's like after he insulted me, then I really started screaming outside." *Id.* Claimant stayed outside for 30 to 45 seconds screaming before he left. Transcript at 30.

(10) Claimant left the workplace. When he was a couple blocks away, the police encountered him and discussed what happened. Police told claimant he was "barred from the property" and "was told never to come back." Transcript at 31. Police contacted the general manager and told him that "the conversation ended with them saying that he [claimant] probably should not return to the property." Transcript at 9. The employer then "did enforce trespass" against claimant. *Id.*

(11) On December 22, 2017, the employer prepared a letter titled "Confirmation of Employee Separation." The letter stated that the employer "acknowledge[d] your voluntary quit due to job abandonment" and "also serves as notice that you are hereby barred and restricted from all [] [c]ompany facilities, and any violation will constitute trespassing." Exhibit 1.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that the employer discharged claimant for misconduct.

The employer alleged that claimant quit work. Claimant denied that he quit and alleged that the employer discharged him. The distinction between a voluntary leaving and a discharge is that if the employee could have continued to work for the same employer for an additional period of time, the

work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Although the employer did not tell claimant he was fired or discharged, the circumstances of claimant's work separation were such that no reasonable person would believe he was welcome to return to work. Claimant left work on December 19th because he was instructed to leave by his direct supervisor. Thereafter, police, whom the general manager had called to deal with claimant, told claimant he was barred from the property and never to return, police informed the employer that they had advised claimant not to return to the property, the employer "did enforce trespass" against claimant, and the employer subsequently sent a letter to claimant stating that he was barred and restricted from all company facilities, and any violation would constitute trespassing. At no time after sending claimant home from work or being notified that police had instructed claimant not to return to the workplace did the employer notify claimant that the police had been wrong, and that he should return to resolve the conflict with the employer and return to work. There is nothing in this record that would reasonably suggest to an employee that he would be allowed to continue working for the employer for an additional time or would be welcome to return to the workplace. The work separation was, therefore, 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that, on December 19th, "claimant was upset, yelled and used profanity," and that his conduct "was a wantonly negligent violation of the employer's policy that prohibited such conduct." Hearing Decision 18-UI-104224 at 4. We agree. Claimant engaged in conduct that violated policies about which he knew, under circumstances where he was, most likely, conscious of his conduct and knew or should have known the conduct would violate the standards of behavior any employer would have the right to expect of an employee. The ALJ also concluded, however, that "claimant's conduct was excusable as an isolated instance of poor judgment" because "[c]laimant had no prior incidents of similar conduct." *Id.* We disagree.

OAR 471-030-0038(1)(d) defines an isolated instance of poor judgment as a single or infrequent occurrence of poor judgment, but also states that "[a]cts 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)." The ALJ did not address whether claimant's conduct exceeded mere poor judgment such that the conduct did not fall within the exculpatory provisions; we conclude that it did.

As a preliminary matter, the employer's witnesses stated in its exhibit and during the hearing that the employer had continuing work available for claimant had he not left work on December 19th. The employer's claim is not plausible. Claimant left because he was told to leave, and stayed away because he was told by police not to return to work. The employer was aware that those things had occurred and did nothing to notify claimant that he was welcome to return. Claimant's conduct involved a protracted diatribe in which he yelled, screamed, used foul language, said "fuck you" and insulted the manager's parents, used his hands in an aggressive manner, followed the operations manager when he tried to walk away, accused the employer of engaging in unlawful and unethical practices, continued to scream outside after leaving, and, as a result of claimant's outburst, the operations manager "felt extremely threatened" by claimant such that he had the general manager call the police. After claimant left, the employer "did enforce trespass" and notified claimant by mail that he was not permitted to return to the employer's premises. For those reasons, the employer's claim that it would have allowed claimant to continue working is not plausible or credible. The acts claimant admitted he did, and the threat the employer perceived as a result of claimant's acts, were such that no reasonable employer would allow the individual to continue working. Claimant's conduct on December 19th, although isolated, therefore exceeded mere poor judgment by creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible, and cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for acts constituting a wantonly negligent violation of the standards of behavior it had the right to expect of him, which cannot be excused as an isolated instance of poor judgment. Claimant's discharge was, therefore, for misconduct, and claimant is subject to disqualification from receiving unemployment insurance benefits until he requalifies for benefits under Employment Department law.

DECISION: Hearing Decision 18-UI-104224 is set aside, as outlined above.

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

DATE of Service: April 12, 2018

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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