

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0374

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152420). Claimant filed a timely request for hearing. On March 28, 2018, ALJ Snyder conducted a hearing and issued Order No. 18-UI-106154, affirming the Department's decision. On April 5, 2018, ALJ Snyder issued Amended Order No. 18-UI-106736, which changed the date of disqualification. On April 16, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Gilda's Italian Restaurant employed claimant as a server from January 2016 until it discharged him on February 6, 2018.

(2) The employer expected claimant to maintain a professional demeanor at work and refrain from engaging in any angry, hostile conduct, including toward his coworkers. Claimant understood the employer's expectations as a matter of common sense.

(3) On January 20, 2018, claimant was working as the lead server. A coworker asked him if she could leave for the night, and claimant told her to finish her tables first. A few minutes later, the coworker returned to claimant and told him that the manager had told her to leave for the night. Claimant believed it was his decision when the server should leave because he was the "closing server" for the night. Claimant became angry, stated, "fine," and "stabbed" at the point of service monitor, "hitting it forcibly" with two fingers. Audio Record at 25:43 to 26:12.

(4) At the end of January 2018, the manager gave claimant a written warning for how he reacted when the server told him she was leaving on January 20, 2018. The manager told claimant the employer expected him to refrain from exhibiting hostility and a poor attitude while working, including displays of anger such as hitting the point of service monitor.

(5) On February 3, 2018, claimant's coworker asked him, as the lead server that night, what else she needed to do before she left for the night. Claimant told her to finish her tables, which he saw were still

in “disarray” and only “half closed,” then she could leave. Audio Record at 21:25 to 21:51. The coworker returned to claimant a short while later and stated that the manager had told her to go home. Claimant felt “irritated” by the situation, and told the coworker, “Fine, go ahead and go. You’re no good to me anyway.” Audio Record at 22:57 to 23:03. The owner saw claimant speaking angrily to the server and asked him what was happening. The claimant responded to the owner in a “combative,” angry tone that he was upset that the server was leaving early.

(6) On February 6, 2018, the employer discharged claimant for violating its behavior expectations.

CONCLUSIONS AND REASONS: We agree 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. 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.

The employer had the right to expect claimant to maintain a professional demeanor and refrain from losing his temper at work. Claimant knew or should have known that expectation as a matter of common sense and based on the written warning he received at the end of January 2018 prohibiting such conduct. On February 3, 2018, claimant chose to speak in a rude and hostile manner to his coworker and the owner. Claimant’s February 3 behavior was willful, and violated the employer’s expectations.

Claimant’s February 3 conduct is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. To be an “isolated instance of poor judgment,” the February 3 behavior at issue must have been, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant lost his temper toward a coworker on January 20, 2018, thereby previously violating the same employer standard, under circumstances where he knew or should have known that doing so was likely to violate the employer’s expectations of him. Given the prior incident on January 20, claimant’s willful conduct on February 3 was not a single occurrence of willful or wantonly negligent poor judgment. As such, it was not isolated and is not excusable as an isolated instance of poor judgment.

Claimant’s behavior on February 3 also was not excusable as a good faith error under OAR 471-030-0038(3)(b). Although claimant implicitly argued that he was justified in losing his temper toward his coworker because she did not meet his performance standards (Audio Record at 27:18 to 27:46), claimant did not dispute that he lost his temper or contend that he failed to control his temper because he mistakenly thought it was acceptable or tolerated by the owner. As well, any such contention would be implausible given the January warning against further angry outbursts toward coworkers. For these reasons, claimant’s behavior is not excused from constituting misconduct as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-106736 is affirmed.

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

DATE of Service: May 16, 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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