

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0690

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, not for misconduct (decision # 144216). The Employer filed a timely request for hearing. On May 31, 2018, Office of Administrative Hearings (OAH) served notice of a hearing scheduled for June 13, 2018. On June 13, 2018, ALJ Janzen conducted a hearing at which claimant failed to appear, and on June 21, 2018 issued Order No. 18-UI-111291, concluding claimant's discharge was for misconduct. On July 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant asked EAB to consider new information regarding his work separation from the employer. EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination, and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented him from offering the information into evidence at the hearing. OAR 471-040-0090 (October 29, 2006). Claimant asserted in his application for review that he had experienced health issues and had been in the hospital more than once with many doctor appointments, and did not understand the importance of Order No. 18-UI-111291. However claimant did not assert or show that his health issues, hospitalization or doctor appointments prevented him from appearing at the June 13, 2018 hearing, and his statement instead suggests that he simply did not understand the importance of appearing, which was within his reasonable control. Because claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering his information into evidence at the hearing, his request for EAB to consider new information is denied.

FINDINGS OF FACT: (1) Assisted Living Concepts Inc., employed claimant as a maintenance technician for approximate two years, until March 5, 2018.

(2) The employer had a policy that prohibited employees from engaging in verbal abuse of its assisted living residents. Claimant was aware of the employer's policy, as he had been previously trained by the employer at monthly meetings.

(3) As part of claimant's duties, he was responsible for preparing the rooms in the facility after residents vacated them, which included putting in new carpet, painting, replacing hardware and baseboards. Claimant understood that expectation.

(4) On March 1, 2018, claimant and the employer's Western division regulatory specialist were meeting when a resident poked her head into the regulatory specialist's office and asked to have her heat turned up. The regulatory specialist observed claimant hold up his middle finger, in anger, at the resident. The resident did not see claimant give her the finger. As the resident walked away claimant stated to the regulatory specialist that the resident was a fucking pain in his ass. During this same meeting, claimant was hostile and used profanity on three other occasions.

(5) In the previous four months, the regulatory specialist had given claimant at least five verbal warnings consisting of coaching and developmental discussions regarding his general performance, his attitude and not completing his work. Claimant's direct supervisor had also met with claimant twice during this period to discuss his work performance and the employer's expectations. On or about February 23, 2018, the regulatory specialist reminded claimant that rooms needed to be completed. As of March 1, 2018, claimant had not completed any of the rooms, which had been vacant for four months.

(6) On March 2, 2018, the employer discharged claimant because of his abusive behavior toward the resident on March 1, 2018.

CONCLUSIONS AND REASONS: We agree with 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 connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) 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 has the burden to establish 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 held up his middle finger at a resident in anger, and in a "very obvious way," and then stated to the employer "she [the resident] is a fucking pain in my ass." Recording at 9:50-11:15. Claimant was aware of the employer's policy prohibiting employees from engaging in verbal abuse of its assisted living residents.. ORS 124.050(1)(f). Claimant had attended monthly meetings and coaching by the employer about engaging in abusive behavior toward residents. Recording at 13:00-13:30. Claimant consciously chose to engage in abusive behavior toward the resident, which he knew or should have known violated the standards of behavior which the employer had the right to expect of an employee. Claimant's conduct therefore was, at best, wantonly negligent.

OAR 471-030-0038(3)(b) defines exceptions to “misconduct,” including isolated instances of poor judgment and good faith errors. OAR 471-030-0038(1)(d)(A) defines an isolated instance of poor judgment as a “a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” As stated above, in the four months prior to claimant’s discharge, the employer had met with claimant on at least seven occasions regarding his general performance, his attitude and not completing his work. Recording at 17:00-21:00. Claimant never indicated to the employer that he was experiencing any issues that interfered with his ability to get his work done. Recording at 20:00-21:50. Claimant’s ongoing failure to complete his work despite repeated warnings demonstrated a conscious indifference to the employer’s expectations and the consequences of his actions, which was, at best, wantonly negligent. His verbal abuse of the resident on March 1, 2018 therefore cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

Claimant’s behavior on March 1, 2018 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record fails to show claimant sincerely believed, and had a rational basis for believing, that verbally abusing the resident was consistent with the employer’s expectations.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 18-UI-111291 is affirmed.

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

DATE of Service: August 17, 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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