

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1014

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135238). Claimant filed a timely request for hearing. On May 22, 2014, ALJ Murdock conducted a hearing, and on May 27, 2014 issued Hearing Decision 14-UI-18393, reversing the Department's decision. On June 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it contended that claimant engaged in disqualifying misconduct on March 3, 2014 when he jokingly referred to the date that an employee of Middle Eastern ancestry was expected to return to work after a trip to the Middle East as the date when his terrorist training was completed. We agree with the ALJ's conclusion that claimant was not reasonably aware that such a comment, which claimant plausibly believed would not offend the employee to which it referred, might violate the employer's standards until he had received the January 28, 2014 final warning from the employer. We therefore also agree with the ALJ's conclusion that claimant's March 3, 2014 comment, assuming it involved a willful or wantonly negligent mental state, was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) (August 3, 2011). Because the employer's written argument did not address why claimant's March 3, 2014 comment was not subject to this exception, it did not persuade us that the ALJ's decision was incorrect.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 14-UI-18393 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** July 17, 2014

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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