

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1282

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On June 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 130838). Claimant filed a timely request for hearing. On July 17, 2014, ALJ Seideman conducted a hearing, and on July 25, 2014, issued Hearing Decision 14-UI-22218, affirming the administrative decision. On July 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.<sup>1</sup>

**FINDINGS OF FACT:** (1) Lebanon Rehab and Specialty Care employed claimant as a Certified Nursing Assistant (CNA) from February 17, 2004 to June 3, 2014.

(2) The employer expected employees to treat residents and other staff members in a professional and courteous manner. Claimant understood the employer's expectation because on August 1, 2013, she received a written warning regarding her use of inappropriate and unprofessional language in the workplace.

(3) On May 28, 2014, claimant and other CNAs were angrily discussing their work hours at the nurses' station. Claimant was upset because she had not been assigned to work the next day. In the midst of this discussion, a resident rang for assistance. Claimant entered the resident's room and angrily declared

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<sup>1</sup> Even if we had considered claimant's argument, it would not change the outcome of this decision, because claimant's argument concerns a base year extension issue that is apparently being adjudicated by the Department, and does not include any arguments as to why she should not be disqualified from receiving unemployment insurance benefits because of her discharge from Lebanon Rehab and Specialty Care.

that “Avamere is not going to fuck me over.” Audio ~ 6:28. Claimant said that she could not live on four days work for the pay period, that staff members with six months experience were scheduled to work the next day, and that “they think they can fucking tell me I’m not working.” Audio ~ 7:04. Another staff member who was in the room told claimant to calm down, and claimant left the room. The two residents in the room observed that claimant was really mad.

(4) Claimant worked for the employer on May 29, 2014. During claimant’s shift, the charge nurse on duty observed a resident who was standing in the doorway and leaning on the door. The nurse believed the resident was in danger of falling to the floor. Because claimant was the staff member closest to the resident, the nurse yelled at claimant to assist the resident. Claimant responded that “I’m not fucking running. He can fall for all I care. I’m not getting punched.” Audio ~ 13:29 to 13:35. Claimant was reluctant to help the resident because he had a history of hitting staff members. Claimant eventually assisted the charge nurse in transferring the resident to a wheelchair.

(5) On June 3, 2014, the employer discharged claimant for her use of inappropriate and unprofessional language on May 28 and 29, 2014.

**CONCLUSION 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect employees to treat coworkers and residents in its care facility in a courteous and professional manner. Claimant understood the employer’s expectations, both as a matter of common sense and because she had been warned about her use of inappropriate and unprofessional language on August 1, 2013. Claimant used foul language in front of a resident on May 28, 2014 because she was angry about her lack of work hours, and used foul language in addressing a coworker on May 29 because she did not want to assist a resident who might hit her. Claimant’s conscious decision to use language she knew was inappropriate demonstrated indifference to the consequences of her actions. Claimant’s conduct was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. An exercise of poor judgment is isolated if it is a single or infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior. Claimant used poor judgment on May 28, when she used foul language in front of a resident, and again on May 29, when she used foul language in addressing a

coworker. Claimant's exercise of poor judgment was, therefore, a repeated act and not a single occurrence.

Claimant's actions also did not result from a good faith error. After the warning she received regarding inappropriate language in August 2013, claimant cannot have sincerely believed that the employer would excuse her use of foul language in May 2014.

The employer discharged claimant for misconduct, and claimant is disqualified from the receipt of unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-22218 is affirmed.

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

**DATE of Service:** September 2, 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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