

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1297

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On June 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162513). Claimant filed a timely request for hearing. On July 21, 2014, ALJ Shoemake conducted a hearing, and on July 28, 2014 issued Hearing Decision 14-UI-22299, affirming the Department's decision. On July 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) JP Morgan Chase Bank employed claimant as a branch manager from May 1, 2011 to June 2, 2014.

(2) The employer's written code of conduct prohibited harassment or inappropriate conduct by or against employees, customers, suppliers, contractors or any other individuals who conducted business with the employer. The code of conduct provided some examples of prohibited behaviors, including comments, jokes or negative stereotyping, made verbally, via email, or through any other form of communication, that were insulting, degrading, exploitative, derogatory or discriminatory in nature. The employer provided and trained claimant on its code of conduct annually.

(3) On May 22 and 23, 2014, two employees claimant managed complained to the employer's district manager about claimant's behavior. The employer learned from one of the employees that claimant had sent her a text message referring to another employee as a "douche," and had referred to other employees as "fat" and "asshole." Exhibit 1. The employer also learned from the employee that claimant had referred to one of the employer's customers as a "hooker." Exhibit 1. The employer learned from the other employee that claimant repeatedly joked about the employee's religious beliefs, and once told her that her attitude was "shit." Exhibit 1.

(4) On May 28, 2014, the employer's human resources representative spoke with claimant, who admitted engaging in the conduct alleged by the employees he managed, asserting that he had been "lulled" into thinking that he and the employees were "close" and "like a family," such that they understood that he was joking. Transcript at 46. Claimant later sent the district manager a text message apologizing for his behavior, stating that after speaking to the employer's human resource representative, he realized how his joking could be misconstrued.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from the behavior reported by the two employees he managed. Claimant understood the employer's code of conduct prohibited harassment or inappropriate conduct by or against employees, customers, suppliers, contractors or any other individuals who conducted business with the employer. Claimant also understood that the code of conduct prohibited comments, jokes or negative stereotyping, made verbally, via email, or through any other form of communication, that were insulting, degrading, exploitative, derogatory or discriminatory in nature. Claimant knew or should have known from the code of conduct, training, and as a matter of common sense that referring to an employee as a "douche," an "asshole," or "fat," referring to a customer as a "hooker," repeatedly joking about an employee's religious beliefs, and telling an employee that her attitude was "shit" probably violated the employer's expectations. Claimant's conscious decisions to engage in such conduct demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment because it was a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence. *See* OAR 471-030-0038(1)(d)(A). Nor can claimant's conduct be excused as a good faith error. Although claimant may have believed that the employees he managed did not find his behavior offensive, he did not assert, and the record does not show, that he sincerely believed, and had a rational basis for believing, his conduct complied with the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 14-UI-22299 is affirmed.

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

**DATE of Service: September 5, 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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