EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1785

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 16, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 133858). The employer filed a timely request for hearing. On November 4, 2014, ALJ Lohr conducted a hearing, and issued Hearing Decision 14-UI-28177, affirming the Department's decision. On November 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant from September 23, 2010 to August 25, 2014 as a deli clerk.

(2) The employer's nondiscrimination and anti-harassment policy prohibited employees from making statements that could be perceived as discriminatory or harassing in nature at work. The employer provided claimant the policy at hire and in September 2013. The employer also expected employees to be courteous and contribute to a positive working environment at work. The employer expected employees to refrain from gossiping or causing "unrest amongst employees." Exhibit 1.

(3) On September 19, 2013, the employer gave claimant a warning because he jokingly called another employer a "loser" while working in the deli on September 8, 2013. Exhibit 1.

(4) On January 10, 2014, the employer gave claimant a three-day suspension from work because claimant engaged in a conversation with a coworker on January 9, 2014 that the employer considered to be gossip that "would lead to unrest amongst employees." Exhibit 1.

(5) On March 27, 2014, the employer suspended claimant because he failed to greet customers on the sales floor. The employer suspended claimant pursuant to its progressive discipline policy.

(6) On August 17, 2014, claimant engaged in a conversation with two deli clerks while working at the deli counter regarding transgender and homosexual people. In response to one of the clerk's comments,

claimant stated to her, "You're ignorant and uneducated and your church is stupid and your family is too. Can't believe you." Exhibit 1. The clerk reported the conversation and claimant's statements to a manager.

(7) On August 20, 2014, claimant's manager spoke with claimant, who admitted engaging in the conduct alleged by the employee. Claimant told the manager he understood the conversation was prohibited in the workplace.

(8) On August 25, 2014, the employer discharged claimant for making statements to a coworker at work that were discriminatory or harassing in nature.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but not 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 a right to expect claimant to refrain from making discriminatory or harassing statements to others at work. We infer that claimant understood the employer's expectation as a matter of common sense, and because the employer gave him its antidiscrimination policy in September 2013. Claimant knew or should have known that telling a coworker she was "ignorant and uneducated" and referring to her church and family as "stupid" probably violated the employer's expectations. Claimant's conscious decision to make such statements demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

However, claimant's conduct was an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

The employer did not allege or show claimant had violated the employer's antidiscrimination policy before August 20, 2014. Thus, claimant's conduct on August 20, 2014 was not a repeated act. Nor does the record show claimant's conduct in the final incident was part of a pattern of other willful or wantonly negligent behavior. Claimant was suspended from work for failing to greet customers on March 27, 2014. The record fails to show sufficient detail to determine if claimant consciously failed to greet the customers on March 27, 2014. Moreover, the employer's manager testified that, had claimant not already received warnings under the employer's progressive discipline policy, the employer would

not have disciplined him for failing to greet customers. Audio Record at 19:59 to 20:44. Thus, the preponderance of evidence does not show claimant consciously engaged in conduct he knew or should have known would probably violate the employer's expectations by failing to greet customers on March 27. Nor does the record show that claimant knew or should have known from prior experience, training or warnings that jokingly calling a coworker a "loser" would probably violate the employer's expectation that claimant be courteous and contribute to a positive working environment at work. Nor do we infer that claimant knew or should have known that as a matter of common sense. Similarly, the employer failed to show what claimant said on January 9, 2014, or how his statements violated the "no gossip" policy or otherwise "would lead to unrest amongst employees." In the absence of specific information about claimant's statements, we cannot determine whether claimant knew or should have known the statements would probably violate the employer's prohibition on gossip.

We also conclude that claimant's conduct did not exceed mere poor judgment. The record does not show claimant's conduct in the final incident violated the law, or was tantamount to unlawful conduct. Although claimant's statements to his coworker were offensive, they were not threatening or otherwise so egregious as to create an irreparable breach of trust in the employment relationship, or otherwise made a continued relationship impossible.

We therefore conclude the employer discharged claimant for an isolated instance of poor judgment, and not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-28177 is affirmed.

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

DATE of Service: **December 23, 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. 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.