

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1808**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150537). Claimant filed a timely request for hearing. On September 25, 2014, ALJ S. Lee conducted a hearing, and on November 3, 2014 issued Hearing Decision 14-UI-28068, affirming the Department's decision. On November 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Society of St. Vincent De Paul employed claimant from January 2, 2009 to August 11, 2014 as a retail associate.

(2) The employer expected employees to obey managers' reasonable instructions and behave in a respectful, professional manner towards coworkers and customers. Claimant understood the employer's expectations.

(3) In April 2014, the employer gave claimant a verbal and a written warning because claimant allegedly rolled her eyes at a customer who asked for assistance, and spoke rudely to coworkers. The employer warned claimant to be polite to customers and coworkers, and to refrain from having angry outbursts at work.

(4) Near the end of her shift on August 10, 2014, claimant began talking with a customer about personal matters after the customer realized she knew claimant's son. The assistant manager noticed there was a line of customers at the registers, and asked claimant to work at a register. Claimant heard the manager, and put up her finger to signal for the manager to wait while claimant continued talking with the customer. The assistant manager called claimant to the register again and claimant reported to the register. There was no longer a line of customers at the registers. Claimant was dissatisfied with how

the assistant manager told her to report to the register, and told the assistant manager she wanted to talk to her.

(5) Because claimant's shift was ending, the assistant manager went to the office with the "third key" manager, a manager trainee, and claimant. Claimant did not want to discuss her complaint with three managers in the office. The assistant manager left the office and went to the locker area. Claimant went to the locker area and loudly repeated several times her dissatisfaction with how the manager had called claimant to the register. The assistant manager told claimant to contact the general manager before she returned to work, and left the locker area.

(6) The assistant manager went to the office and locked the door. Claimant went to the office door and began "banging" on the locked door. Transcript at 31. Claimant stated she wanted to speak with the third key. The assistant manager told claimant the third key was occupied, and claimant could speak with her later. Claimant "banged" on the door again. The office was within earshot of customers. The assistant manager opened the door. Transcript at 31. Claimant entered the office and yelled at the assistant manager for several minutes before leaving the store. The assistant manager asked a coworker to walk her to her car.

(7) On August 11, 2014, the employer discharged claimant for failing to follow a manager's instructions and engaging in an angry outburst toward a manager on August 10, 2014.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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 connected work. 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 instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for her actions toward the assistant manager on August 10, 2014. At hearing, claimant and the employer disagreed regarding claimant's behavior during the final incidents resulting in her discharge. However, claimant's testimony was inconsistent during the hearing regarding her behavior on August 10. Claimant testified that she was discussing a death in the customer's family when the manager called her to the register (Transcript at 39), but testified later in the hearing that she was also explaining to the customer how the employer sorted clothing when the manager first called her to the register (Transcript at 56-57). Claimant testified she "did knock hard," when she went to the office (Transcript at 43), and also testified that she did not knock loudly when she went to the office to see the manager after she left the locker area (Transcript at 61). However, the assistant manager's

testimony was consistent with what she told the general manager at the time of claimant's discharge, and was corroborated by statements made to the general manager by another employee on August 11, 2014. *See* Transcript at 10. We therefore found facts in accordance with the employer's evidence on matters in dispute.

The employer had a right to expect claimant to follow instructions and to refrain from engaging in angry outbursts at work. Claimant knew or should have known the employer's expectations from prior warnings and as a matter of common sense. Claimant testified at hearing that she continued speaking with her son's friend rather than report to the register immediately because the customer was upset and claimant wanted to provide good customer service. Transcript at 39-40. Claimant's testimony is not persuasive because it does not show why she failed to explain the customer's needs to her manager rather than merely disobeying instructions, or why claimant prioritized the personal needs of her son's friend over the business needs of customers waiting in line. Claimant knew or should have known that failing to report to the register to assist waiting customers when her manager told her to do so probably violated the employer's expectations. Claimant's conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions and was, at best, wantonly negligent.

Claimant's actions cannot be excused as an isolated instance of poor judgment. Claimant's insubordination when she failed to report to the register and her subsequent angry outbursts when she yelled at her manager in the locker room, banged on the office door, and yelled at her manager again in the office, were separate and distinct violations of different employer expectations, as claimant had time to pause, reflect and assess the situation between each of those instances and nonetheless decided to continue her conduct despite having been given instructions to the contrary. Moreover, acts that create irreparable breaches of trust in the employment relationship or make a continued 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 assistant manager testified that she felt threatened by claimant on August 10 because claimant was yelling, "gritting her teeth," "combative," and "very angry." Transcript at 32, 33. The assistant manager's behavior was consistent with her testimony, because she waited to leave work after claimant left, and asked a coworker to walk her to her vehicle, fearing claimant might "hurt her." Transcript at 33. Objectively considered, claimant's behavior toward her manager was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment for that additional reason and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's actions were not the result of a good faith error in her understanding of the employer's expectations. Claimant did not assert or show that she sincerely believed or had a factual basis for believing the employer would condone her conduct toward her assistant manager.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 14-UI-28068 is affirmed.

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

**DATE of Service: January 8, 2015**

**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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