

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1920**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101733). Claimant filed a timely request for hearing. On December 15, 2014, ALJ Kirkwood conducted a hearing and issued Hearing Decision 14-ui-30388, affirming the Department's decision. On December 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Robert L Stacy CPA LLC employed claimant from June 16, 2009 to October 21, 2014.

(2) The employer's owner expected claimant to behave in a professional manner at work and to refrain from engaging in conduct that disrupted work, including insubordination and the use of foul language. Claimant understood the employer's expectations.

(3) Prior to May 2014, claimant and a coworker regularly had disagreements at work that resulted in arguing and the use of foul language. Claimant and her coworker complained to the owner about each other. The owner investigated the complaints, and was unable to determine if one employee was at fault for the disagreements.

(4) In May 2014, the owner gave claimant and the coworker a written warning advising them that they would be subject to termination if they engaged in the use of foul language or other unprofessional conduct at work.

(5) On or about July 2014, claimant became upset with the coworker and told her to "go to hell." Transcript at 8. On a subsequent occasion, claimant told the coworker to "fuck off" because she believed the coworker was "mocking her." Transcript at 16. Claimant was dissatisfied when she heard the coworker whistling at work because she thought the coworker whistled to bother claimant. The owner did not tell the coworker to stop whistling because he disagreed that the coworker intended to bother claimant by whistling.

(6) On October 17, 2014, claimant had a disagreement with the coworker about stapling paperwork and called her a “bitch” two times as claimant was leaving the office. Transcript at 16-18.

(7) On October 21, 2014, the owner met separately with claimant and the coworker to offer them a last chance agreement as a condition of continued employment. The agreement required them to watch a video about harassment and bullying at work, and to refrain from additional unprofessional conduct at work. The coworker agreed to the last chance agreement.

(8) When the owner met with claimant to discuss the last chance agreement, claimant became upset and insisted that the coworker should have to watch the video that day, and that the owner should investigate her complaints again. The owner refused to change the terms of the last chance agreement, and claimant accepted the agreement. The owner told claimant the meeting was finished, and claimant left the owner’s office. A short time later, claimant returned to the owner’s office, and told the owner he had not been impartial when he investigated her complaints, and that she would leave work and not return if the coworker whistled again. The owner told claimant to go home. Claimant asked, “And not come back?” The owner responded, “Yes.” Claimant responded, “Then I quit with cause.” Transcript at 15.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant for misconduct.

The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

In this case, the owner severed the employment relationship in response to claimant’s assertion that he had not been impartial when he investigated her complaints about her coworker, and threat to quit if her coworker whistled again. The work separation therefore was a discharge, and claimant’s subsequent statement that she quit did not change the nature of the work separation to a voluntary leaving.

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 because she behaved in an insubordinate and unprofessional manner toward the owner on October 21, 2014. The employer had a reasonable expectation that claimant behave in a professional manner at work and refrain from insubordination. Claimant understood the employer's expectations through prior warnings and as a matter of common sense. By making demands to the owner about the last chance agreement, returning to argue with him after he told claimant the conversation was finished, stating he had not been impartial when he investigated her complaints, and threatening to quit if the coworker whistled again, claimant consciously engaged in conduct she knew or should have known would probably result in a violation of the employer's expectations. Claimant's conduct therefore was a wantonly negligent disregard of the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered "isolated," it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant had repeatedly used foul language toward her coworker after receiving the employer's warning in May 2014. Claimant's conduct in each of those instances constituted a separate willful violation of the employer's expectations. Because the record shows claimant had engaged in a pattern of other willful conduct, her conduct during the final incident cannot be considered isolated, and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct also cannot be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that her behavior during the final incident complied with the employer's expectations regarding professionalism in the workplace.

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

**DECISION:** Hearing Decision 14-UI-30388 is affirmed.

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

**DATE of Service:** February 4, 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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