

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0063**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92949). Claimant filed a timely request for hearing. On December 30, 2014, ALJ S. Lee conducted a hearing, and on January 6, 2015 issued Hearing Decision 15-UI-31328, affirming the Department's decision. On January 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Toyota-Scion of Gladstone employed claimant as a salesperson from February 6, 2009 to November 11, 2014.

(2) The employer had a zero tolerance policy for workplace violence and expected employees to refrain from fighting or making verbal threats at work. Claimant received a copy of the employer's policy at hire, and understood the employer's expectations as a matter of common sense.

(3) On November 8, 2014, claimant became upset because he believed another salesperson was contacting claimant's customers. Claimant told the salesperson, "Don't call my customers." Transcript at 42. As the salesperson sat down to use the telephone, claimant stated, "I'm not fucking playing games," rushed up to the salesperson, and hit him in the back. Transcript at 42-43. The salesperson yelled at claimant, "If you don't leave, I'll knock your head off." Transcript at 45. Claimant then told the salesperson he wanted to fight. The sales manager witnessed the incident and told claimant to report immediately to the general manager, who sent claimant home. Claimant's strike left a bruise on the salesperson's back.

(4) On November 10, 2014, the employer discharged claimant for engaging in workplace violence.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to refrain from engaging in violence in the workplace. Claimant was aware of the employer's expectation as a matter of common sense and because he received the handbook containing the employer's standards for employee conduct. It is undisputed that claimant often told the salesperson that he was calling claimant's customers, and that he struck the salesperson in the back. Transcript at 26-27. Claimant testified that it was only "horseplay." Transcript at 26-27. The employer's two witnesses present during the incident testified that claimant rushed up to the salesperson, hit him hard on the back, and insisted that the salesperson go outside to fight with him. Transcript at 18-20, 42-43. Their combined testimony outweighs claimant's uncorroborated testimony. Moreover, it is improbable that, had claimant merely been engaging in "horseplay," he would have hit the salesperson hard enough to leave a bruise and then demand to fight the salesperson, or that the salesperson would have reacted to the incident by yelling at claimant that he would "knock claimant's head off" in front of a manager. The weight of the evidence indicates that claimant struck the salesperson to emphasize his demand that the salesperson not contact certain customers, and in doing so, willfully disregarded the employer's expectation that employees refrain from engaging in violence in the workplace.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. OAR 471-030-0038(1)(c) specifies that acts that violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Under ORS 163.160, a person commits the crime of assault in the fourth degree if he intentionally, knowingly or recklessly causes physical injury to another. Under ORS 166.065, a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting the other person to offensive physical contact. At minimum, claimant recklessly injured his coworker, and intentionally annoyed him by striking him and bruising his back. Claimant's decision to use physical force toward his coworker was tantamount to assault or harassment, and therefore exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(1)(d)(D).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, and the record does not show, that he had a sincere belief, or rational basis for believing, that the employer would condone striking a coworker out of anger or frustration, regardless of whether the coworker was contacting claimant's customers. Claimant's conduct was, therefore, not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation from the employer.

**DECISION:** Hearing Decision 15-UI-31328 is affirmed.

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

**DATE of Service: March 5, 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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