

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0171

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121547). Claimant filed a timely request for hearing. On February 19, 2015, ALJ Wyatt conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34078, concluding the employer discharged claimant, but not for misconduct. On March 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) First installation Repair employed claimant as an office furniture installer from February 25 to November 26, 2014.

(2) As claimant left work on November 25, 2014, he noticed that his time card was missing, and that he therefore could not clock out. Claimant telephoned the employer's general manager, who did not know what happened to claimant's time card. The general manager instructed claimant to complete a form to record his clock out time.

(3) When claimant reported for work on November 26, 2014, he noticed that his time card was still missing. Claimant informed the general manager, who could not find claimant's time card.

(4) Claimant was concerned that one of the other employees had disposed of his time card as a joke, that he would be unable to recall the hours he worked, and that he would therefore not get paid for all hours worked. Claimant became very upset, lost his temper, yelled "this isn't right," that "he worked hard for his money" and that "this is a "bunch of bull," and used foul language. Audio Record at 11:30. Another employee approached claimant, who yelled, "What the fuck are you looking at?" Audio Record at 11:40. The general manager told claimant to calm down because it was not a "big deal." Audio Record at 11:55. Claimant yelled that it was a big deal. The general manager searched for claimant's time card again, found it, and gave it to claimant. Claimant calmed down, clocked in, and started work.

(5) The employer discharged claimant for his behavior on November 26, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was for an isolated instance of poor judgment, and not 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. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from yelling and using foul language at work. Claimant knew or should have known his conduct on November 26, 2014 probably violated the employer's expectations regarding workplace behavior, and his conscious decision to engage in such behavior demonstrated indifference to the consequences of his actions. Claimant's conduct therefore was a wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.

However, claimant's conduct on November 26 was an isolated instance of poor judgment, and not misconduct. An act is isolated if the exercise of poor judgment is 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). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer did not assert, and the record fails to show, that claimant's exercise of poor judgment on November 26 was a repeated act or part of a pattern of willful or wantonly negligent behavior. Nor does the record show that claimant's conduct violated the law, or that it was tantamount to unlawful conduct. At hearing, the employer's general manager testified that he could no longer trust claimant to control his temper when interacting with customers and other employees. Audio Record at 12:15. Viewed objectively, however, claimant's relatively brief verbal outburst, during which he did not insult, threaten to harm, or call anyone foul names, was not so egregious that it created an irreparable breach of trust in the employment relationship, or otherwise made a continued employment impossible. *Accord Double K Cleaning Service, Inc. v. Employment Department*, 191 Or App 374 (2004) (male claimant's heated argument with the employer's female owner could be excused as mere poor judgment where he used only mild profanity, did not persist in prolonging the argument, and did not insult or curse the supervisor after being told to stop); cf. *Weyerhaeuser Co. v. Employment Division*, 103 Or App 143 (1990) (claimant's conduct exceeded mere poor judgment where he argued with his supervisor for almost 30 minutes, swore at him and called him obscene names, at times within inches of his face, and later threatened to harm him), *Columbia Plywood v. Employment Division*, 36 Or App 469 (1978) (claimant's verbal outburst toward his foreman exceeded mere poor judgment where it was part of a larger incident

in which he knowingly disregarded his foreman's instructions, engaged in a loud, extended argument with him, and insulted him).

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

DECISION: Hearing Decision 15-UI-34078 is affirmed.

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

DATE of Service: April 15, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.