

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0531**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90506). Claimant filed a timely request for hearing. On April 7, 2015, ALJ Wipperman conducted a hearing, and on April 15, 2015 issued Hearing Decision 15-UI-36919, affirming the Department's decision. On May 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she appeared to assume that EAB would hold a hearing to review the merits of Hearing Decision 15-UI-36919, and she referred to additional evidence she intended to present about the work separation. EAB construes this part of claimant's argument as a request that EAB consider additional evidence under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider the new information if the party offering it was prevented by factors or circumstances beyond its reasonable control from presenting that information at the hearing. While claimant's request referred to obtaining a notarized statement from a witness who was not available to testify at the hearing, neither she nor the attorney representing her at the hearing referred to an unavailable witness, a statement from such a witness or asked for a postponement of the hearing to enable that witness to offer evidence. Claimant failed to show that she was reasonably unable to make arrangements to present at least a statement from that witness at hearing, to testify herself about the contents of any such witness's statement or that she otherwise exhausted reasonable efforts to make such information available to the ALJ during a hearing. For this reason, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) J C Penney Corporation, Inc. employed claimant from May 14, 2013 until January 23, 2015, last as an associate in the fine jewelry department.

(2) The employer expected claimant to follow the direct instructions of her managers. The employer also expected claimant not to engage in threatening, intimidating or retaliatory behavior toward coworkers. The employer further expected claimant to provide honest information when managers questioned her about work-related matters. Claimant understood the employer's expectations as a matter of common sense.

(3) In late October 2014, claimant was promoted to a management position in the home department. After claimant was promoted, the general manager and other managers became concerned about the manner in which claimant spoke and behaved toward the sales associates who were subordinate to her as well as to other managers. Claimant had several coaching sessions about her performance as a manager. On December 8, 2014, the employer's general manager and another manager met with claimant and told her that her performance as a manager did not meet the employer's expectations and that she would be re-evaluated after thirty days. On December 26, 2014, the general manager and the employer's human resources manager met with claimant and advised her that her managerial performance had not improved and that she could step down from her position as a manager and continue her employment as a sales associate, or she could remain in her position as a manager and her performance would be re-evaluated after another thirty days. Both managers told claimant they did not think her performance would improve during the second thirty days and that, if it did not, she likely would be discharged. Claimant agreed to step down. Claimant became an associate again and was assigned to the fine jewelry department.

(4) On January 16 or 17, 2015, claimant was upset because she had just turned in the keys she had been given when she became a manager. She was crying in the workplace. On that day, claimant asked an associate at one of the employer's cosmetic counters to touch up her make-up. That associate noticed that claimant was upset and decided to apply the make-up to claimant in a private conference room away from customers. Once they were in the conference room, claimant started describing many problems she was having and her perception of the circumstances that led to her demotion from a manager back down to a sales associate. Claimant told the sales associate that the managers had told her to give up her manager position. Claimant told the associate that she had consulted with an attorney about the lawfulness of the managers' actions, and that the attorney had recommended that she step down from the management position and told her that, if she was discharged, she would have a viable lawsuit for wrongful termination. Transcript at 28. Toward the end of the conversation, claimant told the associate that the employer and the managers had "screwed her over in her position [as manager]." Transcript at 21. Claimant then told the sales associate "if [the associate] told management about anything [claimant] was saying, [claimant] would sue the employer and sue [the associate] as well." Transcript at 21. After her interaction with claimant, the sales associate's manager noticed that the associate was upset and asked her what was wrong. The sales associate told her manager what claimant had said to her and that she felt she had been bullied and threatened. The manager took the sales associate to meet with the employer's human resources manager. The associate described in detail to the human resources manager the conversation she had just had with claimant.

(5) On January 23, 2015, the general manager and another manager met with claimant to discuss her conversation with the sales associate in the cosmetics department. The managers told claimant that they

knew about her conversation with the sales associate. The managers did not inform claimant how they obtained their information, or that the sales associate had spoken to them. Claimant denied that any conversation with the sales associate had occurred. After the managers provided details about the conversation that could only have been known by the sales associate or someone who overheard the conversation, claimant admitted that the conversation had taken place. The managers told claimant that it was unacceptable for her to threaten or intimidate the sales associate or appear to have done so. Claimant explained to the managers that she had been “joking” when she stated she would sue the associate if the associate repeated any part of the conversation and that the associate “misunderstood” her comment about suing her. Transcript at 12. The managers told claimant that she was not going to be discharged over the statement she made to the associate on January 16 or 17, 2015. Transcript at 11, 36. However, both managers told claimant that she was prohibited from discussing with the sales associate any matters relating to the conversation on January 16 or 17, 2015 or she would be discharged. Exhibit 1 at 8. Claimant understood that the managers’ instruction to her.

(6) On January 23, 2015, approximately one hour after the managers instructed claimant not to speak with the sales associate about the January 16 or 17, 2015 conversation, claimant left her work area in the fine jewelry department and walked over to the sales associate at the cosmetics counter. Claimant asked the associate why she had disclosed the contents of their previous conversation to anyone. Transcript at 10, 23. Claimant also told the associate that she was only “joking” when she previously threatened to sue her, and “that she didn’t mean for [the associate] to take it [the comment] seriously.” Transcript at 23. The sales associate reported this second conversation with claimant to the general manager and another manager.

(7) On January 23, 2015, the employer discharged claimant for disregarding the managers’ instruction not to bring up matters related to the January 16 or 17, 2015 conversation with the sales associate and for engaging in behavior that threatened or attempted to intimidate the sales associate.

**CONCLUSIONS AND REASONS:** 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).

On January 23, 2015, only an hour after the employer’s representatives instructed claimant not to communicate with the sales associate in the cosmetics department about any matters related to her January 16 or 17, 2015 conversation with the same sales associate, claimant did so. Claimant did not dispute that she received that instruction and agreed that she understood its clear prohibitions. Transcript at 27, 29. Claimant did not offer a clear explanation about why she disregarded the employer’s instructions and why she went out of her way to do so by leaving the Department in which she worked to go to the separate department in which the sales associate worked. Claimant’s ostensible justification for her behavior, that she was under duress as a result of a personal injury, was intending to

“investigate the [sales associate’s] accusation” against her and that her behavior was “poor judgment,” appears to have been an attempt to rationalize and minimize that behavior. Transcript at 29. There was no evidence in the record suggesting that claimant’s actions were not in her control, that she was unable to appreciate that she was violating the employer’s explicit instructions when she spoke to the associate on January 23, 2015 or that, somehow, the managers’ instruction slipped her mind. Nor did claimant deny she was aware of the consequences of speaking with the sales associate, since the general manager and the other manager had told her that she would be discharged if she had any further contact with the sales associate about matters discussed on January 16 or 17, 2015. On this record, when claimant agreed that employer’s instructions to her were very clear, and that the instructions were given to her only a scant hour before she violated them, it can only be inferred that claimant knowingly, intentionally and conspicuously disregarded them, with full knowledge that she was doing so and with the understanding that the employer would discharge her as a result. While claimant’s underlying motives may have been obscure, she willfully violated the employer’s clearly communicated instructions and its standards.

Claimant’s willful disregard of the employer’s instructions on January 23, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an “isolated instance of poor judgment” if it 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). However, a single act of willful or wantonly negligent behavior cannot be excused as an isolated act of poor judgment if, among other things, it was the sort of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant had previously disregarded the employer’s expectations that she refrain from providing dishonest information to the employer when she initially denied to the general manager and the other manager on January 23, 2015 that she had any conversation with the sales associate on January 16 or 17, 2015. Claimant’s contention that made this initial denial because she did not remember that she had a conversation with the sales associate was implausible. Transcript at 12, 16, 27. It is unlikely that claimant would forget an entire conversation or forget with whom she had conversed, when, by her own admission, she was upset because she had just turned in her management keys. In addition, she admitted that she was venting her distress to the sales associate and said that she might commence a lawsuit against the employer if she was discharged. Transcript at 27, 28. After claimant’s initial denials that the conversation with the associate had occurred, she then allegedly remembered it when the managers disclosed very specific details of it to her. From the sequence by which claimant’s recollection was allegedly and suddenly refreshed, the most reasonable inference is that she acknowledged the conversation when she became aware that the employer had independent information about it and realized further denials would not be a convincing subterfuge. It is most likely that claimant recalled the January 15 or 16, 2015 conversation from the outset of the January 23, 2015 meeting with the general manager and the other manager, but intentionally and knowingly tried to conceal the existence and substance of that conversation from the managers. On these facts, there is no other likely explanation for claimant’s behavior other than that she was willfully dishonest when she initially denied having had the January 15 or 16, 2015 conversation with the sales associate. Because claimant’s willful disregard of the employers instructions on January 23, 2015 was preceded by willful dishonesty in providing information in the January 23, 2015 meeting, claimant’s willful disregard of the employer’s standards was repeated and not isolated or infrequent. For this reason, it does not meet the standard for being excused as an isolated instance of poor judgment.

As well, claimant's behavior on January 23, 2015 was the sort that caused an irreparable breach of trust in the employment relationship. Honesty in work related matters is fundamental to the employment relationship, and claimant deliberately tried to conceal critical information from the employer during the January 23, 2015 meeting for the apparent purpose of avoiding disciplinary action and personal embarrassment. Moreover, after that meeting, when she was clearly instructed not to have further contact with the sales associate and knew she could be discharged if she did, claimant immediately turned around and again contacted the sales associate. Based on claimant's willful dishonesty, and her immediate, willful disregard of the employer's instructions in a matter as important as protecting one of its employees from an appearance of possible retaliation, a reasonable employer would objectively conclude that it could no longer trust claimant to behave appropriately in the workplace. For this reason, claimant's behavior on January 23, 2015 is also not excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-36919 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service:** June 26, 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](http://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.

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