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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0597

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132836). Claimant filed a timely request for hearing. On May 4, 2015, ALJ Frank conducted a hearing, and on May 12, 2015 issued Hearing Decision 15-UI-38355, affirming the Department's decision. On May 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Department of Corrections employed claimant as a technical support analyst from December 29, 2003 until March 6, 2015.

(2) The employer expected claimant to behave in a professional and business-like manner in the workplace and to refrain from offensive and disruptive conduct. Claimant was aware of the employer's expectations as stated in the employer's code of conduct and as a matter of common sense.

(3) In approximately March 2014, the employer initiated pre-dismissal proceedings against claimant based on his workplace behavior, including particularly his alleged behavior in discussing personal issues with coworkers. Rather than discharging claimant, the employer agreed to enter into a last chance agreement him. In the agreement, claimant was required to abide by all employer policies, to limit his personal phone calls while at work and to refrain from spending time on "personal issues during work hours." Exhibit 1 at 5. The last chance agreement was signed on July 17, 2014. Exhibit 1 at 7.

(4) At various times after July 17, 2014, claimant's coworkers reported to the employer that claimant extensively discussed during work hours his recent divorce, his bitter feelings toward his ex-wife and the loss of his house in the divorce settlement. On one occasion after July 17, 2015, claimant had a forty minute phone call with his ex-wife during work hours during which they discussed personal issues. Exhibit 1 at 17. On October 8, 2014, at least one of claimant's coworkers reported that claimant took a phone call from his wife while at his work station on October 7, 2014 and the coworker heard claimant

"screaming" repeatedly at his wife and yelling "god dammit," "shit" and "fuck." Exhibit 1 at 15, 17; Transcript at 23. On October 23, 2014, a coworker reported that claimant became upset during a phone call with his manager and in the presence of the coworker and another coworker called the manager a "fucking asshole" after the call was over in a loud enough voice for them to hear. Exhibit 1 at 13, 17; Transcript at 17, 22-23, 30.

(5) On November 24, 2014, the employer placed claimant on duty stationed at his personal residence pending an investigation of his compliance with the last chance agreement after July 17, 2014.

(6) On March 6, 2015, the employer discharged claimant for various violations of the last chance agreement, including conversations about personal matters with his coworkers after July 17, 2015, the statements he made in the workplace during the October 7, 2014 conversation with his ex-wife and the statement he made on October 23, 2014 about his supervisor in the workplace. Exhibit 1 at 15, 17, 19, 21.

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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(c). 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).

While the employer's witness cited several reasons for claimant's discharge, there was insufficient evidence that placed claimant on reasonable notice that his behaviors underlying some of those reasons violated the employer's expectations. We confine our discharge analysis to claimant's alleged behaviors which, if he engaged in them, he was reasonably aware they violated the employer's standards, whether as specifically articulated in the last chance agreement or as violations of the employer's policies, which were incorporated in the last chance agreement.

In the last chance agreement, claimant specifically agreed to refrain from discussing personal matters during work hours, and from engaging in phone calls doing so. Exhibit 1 at 5. Although claimant testified that he did not understand this prohibition to preclude him from any mention of personal matters at work, he agreed that the "lengthy" call with his ex-wife in which he discussed for forty minutes matters relating to his daughter was excessive and violated the employer's standards as set out in the last chance agreement. Transcript at 20-22, 29; Exhibit 1 at 5. We agree that, while the last chance agreement did not plainly prohibit incidental comments made to coworkers or others during work about personal issues, taking approximately forty minutes away from work time to have a conversation with his ex-wife about such matters was of a length that claimant could not reasonably

construe it as an incidental mention of personal matters or as a reasonably limited personal commentary. Claimant's decision to have such a lengthy conversation about personal matters was at least a wantonly negligent violation of the employer's standards as set forth in the last chance agreement.

Claimant's loud, angry and repeated use of foul language in his phone conversation with his ex-wife on October 7, 2014 was, as a matter of common sense, a violation of the employer's respectful workplace policy, as incorporated into the last chance agreement. Transcript at 16; Exhibit 1 at 7. Claimant conceded that he used the language the employer contended that he had, he did not dispute that some coworkers overheard his use of the foul language, that he was not "officially" on break when he was speaking in this manner with his ex-wife and that his statements were a violation of the last chance agreement. Transcript at 22-23, 30. What claimant said to his wife on October 7, 2014 in a loud and angry voice that was overheard by his coworkers was at least a wantonly negligent violation of the employer's expectations. Claimant conceded that he made a loud reference to his supervisor as a "fucking asshole" on October 23, 2014, that it was overheard by at least two coworkers and that it was a "slip in professionalism" that violated the employer's respectful workplace policy as incorporated into the last chance agreement. Transcript at 22, 23, 30. Claimant's use of foul language to refer to his supervisor on October 23, 2014 was also at least a wantonly negligent violation of the employer's expectations.

Claimant's wantonly negligent behavior in speaking with his ex-wife about personal issues during work and his use of foul language in the workplace was excusable if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior constitutes an "isolated instance of poor judgment" if, among other things, it is a single or infrequent act rather than a repeated occurrence or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant repeatedly formed and exercised poor judgment by engaging in three separate wantonly negligent violations of the employer's expectations. Claimant's behavior was not single, but repeated, and for that reason cannot be excused as an isolated instance of poor judgment.

Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Here claimant conceded that he understood each of his three acts of wantonly negligent behavior to have been a violation of the employer's standards as set out in the last chance agreement. Transcript at 23, 29, 30. Since claimant did not contend that he behaved as he did out of a mistaken understanding of the employer's standards or because he thought the employer would condone his behavior, he did not make the threshold showing for the application of the excuse of a good faith error.

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

DECISION: Hearing Decision 15-UI-38355 is affirmed.

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

DATE of Service: <u>July 14, 2015</u>

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.

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