

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1111**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 135502). Claimant filed a timely request for hearing. On August 31, 2015, ALJ M. Davis conducted a hearing, and on September 1, 2015 issued Hearing Decision 15-UI-43771, concluding the employer discharged claimant, not for misconduct. On September 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Hour Glass Pub & Eatery employed claimant as a bartender from October 11, 2008 to May 27, 2015.

(2) When claimant reported for work on May 27, 2015, he discovered that the employer's grill was not working. Claimant became upset and telephoned the employer's owner. The two engaged in a heated argument regarding the grill and claimant's belief that although the employer was garnishing his wages for child support, it was late in paying his child support.

(3) Claimant was willing to continue working for the employer. However, the owner repeatedly told claimant, "you need to go," "get out of my place," and "go." Audio Record at 14:00. Before claimant left work, he telephoned the employer's other bartenders to determine whether they could work that day. The owner telephoned claimant and again instructed him to leave, repeatedly telling him to "go." Audio Record at 22:30, 23:30. Claimant left work and did not return.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, not for misconduct.

The first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) states that 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. 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.*

At hearing, the parties disagreed on what claimant and the employer’s owner said to each other on May 27, 2015 that resulted in claimant’s work separation. However, the employer’s owner did not testify at the hearing, and the employer’s evidence consisted entirely of hearsay. Absent a basis for concluding that claimant was not a credible witness, his sworn testimony that the owner repeatedly told him, “you need to go,” “get out of my place,” and “go” outweighs the employer’s hearsay evidence to the contrary. Accordingly, the record shows that the employer severed the employment relationship, and not claimant. The work separation therefore is a discharge, and not a quit.

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) 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). 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 discharged claimant because of his behavior during his argument with the owner on May 27, 2015. However, even if we assume that claimant violated the employer’s expectations regarding workplace behavior willfully or with wanton negligence, claimant’s conduct can be excused as an isolated instance of poor judgment. The employer did not assert or show that claimant engaged in similar conduct on prior occasions, or that his conduct on May 27 was part of a pattern or other willful or wantonly negligent behavior. Claimant’s conduct did not violate the law and was not tantamount to unlawful conduct. Nor does the record show his behavior was so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible.

We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 15-UI-43771 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 12, 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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