

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1135**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 85629). The employer filed a timely request for hearing. On September 24, 2015, ALJ Buckley conducted a hearing, and on September 25, 2015 issued Hearing Decision 15-UI-44876, affirming the Department's decision. On September 28, 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 September 6, 2011 to July 13, 2015.

(2) On July 13, 2015, claimant was frustrated and upset with the employer due to safety concerns, the behavior of coworkers, and working conditions. That resulted in claimant "mouthing off," and "venting frustration" and "anger." Audio Record at 19:00. Claimant told employees he had reported the employer to the Oregon Construction Contractors Board (CCB) and was going to get it "shut down," that he was going to quit and take several of the employer's employees and customers with him, and that he already had applied for a \$5,000,000 federal contracting grant. Audio Record at 10:00. Claimant further asserted that he was going to have inspectors "all over" the employer, and that when the time was right, he was going to tell employer's customers what kind of "messed up stuff" went on there. Audio Record at 10:30. Claimant told two employees they better find other jobs fast because he was starting his own business and "throwing [them] under the bus" by having the employer "shut down." Audio Record at 10:45.

(3) The employer discharged claimant for his behavior on July 13, 2015.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was not 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. 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 his behavior on July 13, 2015. Claimant knew or should have known as a matter of common sense that his conduct probably violated the employer's expectations regarding workplace behavior, and his conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions. Claimant's conduct therefore was, at best, a wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.

The remaining issue is whether claimant's conduct can be excused as an isolated instance of poor judgment. 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). An isolated act exceeds mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3) only if it violates the law, is tantamount to unlawful conduct, creates an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In the present case, the employer did not assert, and the record does not show that claimant's exercise of poor judgment on July 13, 2015 was a repeated act or pattern of other willful or wantonly negligent behavior. At hearing, claimant testified that he was "mouthing off," and "venting frustration" and "anger," and admitted that he was being "childish." Audio Record at 19:00, 21:00. However, claimant's conduct did not violate the law and was not tantamount to unlawful conduct. The record fails to show that claimant had made or intended to make false allegations about the employer to CCB, or that he intended to quit and take employees and customers with him, undermine the employer's relationships with its customers, or otherwise harm the employer's business. Absent such showings, claimant's behavior was not so egregious that, viewed objectively, it created an irreparable breach of trust in the employment relationship. Nor does the record show that claimant's conduct otherwise made a continued relationship impossible.

We therefore conclude that 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-44876 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 16, 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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