

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1333**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125815). Claimant filed a timely request for hearing. On October 28, 2015, ALJ Upite conducted a hearing, at which the employer failed to appear, and on November 5, 2015 issued Hearing Decision 15-UI-47275, concluding claimant's discharge was not for misconduct. On November 10, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer stated that it had "missed the hearing due to new hire training." The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer did not assert or show what, if any, attempt was made to participate in the hearing despite the conflict, nor show what, if any, attempt was made to secure a postponement or continuance of the hearing. The employer's request to have EAB consider new information is, therefore, denied.

**FINDINGS OF FACT:** (1) Willamette Valley Medical Center employed claimant as a registered nurse from January 13, 2015 to August 6, 2015.

(2) The employer had a social media policy that permitted employees to use social media, but required employees doing so to be respectful and professional, and to refrain from using social media to defame, denigrate, embarrass or harm the employer or its patients. The policy prohibited employees from using patient-identifying information in social media postings, or from making public comments about the care of a specific patient. The employer had another policy that specifically required that bariatric program patients be treated with dignity and respect. The employer provided claimant with copies of its policies.

(3) In approximately early July 2015, claimant felt frustrated because of events that had occurred while she was caring for an obese patient. Claimant did not reveal her frustration to the patient while providing care. She posted the following statement on her social media webpage:

I love my profession. However, when you weight [sic] close to 450 lbs. and you bitch because I'm "too small" to hold your enormous thigh and it take [sic] two people (digging past the fat) to find your urethra (to catholic [sic] you)... I really feel that it's a disservice to the "parent [sic] nurse relationship" for me to say what I REALLY want to scream in your face, while I shove my extremely painful hurt finger under your fat butt because I have to change your diaper. But don't worry about anyone else that HAS to take care of you because YOU let yourself get THAT big!"

Exhibit 1. Claimant did not reveal the patient's name, gender, the reason the patient was receiving medical treatment, the shift she worked, or any other information that would tend to identify the patient about whom she was complaining. Claimant also exaggerated details about the incident, including the patient's weight, to obscure the patient's identifying characteristics.

(4) A number of claimant's coworkers, including her manager, were "friends" on claimant's social media webpage and could view her posts. Several weeks passed without any of claimant's coworkers having commented on claimant's post. On July 25, 2015, an employee reported the comment to claimant's manager. On July 27, 2015, the manager instructed claimant to remove the post and claimant immediately complied.

(5) On August 6, 2015, the employer discharged claimant because of her social media webpage post. Before the July 2015 social media webpage posting, claimant had never before violated the employer's policies or expectations.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, but 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.

The employer had the right to expect claimant to refrain from making social media webpage posts with content that defamed, denigrated, embarrassed or harmed the employer or its patients. Claimant knew or should have known the expectation because the employer gave her copies of the policies that set forth those expectations. Claimant violated the expectation by making a post that clearly referred to an incident that happened at work during which she was providing care to patient and subjected the

employer and the patient to denigration and potential embarrassment. Claimant was conscious of her conduct in making the work-related post, and knew or should have known that it would probably result in a violation of the employer's policies and expectations. Her conduct was, therefore, wantonly negligent.

Wantonly negligent conduct may be excused if it is an isolated instance of poor judgment. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined as a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct, which does not exceed mere poor judgment. OAR 471-030-0038(1)(d). In this case, claimant had never before violated the employer's policies or expectations, making her conduct isolated. Claimant's conduct was not unlawful or tantamount to unlawful conduct. Although the post was insensitive and disrespectful to the patient, and subjected the employer to potential embarrassment or harm, the severity of claimant's conduct was mitigated by the fact that her initial posting on a public site that was shared by her coworkers and supervisor remained undisturbed for several weeks before anyone identified it as inappropriate, and by her cooperation with the employer in immediately removing the post when instructed to do so. Moreover, the employer did not assert or show that claimant's behavior was the type of conduct that either caused an irreparable breach of trust in the employment relationship or would otherwise make a continued employment relationship impossible. The record does not show that claimant's conduct exceeded mere poor judgment.

In sum, the employer discharged claimant because of an isolated act that did not exceed mere poor judgment. As such, claimant's wantonly negligent violation of the employer's expectations is excused from being considered misconduct under OAR 471-030-0038(3)(b). Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 15-UI-47275 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** December 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](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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