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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
2016-EAB-0193

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 22, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83225). Claimant filed a timely request for hearing. On December 7, 2015, ALJ Buckley conducted a hearing and issued Hearing Decision 15-UI-48920, reversing the Department's decision. On December 15, 2015, the employer filed an application for review with the Employment Appeals Board (EAB). On January 21, 2016, EAB issued Appeals Board Decision 2016-EAB-0193, reversing and remanding this matter for further development of the record. On February 1, 2016, ALJ Buckley conducted a hearing at which the employer did not appear, and on February 8, 2016 issued Hearing Decision 16-UI-52531, again reversing the Department's decision. On February 19, 2016, the employer filed an application for review with EAB.

Although the employer did not appear at the hearing on remand, it submitted a written argument in opposition to Hearing Decision 16-UI-52531. Because the employer did not certify that it provided a copy of this written argument to the other parties as required by OAR 471-041-0080(2)(a), EAB did not consider that written argument when reaching this decision.

FINDINGS OF FACT: (1) Terraspatial Technologies employed claimant as a product manager from October 28, 2012 until September 1, 2015.

(2) The employer expected claimant to respond to its reasonable inquiries. As a matter of common sense, claimant understood the employer's expectation as he reasonably interpreted it.

(3) Throughout claimant's employment, the employer's workplace was informal, and behavior that might be considered unprofessional in other work environments was common place. The employer's president, to whom claimant reported, invited and allowed employees to openly and freely "vent" frustrations to him in very frank language, whether about him, the employer's operations and practices,

other employees or customers. Transcript at 26, 27. It was not abnormal for employees to "blow off steam" at the president. Audio at ~14:53. On many occasions before August 29, 2015, claimant had communicated orally and in writing to the president expressing his views forcefully and in a manner that would probably have been considered aggressive, insulting, or insubordinate in other workplaces, but was condoned in the employer's workplace. Transcript at 15; Audio at ~14:14, ~14:53, ~15:34, ~17:00, ~18:00. The employer never told claimant that his communication style was not acceptable in the workplace.

(4) On Friday, August 29, 2015, the employer's president sent an email to claimant in which the president expressed concern about recent interactions with claimant as well as appreciation for claimant's hard work and the value that he provided to the company. The email acknowledged that the president was aware of some of claimant's frustrations, identified them, expressed the president's continued commitment to the success of the company and set out the sort of progress the president believed the company needed to make to remain viable. The email went on to state:

> At this point, I see two possible paths going forward: The first is you being full onboard. The second involves you transitioning out of the company. You need to decide whether or not to be here. This is you decision. If you do [want to remain with the company], I need your full commitment, a development schedule and for you to communicate with me respectfully. If not, then let's work together on a transition plan. **** **Please get back to me by the close of business on Monday [August 31, 2015]**. If you decide to stay, let's schedule a fact to face discussion where we will work together to outline your job description so we are clear as to what your responsibilities are.

Transcript at 32-33 (emphasis added).

(5) On August 29, 2015, after he received the president's email, claimant replied to it, and stated:

> [T]hat's what I need time for next week, right? I see your self-confidence, but that isn't a Plan. Self-confidence doesn't help when you stop making payroll, Microsoft shuts off our Cloud, and the bank locks the doors. **** I don't need your assurances; I need a plan, and so do you, and so does everyone who relies on [the company], not intentions, not promises, not words, not progress, not wishful thinking, a plan. I'm starting to think you have a mental problems processing information coherently. **** You lied to me, to my face, and on paper about these things. **** You have so far demonstrated that this is not a viable business and we will be out of business within months. So what are you offering me? Personal guarantees and self-confidence? You have not made any sales. Zero. And you have looked me in the eye, outright lied, and then you have shown no remorse about doing so. **** What weight do you think your work has when you behave like that? When you say anything, I'm sure it's self-serving and doubt it's true. **** **I'm not going to have a response for you on Monday.** Next week is for serious review of my position. If you have anything concrete to share, please email me, the sooner the better.

Transcript at 21-22 (emphasis added). Sometime on August 29, 2015, although claimant was scheduled to work on Monday, August 31, 2015 and throughout that week, claimant informed the employer's president that he was going to take off the week of August 31 through September 4, 2015. Claimant did

not ask for the employer's permission and did not receive it. However, the president did not forbid claimant from taking that time off.

(6) By the close of business on August 31, 2014, claimant had not responded to the president's request to let him know whether claimant had decided to stay with the employer. On September 1, 2015, the employer discharged claimant for failing to answer to president's question about his intentions by August 31, 2015. Sometime later, the employer sent an email to claimant informing him that he was discharged.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

EAB adheres to the reasoning set out in Appeal Board Decision 2015-EAB-1488 and concludes that claimant violated the employer's standards with at least wanton negligence when he did not respond by August 31, 2015 to state his intentions about his continued employment. The remaining issue is whether claimant's wanton negligence was excused under one of the exculpatory provisions of OAR 471-030-0038(3)(b).

Willful or wantonly negligent behavior is excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an "isolated instance of poor judgment" if it was 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). To be considered excusable as an isolated instance of poor judgment, the behavior at issue must not "exceed mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Here, the employer alluded to claimant's allegedly insubordinate communications before August 29, 2015 as prior acts of misconduct. Claimant believed that the employer told the Department that claimant had failed to remain in contact with the employer during March 2015, from which an allegation of prior misconduct may also be inferred. Transcript at 8, 10-11, 17, 28-29, 32; Exhibit 1 at 1, 3-17. Claimant's testimony about the communication practices and styles that the employer's president condoned in the workplace was not rebutted nor was it disputed that such communications would likely have been viewed in other workplaces as aggressive, foul, unprofessional and insubordinate. Transcript at 26-27; Audio at ~13:52 *et seq.* Indeed, the employer's president agreed that "temper tantrums" were not uncommon in the workplace, whether from claimant or other employees, and that claimant was never disciplined for freely expressing his opinions in this manner. Transcript at 8, 15. The weight of the evidence in this record shows that, given the broad latitude in this workplace about the style and substance of communications, claimant was not aware or reasonably should have been aware that any expressions of his opinions before August 31, 2015 violated the employer's standards. With respect to

claimant's alleged failure to maintain contact with the employer during March 2015, claimant's testimony was unrebutted that he was in communication with the employer during this time, and any allegation that he violated the employer's standards in March 2015 is not supported by the evidence. Audio at ~19:03, ~21:15, ~21:50. Accordingly this record does not show that claimant engaged in any behavior before August 31, 2015 that violated the employer's standards willfully or with wanton negligence. Claimant's wantonly negligent behavior of August 31, 2015 when he did not respond to the president's inquiry about his intentions was a single act in violation of the employer's standards. It meets the first standard to be excused as an isolated instance of poor judgment.

While claimant's failure to reply to the president's email by August 31, 2015, as instructed, was contrary to the seriousness expressed in that email, it was understandable that claimant thought the president would condone that failure. On this record, the workplace appeared to be one in which great leeway was given to employees' headstrong reactions, fits of pique and uncensored behaviors. Against this backdrop of tolerance, a reasonable employer would not conclude, based its first unsuccessful attempt to regulate claimant's behavior, meant that it could not trust claimant in the future to conform his workplace behavior to its requirements. A reasonable employer would not have concluded that claimant's behavior on August 31, 2015 exceeded mere poor judgment. Since it meets all applicable standards, claimant's wantonly negligent behavior on August 31, 2015 was excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-52531 is affirmed.

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

DATE of Service: <u>March 9, 2016</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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