

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0418**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74423). The employer filed a timely request for hearing. On April 4, 2016, ALJ Vincent conducted a hearing, and on April 6, 2016 issued Hearing Decision 16-UI-56636, concluding the employer discharged claimant for misconduct. On April 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she attempted to introduce information not presented at the hearing. Claimant did not explain why she was unable to present this information during the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Goodwill Industries of the Columbia-Willamette employed claimant from November 21, 2012 until December 31, 2015, last as a retail store supervisor.

(2) The employer expected claimant to refrain from offensively touching other employees or physically grasping them to emphasize her statements. Claimant understood the employer's expectations.

(3) Sometime around the middle of September 2015, claimant called a donation attendant she supervised for assistance. The donation attendant was standing near the back door of the store and was unable to leave that location immediately because he was the only attendant on duty. Some minutes later, claimant approached the donation assistant. When claimant reached the assistant, she "grabbed" his vest and shirt with both hands and pulled him toward her. With her face in the assistant's face, claimant told the donation assistant "she's not scared of [him]." Audio at ~16:35. Claimant then walked away. The donation assistant was recently hired and did not notify the employer of claimant's behavior because he wanted to keep his job.

(4) Around December 10, 2015, the employer's district manager visited the store at which claimant worked. He inspected the contents of the store's suggestion box. He saw five separate handwritten notes referring to the same incident and in which claimant's behavior was characterized as "sexist management." Audio at ~6:31. The district manager referred the incident addressed in the notes to the employer's human resources intervention specialist for investigation.

(5) After December 10, 2015, the intervention specialist tracked the author(s) of the notes through their handwriting. Through these efforts, he learned from one employee of the incident in mid-September 2015 involving claimant and a donation attendant. The intervention specialist arranged for the manager of claimant's store to interview the donation attendant. The attendant confirmed to the manager that some weeks earlier claimant had grabbed him by his shirt and vest and had told him she was not afraid of him. The attendant was unable to explain what had motivated claimant's behavior or her statement to him.

(6) On approximately December 21 or 22, 2015, the intervention specialist was again at the store and was able to interview the donation attendant. He was not able to meet with claimant. On December 24, 2015, the intervention specialist interviewed claimant by phone. During this interview, claimant said she did not recall having had the interaction that the donation attendant described. The intervention specialist told claimant she was suspended. He asked claimant to think more deeply about the alleged interaction, and he would call her on Monday, December 28, 2015 to learn if her memory had improved. The intervention specialist was not able to call claimant on December 28, 2015.

(7) On December 30, 2015, claimant and the intervention specialist were finally able to connect by phone and further discuss claimant's memory of an interaction with the donation attendant. Claimant told the intervention specialist she had only a vague recollection of the incident and she "could not contradict the [donation attendant's] statement." Audio at ~12:04. Claimant also told the intervention specialist she was unable to recall the specific details the interaction because she only had a vague memory of it.

(8) Before December 31, 2015, claimant had never engaged in physically touching or grabbing an employee other than during the interaction with the donation attendant around the middle of September 2015.

(9) On December 31, 2015, the employer discharged claimant for her behavior during the interaction with the donation attendant around the middle of September 2015.

**CONCLUSIONS AND REASONS:** We agree with the Department, and not 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. 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).

In Hearing Decision 16-UI-56636, the ALJ concluded the employer discharged claimant for misconduct based on her behavior during the interaction with the donation attendant in around the middle of September 2015. The ALJ reasoned that claimant knew she was physically touching and grabbing the attendant during that interaction and therefore she had behaved with at least wanton negligence. The ALJ further concluded that claimant's behavior during that interaction was "too serious" to be excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Hearing Decision 16-UI-56636 at 2. We disagree that claimant's behavior toward the attendant in the middle of September 2015 was not excused from constituting misconduct, and that she was disqualified from receiving unemployment benefits.

At the outset, we assume for the same reasons as the ALJ that claimant's behavior during the middle of September 2015 was a wantonly negligent violation of the employer's expectation. At hearing, claimant stated over and over again that she thought the donation attendant was telling the truth about her interaction with him in mid-September 2015, and also testified she knew that such behavior, if it occurred, violated that employer's standards. Audio at ~22:20, ~23:00, ~24:53, ~24:20, ~25:43, ~26:48, ~27:15. Although claimant contended she did not recall the specific details of that interaction, she "vaguely remembered grabbing his [the donation attendant's] vest and shirt," but remembered nothing else or why she had done so. Audio at ~23:36. Significantly, claimant did not contend that, for some reason, she could not control her behavior around the middle of September 2015 or at any other time, or that she had problems in recalling any other events occurring around that time or at any other times. Based on the certainty with which the donation attendant testified, the substance of which was corroborated by the statement the intervention specialist obtained from the independent witness, and claimant's failure to rebut or even question the accuracy of his testimony at hearing, it can only be concluded the event happened as he recounted it. Based on this account, it is difficult to conclude that claimant did not know what she was doing in that interaction, and no evidence in the record shows or tends to show that claimant's thought processes were sufficiently disturbed as to absolve her from awareness that her behavior violated the employer's standards. Therefore, we agree with the ALJ that claimant's behavior toward the donation attendant in the middle of September 2015 was at least a wantonly negligent violation of the employer's standards.

Although claimant's behavior might have been wantonly negligent, it is excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that 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). To qualify to be excused as an isolated instance of poor judgment the behavior at issue must not have exceeded "mere poor judgment" by, among other things, not causing 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's intervention specialist testified that claimant had never before or after the mid-September 2015 engaged in behavior similar to that which she exhibited in her interaction with the donation attendant. Audio at ~13:22, ~19:08. Claimant testified that her alleged behavior during the interaction, as described, was atypical and highly unusual for her. Audio at ~23:00, ~23:58, ~28:54. On this record, the available evidence shows that

claimant's behavior during the middle of September 2015 was a single or infrequent occurrence, and it meets the first prong of the test to be excused as an isolated instance of poor judgment.

Although the ALJ concluded that claimant's behavior during the interactions with the donation attendant was "too serious" to fall within the exculpatory provision for an isolated instance of poor judgment, we disagree. Hearing Decision 16-UI-56636 at 3. While claimant may have tried to avoid describing the specifics of her behavior in mid-September 2015 by insisting she did not recall the details of the interaction, she did not fabricate a story to innocuously explain the interaction and did not make any attempt to undercut the account given by the donation attendant or to challenge its accuracy or his credibility as a witness. Audio at ~25:43, ~26:48, ~27:15. At hearing, claimant did not attempt to affirmatively justify the behavior described by the donation attendant, and repeatedly stated that it was "totally inappropriate" and unacceptable in the workplace. Audio at ~23:05, ~23:50, ~25:10, ~25:30. Although the employer might have wanted claimant to admit outright the specifics of her behavior during the interaction, an objective employer would recognize the inability of some employees to do so for reasons of personal dignity, and would have acknowledged that claimant's failure to challenge the donation attendant's account was tantamount to such an admission. On these facts, an objective employer would not have concluded claimant's behavior during the interaction with the donation attendant was not of a type that it could not trust claimant to comply with its standards in the future. Claimant's behavior did not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Because claimant's behavior meets all of the requisites, it is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant but not for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-56636 is set aside, as outlined above.

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

**DATE of Service:** May 12, 2016

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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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