

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0551**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 95613). The employer filed a timely request for hearing. On April 27, 2016, ALJ S. Lee conducted a hearing, and on May 2, 2016 issued Hearing Decision 16-UI-58678, affirming the Department's decision. On May 12, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, 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). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Oregon Military Department employed claimant from November 1, 2012 to January 28, 2016 as a procurement and contract assistant to maintain the supplies necessary to operate the employer's Oregon Youth Challenge Program (OYCP) and to supervise the OYCP cadets assigned to work in her area.

(2) In 1987, claimant was diagnosed as having post-traumatic stress disorder (PTSD). Although she had been asymptomatic for seven years, she began experiencing symptoms again in January 2015, including panic attacks.

(3) The employer expected claimant to perform all her job duties and while doing so, maintain a professional standard of conduct, including treating cadets and staff with courtesy, dignity and respect. The employer expected claimant to refrain from yelling, lecturing, harassing, making sarcastic implications, demeaning or using foul language toward cadets and employees. Transcript at 6-7. The employer also expected claimant to address personnel matters through her chain of command and to avoid working unauthorized overtime. Claimant understood the employer's expectations, having received training regarding the employer's policies at hire and every six months thereafter.

(4) Sometime before February 2, 2015, the employer instructed claimant to order a supply bag for a cadet's medical supplies. On February 2, 2015, the OYCP director asked claimant when the cadet's bag would arrive. Claimant perceived the director as having questioned her much more frequently, experienced a panic attack and felt as though she must "go or die." Transcript at 38. Claimant gave her keys to her supervisor and did not report to the supervisor's office later that day, as the supervisor had instructed. Instead, claimant sent an email to staff stating they should contact her supervisor with inquiries regarding her assigned work duties, and left work. The employer believed claimant left her area unsecure when she left. The employer gave claimant a two-month salary reduction after it concluded claimant violated its policies regarding professional conduct, chain of command, employee time off and property accountability. Claimant's union grieved the disciplinary action and claimant told the employer her conduct was due to her PTSD. In August and September 2015, claimant requested intermittent medical leave for her medical condition, and the employer authorized the leave.

(5) In March and August 2015, claimant inadvertently worked 5 to 10 minutes of overtime and arrived to work late once because she lost track of time and the clocks were not "in sync" in the employer's facility. Transcript at 49. The employer reprimanded claimant for working overtime without authorization.

(6) In September 2015, the employer discovered that claimant had forgotten to maintain an adequate supply of urinalysis kits for the OYCP and gave her a written reprimand.

(7) In September 2015, claimant saw a staff person eating candy as he was about to enter a room to work with cadets. The employer did not permit staff to eat candy when working with the cadets. Claimant reminded the staff person it was unacceptable to eat food and candy when working with the cadets, and that the cadets were not permitted to eat candy at OYCP. Claimant later reported the incident to her supervisor. The employer reprimanded claimant for "going outside the chain of command" and correcting the behavior of the staff person. Transcript at 43.

(8) On October 23, 2015, claimant entered a supply area with the cadets in her charge and saw other cadets there who had been assigned to a maintenance staff person. The employer expected cadets to be supervised by staff at all times. Claimant noted that the maintenance cadets were unsupervised even though the supply area contained new supplies and potentially dangerous power tools. Claimant saw one cadet looking through a supply of new gloves, and asked him to explain what he was doing. Claimant felt he was not being responsive to her questions and continued to look through the gloves, and became frustrated. Another maintenance cadet tried to intervene, and claimant told him, "Shut the fuck up." Transcript at 31.

(9) The maintenance staff person charged with supervising the maintenance cadets returned to the supply area. Claimant asked him why he left the cadets unsupervised in the area with power tools and told him that the cadets had been looking through supplies. Claimant felt the maintenance staff person was not taking her concerns seriously enough. The cadets were nearby when claimant spoke to the maintenance staff person.

(10) Claimant reported the incident from October 23, 2015 to the employer. On January 28, 2016, the employer discharged claimant for using foul language toward a youth cadet and allegedly being rude to the maintenance staff person on October 23, 2015.

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

The employer discharged claimant based on the events of October 23, 2015, when claimant used foul language toward a youth cadet and was then allegedly rude to a coworker. Regarding claimant's treatment of the cadet, the employer had a right to expect claimant to refrain from using foul language toward him, and claimant understood that expectation. Claimant violated the employer's expectations by telling a cadet to "shut the fuck up." Claimant stated at hearing that her reaction to the cadet was prompted by "lost patience" and not symptoms of PTSD. Transcript at 42. Thus, the record shows claimant was conscious of her conduct and indifferent to the consequences of it, making her conduct at least wantonly negligent. However, we conclude her conduct is excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(D) further provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused.

The preponderance of the evidence fails to show claimant engaged in other willful or wantonly negligent conduct on October 23 and within a relevant time period before October 23. The employer was dissatisfied regarding how claimant addressed the staff person who left the cadets unsupervised on

October 23. However, the employer's evidence that claimant "went off" on the other staff person, and that she was "very loud, . . . angry and unprofessional in front of the cadets," was based entirely on hearsay. Transcript at 9. Claimant's firsthand testimony does not show that claimant behaved as the employer alleged, or that she yelled, lectured, harassed, demeaned or used sarcastic or foul language toward the other staff. The record provides no reason to doubt claimant's credibility, and her firsthand testimony had more weight than the employer's hearsay evidence, particularly because claimant was direct and responsive when answering the ALJ's questions, admitted her culpability with respect to her language toward the cadet even though it was against her own interest to do so, and because the allegation of other misconduct on October 23 is central to the case and claimant was unable to cross-examine the sources for the employer's hearsay statements about their observations, recollection, truthfulness or potential bias.

The record fails to show that claimant engaged in willful or wantonly negligent behavior by inadvertently working 5 to 10 minutes of overtime in March and August 2015, and arriving late on one occasion. The employer's hearsay evidence failed to outweigh claimant's evidence that she did not consciously disregard the employer's expectations, but rather, failed to note the time and was late or inadvertently worked 5 to 10 minutes late, due in part to having unreliable clocks on the premises.

The record also fails to show that the two reprimands claimant received in September 2015 formed part of a pattern of other willful or wantonly negligent behavior. In early September 2015, the employer reprimanded claimant for failing to maintain a sufficient supply of urinalysis kits for the program. The record fails to show that claimant consciously disregarded the employer's performance expectations by failing to order the kits because claimant thought she had enough tests and "forgot" to order more due to time limitations and the lack of an adequate inventory system. Transcript at 48, 52. Although claimant's failure to order the kits may have been negligent, her conduct did not rise to the level of wanton negligence necessary to show misconduct.

Later in September 2015, the employer reprimanded claimant because she reminded a coworker he was not permitted to eat candy in front of the cadets, and that the cadets were not allowed candy. The record does not show the employer's policy regarding addressing "personnel matters" through claimant's chain of command required claimant to refrain from any discussion of the employer's rules with coworkers, or from mentioning a particular rule when she thought the coworker was about to act contrary to it, especially to avoid a situation that could be construed by the cadets as insensitive, and where, as here, claimant also reported the matter to her supervisor. Thus, because the employer failed to show that claimant knew or should have known the employer's expectation from its policies, prior training, experience or warnings, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence by reminding her coworker about the candy.

The other discipline claimant received during her employment, occurring approximately a year before the final incident, was too remote in time to constitute part of a repeated act or pattern of willful or wantonly negligent behavior.

The record fails to show that claimant had other willful or wantonly negligent incidents of poor judgment, so the conduct involving the cadet was isolated. Moreover, viewed objectively, claimant's foul language toward the cadet in the final incident did not involve such an egregious exercise of poor

judgment that it constituted a breach of trust that made a continued employment relationship impossible with the employer.

Because the conduct for which claimant was discharged was an isolated instance of poor judgment, it did not constitute misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-58678 is affirmed.

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

**DATE of Service:** June 17, 2016

**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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