

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0668**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 132113). The employer filed a timely request for hearing. On May 25, 2016, ALJ Triana conducted a hearing, and on May 26, 2016, issued Hearing Decision 16-UI-60534, concluding that the employer discharged claimant for misconduct. On June 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT;** (1) The Courtyard at Mt. Tabor, an assisted living facility, employed claimant from February 7, 1996 until March 3, 2016, last as a dining room supervisor.

(2) The employer's policy regarding workplace violence listed a number of examples of violent behavior, and specified that an employee who witnessed or learned about violent behavior of the type listed was "required to report it promptly to her supervisor or the [employer's] executive director." Claimant knew about and understood this employer policy, partly as a matter of common sense and also because she received a copy of a handbook containing the policy in 2014. On March 11, 2014, claimant signed an acknowledgement that she had received and read this handbook. Transcript at 11.

(3) On Saturday, February 20, 2016, claimant completed her shift at 4:30 p.m. Later that afternoon, while claimant was at home with her family, J and B,<sup>1</sup> two employees whom claimant supervised,

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<sup>11</sup> J and B are pseudonyms.

engaged in an angry altercation about a food order. J was upset by B's behavior and slapped or punched B twice. B sent claimant a text message, telling her that J hit her. Claimant knew that she should contact her supervisor, the employer's culinary director, about this incident, but did not do so because she believed her supervisor would suspend J and B, and then ask claimant to find other employees to work in their place. Claimant believed she would be unable to find employees willing to work in their place. Claimant determined that B was uninjured, determined that the incident occurred in the kitchen and was not witnessed by residents in the facility, and also determined that the two women were no longer angry with one another. She concluded that further problems were unlikely to occur, and instructed J and B "to stay away from each other and each do their jobs." Transcript at 25. Claimant planned to tell her supervisor about the incident when she returned to work on Tuesday, February 23.

(4) Claimant's supervisor and the executive director learned about the February 20 incident and questioned claimant about it, telling her she should have immediately reported it to them. Claimant continued working until March 1, 2016. On that date, the employer suspended her, pending an investigation into the February 20 altercation and claimant's response to it.

(5) During the investigation, J apologized to B for her behavior. B accepted the apology and said that she was not sure that J was serious, since J had been smiling when she hit B. Exhibit 1. .

(6) On March 3, 2016, the employer discharged claimant for failing to promptly report an incident of violent behavior in the workplace, in violation of its policy concerning workplace violence. Prior to her suspension and discharge, claimant had never been disciplined by the employer. Transcript at 12.

**CONCLUSION AND REASONS:** We disagree with the ALJ, and conclude 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.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, the exercise of poor judgment must be 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). Some acts, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

In Hearing Decision 16-UI-60534, the ALJ found that claimant knew and understood she was required to report any incident of workplace violence to her supervisor. The ALJ concluded that claimant's

failure to promptly report the February 20, 2016 incident, in which an employee that claimant supervised hit another employee, “was, at a minimum, a wantonly negligent violation of the standards of behavior the employer had the right to expect of her” and therefore constituted misconduct. Hearing Decision 16-UI-60534 at 3. The ALJ further concluded that claimant’s conduct was “so egregious as to exceed mere poor judgment. Given the potential legal liability to the employer, the employer could not trust that claimant would not respond inappropriately in the future.” Hearing Decision 16-UI-60534 at 3. While we agree that the conduct that resulted in claimant’s discharge was wantonly negligent, we disagree with the ALJ’s conclusion that her conduct is not excusable as an isolated instance of poor judgment.

The record shows that claimant’s wantonly negligent behavior in regard to the February 20 incident was a single occurrence: prior to her suspension and discharge, the employer had never disciplined claimant. The ALJ’s conclusion – that claimant’s behavior was an irreparable breach of trust in the employment relationship -- was solely based on the ALJ’s finding that claimant’s conduct was “egregious.” *See Calloway v. Employment Department*, 199 Or App 571, 112 P3d 453 (2009) (the court rejected EAB’s finding that claimant’s conduct was a breach of trust because it was “too serious”; the fact that a claimant’s actions are a serious violation of the employer’s standards “does not automatically transform the act into misconduct.”). To determine whether claimant’s conduct caused a breach of trust, it is necessary to apply an objective test because “an employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not do so. \* \* \* The dispositive question is whether the employer’s loss of trust was a reasonable reaction to claimant’s acts.” *Id.*; *see also Isayeva v. Employment Department*, 266 Or App 806, 340 P3d 82 (2014).

Here, the record shows that prior to her discharge, claimant had a 20 year history of work for the employer, during which she had never been disciplined. The situation she faced on February 20 – a report that an employee had assaulted a coworker – was one she had never encountered before. Transcript at 22-23. During the employer’s investigation of the incident, claimant readily admitted that her failure to promptly contact her supervisor was inappropriate, and gave every indication that she understood the seriousness of her conduct. Based on claimant’s length of employment, the novelty of the February 20 incident, and claimant’s response to the employer’s investigation, a reasonable employer would have confidence that claimant was unlikely to engage in future conduct that would violate the employer’s policy regarding workplace violence, or any other employer policy. We therefore conclude that claimant’s behavior was a single incident of poor judgment that did not create an irreparable breach of trust in the employment relationship. Claimant’s actions meet the other requirements to be excused as an isolated incident of poor judgment. Her conduct was not unlawful, or tantamount to unlawful conduct. Her conduct did not otherwise make a continued employment relationship impossible, since there is no evidence in the record that claimant’s conduct adversely affected operations of the employer’s business, or caused any long term damage to the employer’s authority, business status, or its employees.

For the above reasons, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-60534 is set aside, as outlined above.

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

**DATE of Service: July 11, 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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