

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0783**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 92524). The employer filed a timely request for hearing. On May 26, 2016, ALJ Seideman conducted a hearing and on June 16, 2016, after reviewing the entire hearing record, ALJ Holmes-Swanson issued Hearing Decision 16-UI-61908 because ALJ Seideman was not available to do so. Hearing Decision 16-UI-61908 affirmed the Department's decision. On June 29, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) Bay Area Hospital employed claimant from June 13, 1998 until March 8, 2016, last as a supply aide.

(2) The employer expected claimant to refrain intimidating or threatening to retaliate against coworkers for their actions. Claimant understood this expectation of the employer. The employer also expected claimant to answer honestly when it inquired about her behavior in the workplace. Claimant understood this expectation as a matter of common sense.

(3) Before 2016, the employer advised claimant that her coworkers sometimes perceived her as having a "negative" attitude and an angry and "sharp edge." Transcript at 23. On July 31, 2015, during claimant's 2014-2015 performance evaluation, the employer again counseled claimant that her coworkers perceived her workplace conversations as unduly negative. Exhibit 4 at 1.

(4) On Friday, February 19, 2016, claimant and a coworker were working together in the shipping area. Claimant began to criticize the coworker for making mistakes in filling orders. Two other coworkers overheard claimant speaking with the first coworker and thought claimant was unnecessarily rude to the first coworker. Transcript at 13-14, 17-18. On February 19, 2016, the first coworker sent an email to his and claimant's supervisor about claimant's behavior that day and asking that he no longer be assigned to work in proximity to claimant. At least one of the coworkers who witnessed claimant's interaction with the first coworker on February 19, 2016 also complained to the supervisor about claimant's behavior toward the first coworker. Because the supervisor was not at work on February 19, 2016, he did not receive these communications until Monday, February 22, 2016.

(5) On February 22, 2016, after receiving the complaints about claimant, the supervisor approached claimant at around noon, told claimant he had received a complaint about her behavior on February 19, 2016 and he wanted to have a meeting with her on February 25, 2016 to discuss her behavior. Sometime after the supervisor spoke with claimant, claimant went to the supply room where the two coworkers who had overheard her February 19, 2016 interaction with the first coworker were present. Claimant expressed to these two coworkers that she was "very angry" that the first coworker had "turned her in" to the supervisor. Transcript at 22. Claimant told the coworkers that she "was gonna get even with that son of a bitch" for complaining to the supervisor. Transcript at 14, 19. Both of these coworkers reported to the supervisor what claimant said that day in connection with the first coworker.

(6) On February 25, 2016, claimant met with her supervisor and the employer's human resources representative about her behavior. Claimant denied that she had been rude to the first coworker on February 19, 2016. Claimant also denied she had referred to the first coworker as a "son of a bitch" on February 22, 2016 or that she had stated she was "gonna get even" with him. After this meeting, the employer suspended claimant to determine how it intended to address claimant's behaviors on February 19 and 25, 2016, and the denials she made to the employer on February 25, 2016.

(7) On March 8, 2016, the employer discharged claimant for being dishonest with it on February 25, 2016 when she denied she had threatened to "get even" with the first coworker.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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 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).

Claimant did not dispute that she understood the employer expected her to be honest when the supervisor and human resources representative questioned her about her behavior on February 22, 2016.

Rather, claimant contended that she never threatened to “get even” with the coworker on February 22, 2016, and that her February 25, 2016 denial to the employer’s representatives of making such a statement on was truthful. Transcript at 29. However, the two coworkers who overheard claimant’s alleged threat on February 23, 2016 both testified at hearing about what they overheard. Their hearing testimony was consistent, and claimant did not dispute that they were both at a location where they were readily able to hear what claimant said. Claimant chose not to seriously cross examine either of these first-hand witnesses about the accuracy of their recollections. Transcript at 15, 19-20. Given the apparent sincerity of their testimony, its consistency, and the lack of any a concrete motive to explain why both would conspire to fabricate testimony against claimant, the preponderance of the evidence shows, more likely than not, that their testimony was accurate, and that claimant stated to both of them that she was “gonna get even” with the first coworker.

Claimant did not dispute she was aware the employer expected her to be truthful when its representatives questioned her about her workplace behavior. Claimant was obviously aware when she denied making the threatening statement about her intentions toward the coworker that she was being dishonest with the employer. By her denial, claimant willfully violated the employer’s expectations that she would be honest when it questioned her about her work-related behavior.

Claimant’s willful behavior in disregard of the employer’s reasonable standards may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is considered an isolated instance of poor judgment only if, among other things, it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer’s standards. Here, the behavior that claimant denied engaging in occurred only two days before she was discharged for being dishonest about it. Claimant did not dispute she was reasonably aware that the employer prohibited her from making threats against the first coworker or that the statement she allegedly made on February 23, 2016, as testified to by the coworkers who witnessed it, was the type of threat that was proscribed by the employer’s policy. By making the statement on February 23, 2016 about her intention to “get even” with her coworker, claimant violated the employer’s expectations at that time with at least wanton negligence. Since claimant’s wantonly negligent behavior on February 23, 2016 formed a pattern with her willfully dishonest behavior on February 25, 2016, the latter behavior was not a single or infrequent incident in violation of the employer’s standards. As such, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant’s dishonesty on February 25, 2016 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she misrepresented her behavior on February 22, 2016 because she did not understand the employer’s expectation of honesty. Moreover, it is implausible that claimant sincerely believed the employer would excuse her deception. Claimant’s behavior does not meet the threshold to be excused as a good faith error.

The employer demonstrated, more likely than not, that it discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-61908 is affirmed.

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

**DATE of Service: August 5, 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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