

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0786**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 134229). The employer filed a timely request for hearing. On May 17, 2016, ALJ Shoemake conducted a hearing, and on May 24, 2016 issued Hearing Decision 16-UI-60271, concluding the employer discharged claimant for misconduct. On June 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) A-B Enterprises, Inc. employed claimant from May 2014 to February 22, 2016 as a waitress in its restaurant.

(2) The employer expected its employees to refrain from engaging in hostile and aggressive behavior towards coworkers and managers, including unprofessional or disrespectful behavior that made other employees feel intimidated, pressured or bullied. Claimant understood the employer's expectations.

(3) In July 2015, claimant became upset with a coworker and used foul language toward her. The employer warned claimant that it considered the use of foul language towards coworkers to be impermissible hostile and aggressive behavior.

(4) On or about February 11, 2016, the restaurant manager told claimant she had been selected randomly for a drug test. Claimant became upset because she recalled having been selected for drug tests ten times since hire, including in January 2016. Claimant yelled at the manager, used foul language, and told him the employer was harassing and targeting her. The manager called claimant into his office to discuss the matter and explained how an outside company did the random selections and showed claimant the email notice from the company that provided the randomly generated list of employees for

testing. Claimant told the manager he was a “liar.” Transcript at 10. Claimant complained about the employer’s selection process to the person who administered the drug test to her. The manager gave claimant a verbal warning that her conduct was inappropriate.

(5) On February 21, 2016, claimant became upset when a server began to take the food for one of claimant’s tables out to the table. Claimant yelled, “Don’t touch my damn food,” at the server in and told him not to do it again. Transcript at 18. The server, who was in training, called the restaurant manager at home because he was upset about the incident. The server told the restaurant manager that claimant yelled and “cussed” at him in front of customers and coworkers for taking the food out.

(6) On February 22, 2016, the employer discharged claimant for behaving aggressively towards a coworker by using foul language and yelling at him on February 21, 2016.

**CONCLUSIONS AND REASONS:** We agree with the ALJ, and conclude that 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. 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 for behaving in a hostile and aggressive manner to a coworker. Claimant knew that the employer expected her to treat her coworkers in a professional and respectful manner as a matter of common sense and because the employer had disciplined her previously for failing to comply with those expectations. Claimant consciously violated the employer’s expectations regarding treatment of coworkers when, on February 21, 2016, claimant used foul language and yelled at a coworker when he served food to one of claimant’s tables. Claimant’s behavior was, at the very least, wantonly negligent.

In regard to her conduct on February 21, 2016, claimant did not directly deny she yelled and used foul language towards a coworker. Claimant first stated that she did not recall having a conversation with the new server on February 21, although she also stated that she “might have said” that she wanted to bring the food out herself because the customer wanted something extra with the order. Transcript at 24. However, the server from the February 21 incident provided detailed testimony at hearing as to claimant’s actions and statements on February 21. The server’s testimony was consistent with what he had told the manager when he called the manager at home on February 21, as recounted by the manager at hearing. Transcript at 6-7. Based on the evidence presented at hearing, we conclude that the

preponderance of the evidence demonstrates that claimant yelled and used foul language toward a coworker on February 21.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered isolated, it must be a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). Claimant's conduct was not isolated. In July 2015, claimant engaged in conduct that constituted at least a wantonly negligent violation of the employer's expectations regarding the appropriate treatment of coworkers when she used foul language toward a coworker. Claimant engaged in similarly wantonly negligent conduct on February 11, 2016 when she yelled at a manager and called him a "liar," and accused the employer of "harassing" her because she was dissatisfied with being selected for another drug test. Claimant asserted that she was upset because she could not understand how she could be selected again for random drug test, having been selected ten times during her employment when other employees had never been tested. Transcript at 30. Although claimant had the right to complain to the employer and inquire about its random selection procedure, claimant violated the employer's expectations by complaining about the employer to the test administrator, arguing with her manager about the testing, and calling the manager a "liar." Claimant knew or reasonably should have known at the time of each of those incidents that she should not have behaved in an aggressive, insubordinate manner toward the manager and coworkers. Given claimant's conduct in July 2015 and on February 11, 2016, we conclude that her disrespectful behavior on February 21 was not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not allege or show that she sincerely believed or had any basis for believing the employer would excuse or condone her conduct toward her coworkers, given that she had been disciplined for similar behavior in July 2015 and verbally warned earlier in February 2016.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-60271 is affirmed.

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

**DATE of Service:** July 21, 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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