

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0955**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90910). Claimant filed a timely request for hearing. On July 27, 2016, ALJ M. Davis conducted a hearing, and on July 29, 2016 issued Hearing Decision 16-UI-64711, affirming the Department's decision. On August 18 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of that argument to the employer as required by OAR 471-041-0080 (October 29, 2006). Claimant's written argument also contained information not offered into evidence during the hearing, and she failed to show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument or the new information it contained when reaching this decision.

**FINDINGS OF FACT:** (1) TRG Customer Solutions, Inc. employed claimant as a telephone advisor from October 29, 2014 until May 4, 2016.

(2) The employer expected claimant to behave professionally in the workplace and to refrain from using profane or foul language. Claimant understood the employer's expectations.

(3) Sometime in August 2015, a coworker who worked with claimant on a sales campaign abruptly left the workplace for the day. The next day, the coworker complained to human resources department representatives that she had left work the day before because of claimant's attitude and the way claimant had treated her. When claimant learned of what the coworker had done, she was upset and used profane and foul language when speaking to the coworker and her manager about the coworker's behavior. On

September 29, 2015, the employer issued a warning to claimant for her behavior in connection with the coworker. The warning advised claimant “she need[ed] to be professional [in the workplace] and refrain from profanity.” Exhibit 1 at 17.

(4) On January 4, 2016, claimant discovered that the same coworker with whom she worked had made mistakes on a spreadsheet intended for the one of that client’s dealerships. Claimant sent an email to the coworker pointing out the errors. The coworker did not reply to claimant’s email. Claimant later discovered that the uncorrected spreadsheet had been sent to the dealership by the coworker. Claimant then went to the coworker’s desk and asked the coworker if she had read her email informing the coworker of the errors in the spreadsheet. The coworker told claimant she had stopped reading emails from her. Claimant became upset at the coworker’s comment and in her response to the coworker used profane and foul language. The coworker finally put her hand up to claimant’s face and said, “Can you just stop?” Transcript at 22. On February 3, 2016, the employer issued a written warning to claimant, citing that her “verbal outburst” and use of “inappropriate language” of January 4, 2016 was not acceptable behavior in the workplace. Exhibit 1 at 13. The warning advised claimant that her behavior would be monitored on a daily basis to ensure that she complied with the employer’s behavioral standards. *Id.*

(5) On April 20, 2016, claimant again became upset with the behavior of the same coworker and commenced a Skype conversation about it with her lead worker. In the conversation, claimant expressed her disdain for the coworker and used foul language and expressions, such as “bullshit,” “fucking pathetic bullshit,” “fucking bitch dude” “shit,” “manipulative bitch,” “fucking up,” “fucking favor,” “fucking bullshit,” “piece of shit,” “fucked up,” “inappropriate asshole,” “stupid ass,” “shit bitch,” and “manipulative lying bitch.” Exhibit 1 at 21, 22. In the course of this conversation, claimant’s lead asked claimant to stop, but claimant continued to vent her thoughts about the coworker.

(6) On April 29, 2016, when claimant reported for work, she learned that the coworker about whom she had expressed such disdain had resigned without notice. Claimant was upset when she learned of the resignation since she anticipated she would have to handle all of the work on the client’s campaign alone. In the middle of the morning, claimant’s lead told her she needed to participate in a conference call with the senior operations manager and the client advocate about the campaign. When claimant was walking to the office where she would participate in the call, claimant told the lead that he and the conference call attendees could “fuck yourselves” or “are you fucking serious?,” or some other statement using the word “fuck” in expressing her feeling that she did not have time to participate in the call. Transcript at 6, 17, 18. During the conference call, the client advocate asked claimant to forward to her all of the emails claimant had sent to the client. When this request was made, claimant raised the middle finger of her hand to “flip off” the advocate and to express that her displeasure with this request. Later, sometime after the conference call had concluded, claimant went to her lead and asked him if he would authorize her to work overtime during the upcoming weekend to allow her to make up for the unexpected resignation of the coworker. When the lead told claimant he could not authorize overtime, claimant was upset and told the lead he had been “a dick” to her all day, “this place can fuck itself” and that the employer treated its employees “like shit.” Transcript at 6, 17, 18.

(7) On Monday, May 2, 2016, when claimant reported for work, the employer notified her she was being suspended for her behavior on April 29, 2016, including her use of foul language and making the gesture with her middle finger during the conference call. Claimant agreed she had used foul language and

made the foul gesture but stated that she had been angry and tired and had intended the gesture as “a joke.” Transcript at 9, 17; Exhibit 1 at 30. The employer told her it intended to conduct an investigation of her behavior. On Tuesday, May 3, 2016, the employer’s senior operations manager telephoned claimant and told her the employer was “still looking into things” and had not yet made a decision about her continued employment. Transcript at 29. On Wednesday, May 4, 2016, the senior operations manager called claimant and told her “we’re going to have to separate employment.” Transcript at 30.

(8) On May 4, 2016, the employer discharged claimant.

**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 show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified that she understood the employer’s expectation that she refrain from using profane, foul or vulgar language in the workplace, whether in interactions with coworkers or managers. Transcript at 14. Claimant agreed at hearing that she used foul language, including the word “fuck,” when speaking to her lead before the morning conference call on April 29, 2016 and when speaking to her lead at approximately 4:00 p.m. that day about whether he would authorize overtime for her. Transcript at 17, 18. Claimant also agreed that she intentionally made a vulgar gesture with the middle finger of her hand during the conference call in response to the request that she forward several emails to the client advocate. Transcript at 18. With respect her chosen language that day, claimant did not contend that she thought it was acceptable, or that it was customary to use foul language in the employer’s workplace. Instead, claimant stated it was “not necessarily appropriate” and “I admittedly have a sarcasm profanity problem \*\*\*\* [I]t’s a disgusting vulgar bad habit.” Transcript at 16, 17. With respect to the hand gesture, claimant agreed that it was “not appropriate,” but contended “it wasn’t like I was being completely rude” because she intended it as a “frustrated joke.” Transcript at 17. As with the language she used, it is significant that claimant did not assert that the employer had a lenient attitude and it was a common or routine practice in the workplace to engage in behavior or make communicative gestures that would be considered vulgar in other settings. Based on language of the September 29, 2015 and the February 3, 2016 warnings, claimant was on notice that the employer did not tolerate foul communications in the workplace and that it was going to monitor claimant’s workplace behavior for compliance. By the foul language that she chose to use on April 29, 2016 and the foul communicative gesture she chose to make, claimant violated the employer’s standards with a least wanton negligence.

Although claimant’s behavior on April 29, 2016 was a wantonly negligent violation of the employer’s standards, it may be excused from constituting misconduct if it was an isolated instance of poor

judgment under OAR 471-030-0038(3)(b). To be considered an “isolated instance of poor judgment,” the behavior that is at issue must have been, among other things, 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). Here, claimant engaged in three separate and distinct foul communications on April 29, 2016 that violated the employer’s standards: during her interaction with the lead in morning before the conference call; during the conference call to express disdain for the client advocate’s request; and during her conversation with the lead near the end of the business day. Given this sequence and the numbers of her actions on April 29, 2016, claimant’s wantonly negligent behavior was neither a single nor infrequent occurrence. As such, it may not be excused as an isolated instance of poor judgment.

Claimant’s behavior on April 29, 2015 also is not excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend she used the language she because she mistakenly thought it was acceptable or tolerated in the workplace and, indeed, she acknowledged that it was not. Transcript at 17, 18. As well, any such contention would be implausible give the clarity of the September 29, 2015 and February 3, 2016 warnings about the use of vulgar language. For these reasons, claimant’s behavior is not excused from constituting misconduct as a good faith error.

Despite her wantonly negligent behavior, claimant contended that the employer did not discharge her for misconduct but because the employer lost the client for the campaign on which she worked. Claimant appeared to base this supposition on the alleged fact that the language she used on April 29, 2016 was not “misconduct,” on the failure of the senior operations director to tell her immediately on May 2, 2016 that she was fired or discharged, the operations director’s May 4, 2016 usage of the phrase “we’re going to have to separate employment” to indicate claimant was discharged. Transcript at 30; Exhibit 2 at 1-2. Claimant’s first argument is rejected since, as demonstrated above, the evidence in this record establishes that the language that claimant used on April 29, 2016 did constitute misconduct. Claimant’s second argument is rejected since it is not unusual for an employer to defer making an immediate discharge decision and taking time to consider its options. Absent additional evidence, which claimant did not offer, the employer’s two day delay in deciding to discharge claimant does not constitute a suspicious circumstance or suggest claimant was discharged for pretextual reasons. Claimant’s third argument is rejected since, without additional evidence, it is not apparent to us that the particular phrasing used by the senior operations director to communicate claimant’s discharge suggests a reasonable likelihood that claimant was discharged for reasons other than those stated by the employer. Finally, while claimant may be correct that the employer lost the client for which claimant was working around the time of her May 2, 2016 suspension, without more, it is unclear how the loss of that client might have been a motivation for the employer to discharge claimant. To the extent claimant might contend that certain employer representatives wanted to blame someone else for the loss of that client, it would seem more logical for those representatives to affix blame on the coworker who worked on the customer’s account and who resigned abruptly on April 29, 2016 rather than on claimant. In sum, there is insufficient evidence in the record to support claimant’s contention that she was discharged for reasons other than her use of foul language on April 29, 2016.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 16-UI-64711 is affirmed.

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

**DATE of Service: September 28, 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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