

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1007**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 75033). The employer filed a timely request for hearing. On August 9, 2016, ALJ Triana conducted a hearing at which claimant did not appear, and on August 12, 2016 issued Hearing Decision 16-UI-65524, reversing the Department's decision. On August 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although claimant did not appear at the hearing, he submitted a written argument in which he presented facts not offered into evidence during the hearing. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information if the party offering it shows that factors or circumstances beyond the party's reasonable control prevented the party from offering that information during the hearing. While claimant stated in the written argument that he was living in a homeless shelter and for that reason his argument might not have been timely submitted, this does not explain why he failed to appear at the hearing to present evidence or show that it was due to factors or circumstances not within his reasonable control. For this reason, EAB did not consider the new information that claimant sought to present in his written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Aimbridge Employee Service Corporation employed claimant as the night auditor of a hotel.

(2) The employer expected that claimant would follow the instructions of his supervisors and refrain from insubordinate behavior.

(3) Sometime before May 2016, the general manager was facilitating a meeting of all employees and introduced a game intended to highlight issues that might arise when correcting problems in the hotel. At the meeting, claimant addressed some flaws he perceived in the game. Claimant spoke about the flaws longer than the general manager thought was productive. The general manager told claimant he

would speak with him after the meeting about the game. When claimant and the general manager spoke later, the general manager told claimant that he had been a “little loud” when expressing his views on the game and had disrupted the flow of the meeting. Audio at ~21:43. The general manager also told claimant that it was inappropriate for him to bring up problems that affected only himself at all-employee meetings. The general manager suggested to claimant that he should raise such issues in private meetings with the general manager.

(4) On May 5, 2016, the general manger was facilitating another all-employee meeting and asked the employees in attendance to identify customer concerns and discuss them. An issue with the slowness at which the employer’s wi-fi allowed guests to access the internet was brought up. Claimant stated that in his opinion the only way to solve the problem was to provide guests with access codes that enabled them to use the high speed internet access usually reserved only for guests associated with the certain corporate accounts or guests who paid an access fee. When the general manager stated that he did not think the employer should make its high speed access generally available to all guests and should focus on solving the problem with its wi-fi, claimant insisted his resolution was the only way to solve the problem. Claimant continued to voice this opinion. The general manager told claimant three times that an all-employee meeting was not the place for his comments, he wanted to move on to other meeting topics, and claimant could talk about the wi-fi issue with him privately after the meeting. Sometime after the general manager’s third attempt to move the meeting along, claimant got up and started to leave the meeting. When the general manager asked claimant where he was going, claimant stated that he was leaving and “I’m not going to deal with this.” Audio at ~10:56. Claimant left the meeting room.

(5) After leaving the meeting room, claimant went to the back office to speak with the assistant general manager. Claimant told the assistant general manager his perception of what had happened during the meeting and that he thought the general manager had been “disrespectful” to him. Audio at ~18:25. The assistant general manager told claimant she was not going to take sides since she had not been present for his and the general manager’s conversation. At times, claimant’s voice became loud enough during this discussion that the general manager could hear it while still in the room where the all-employee meeting was taking place. After he concluded the meeting, the general manager went to the back office where claimant was. When he entered the office, claimant tried to continue discussing the topic of the hotel’s wi-fi. However, the general manager told claimant he was going to escort him from the hotel, and that he would call claimant after an investigation of his behavior at the all-employee meeting.

(6) On May 11, 2016, the general manager and claimant met at the hotel. Claimant repeatedly apologized for his behavior during the May 5, 2016 all-employee meeting. The general manager told claimant the employer had discharged him for his insubordinate and disruptive behavior during the meeting.

**CONCLUSIONS AND REASONS:** 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. Isolated instances of poor judgment and good

faith errors are not considered misconduct. OAR 471-030-0038(3)(c). 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).

In Hearing Decision 16-UI-65524, the ALJ concluded claimant's behavior during the all-employee meeting on May 5, 2016 was a wantonly negligent violation of the employer's standards since he found that claimant was disruptive and failed to comply with the general manager's request to stop speaking about the wi-fi issue. Hearing Decision 16-UI-65524. The ALJ further concluded claimant's behavior was not excused from constituting misconduct as an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b) because it was an irreparable breach of trust since "the employer could no longer trust that claimant would perform his job duties in a respectful manner." Hearing Decision 16-UI-65524. We agree that claimant's actions during and after the all-employee meeting may have been wantonly negligent, but disagree that they were not excused.

At the outset, even if a claimant's behavior was willful or wantonly negligent it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). Behavior is excused as an isolated instance of poor judgment if it was 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). To be excusable, claimant's behavior at issue also must not have been the type that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0030(1)(d)(C).

In this case, the employer's witness considered that the closest claimant had come to behaving insubordinately or disruptively before May 5, 2016 had occurred during another all-employee meeting on some unspecified prior date. Audio at ~20:36, ~22:49. Although claimant's behavior that prior day involved a comment he made during the meeting, when the general manager alerted him to the need to stop talking and allow the meeting to move on to other topics, he readily complied. Audio at ~21:36. The employer's witness did not describe any other aspects of claimant's behavior that day that could be construed as argumentative, disruptive or insubordinate, and the record fails to show claimant's behavior that day was a willful or wantonly negligent violation of the employer's expectations regarding workplace behavior. On this record, the employer did not show that claimant's alleged behavior on May 5, 2016 was other than a single or infrequent willful or wantonly negligent violation of the those expectations. It therefore meets the first prong to be excused.

While the ALJ concluded that the employer demonstrated claimant's behavior on May 5, 2016 was of a nature that it caused an irreparable breach of trust in the employment relationship, there is insufficient evidence in the record to support this conclusion. Fairly assessed, the testimony of the employer's witness was that claimant may have on occasion during the comments he made on May 5, 2016 raised his voice somewhat above a normal speaking volume. The employer's witness did not contend that claimant was yelling or shouting or raising his voice at anyone in particular, and did not contend that claimant used foul, insulting, rude or disrespectful language. While the employer's witness contended claimant was "disruptive" during the meeting, it appeared that his impression was based on claimant's continuing to speak single-mindedly about the wi-fi issue after two requests that he drop the topic, and not on any other behavior. Nothing the general manager described of claimant's behavior during the May 5, 2016 meeting could be reasonably construed as evidencing an intention to defy or flout the general manager's authority, or anything that resembled active or conspicuous insubordination.

Although the employer's witness testified that after claimant's behavior occurred on May 5, 2016, he became concerned about how claimant would react to guests when he was working nights in the hotel alone, the record fails to show that claimant belabored a work-related topic during a staff meeting was emblematic of a propensity to argue with or behave inappropriately toward guests. Audio at ~20:07. It is also noteworthy that claimant apologized to the general manager for his behavior shortly after the May 5, 2016 meeting, suggesting that he was remorseful for it, rather than convinced that his behavior was appropriate. Viewing the factors surrounding claimant's behavior on May 5, 2016, an objective employer would not have concluded that claimant's behavior that day so fundamentally undermined the employment relationship that it could not trust claimant in the future to behave appropriately in the workplace. Having met both prongs of the standard, claimant's behavior on May 5, 2016 is excused as an isolated instance of poor judgment, and not misconduct.

Although the employer discharged claimant, it did not show that the discharge was for unexcused misconduct, and not an isolated instance of poor judgment. Claimant is not disqualified from unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-65524 is set aside, as outlined above.

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

**DATE of Service: October 4, 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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