

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1080**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72229). Claimant filed a timely request for hearing. On September 2, 2016, ALJ Shoemake conducted a hearing, and on September 9, 2016 issued Hearing Decision 16-UI-67259, affirming the Department's decision. On September 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Special Mobility Services, Inc. employed claimant as a driver from April 11 or 12, 2011 to June 15, 2016.

(2) The employer expected claimant to be courteous to people he encountered while working and wearing the employer's uniform. Claimant understood the employer's expectation, or should have as a matter of common sense.

(3) While working on September 23 or 24, 2015, claimant referred to a female staff person at another business as "candy." He did not know her name and made up the nickname for her based on some song lyrics. Claimant told another person that her body was shaped like a cola bottle. The woman felt offended, thought that claimant's comments were inappropriate, and reported that she felt scared of having to be in proximity to claimant. The employer counseled claimant that his comments were inappropriate and decided not to send claimant back to that business.

(4) In November 2015, claimant was assigned to transport a client. The client's mother typically used baby wipes to wipe surfaces in the vehicle she thought her daughter might touch to protect her daughter from illness. Claimant disliked that the mother did that. He objected to the smell of the baby wipes and was concerned that there were no material safety data sheets (MSDS) covering the product she used. Claimant asked that the mother not use the wipes near his head. The mother ignored his request, and they had a disagreement. On November 18, 2015, the mother complained about claimant to the employer and said that she no longer wanted claimant to drive her daughter.

(5) On June 2, 2016, claimant transported a customer to a strip mall. The accessible parking spaces available in the mall's lot were too small for claimant's vehicle so he stopped in the thoroughfare and opened the vehicle's ramp to help the customer in her wheelchair from the vehicle and take her to her destination. An individual came after claimant, yelled at him and threatened to have him fired for stopping in the thoroughfare. Claimant tried to remain calm, but after approximately ten minutes he "emotionally had enough" and held up his middle finger to the man. Transcript at 24. The man, who owned a business in the strip mall, took claimant's photograph and reported him to the employer.

(6) On June 9, 2016, the employer interviewed claimant about the June 2nd incident. When asked about his hand gesture on June 2, 2016, claimant responded that his gesture was "half a peace sign" and that he made the gesture because he "was wishing [the man] well." Transcript at 25.

(7) The employer suspended claimant pending further investigation, and, on June 15, 2016, discharged claimant for engaging in inappropriate behavior on June 2, 2016.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. Willful or wantonly negligent behavior such as claimant's may be excused if the conduct was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d) defines an isolated instance of poor judgment, in pertinent part, as an isolated act that involves poor judgment and does not exceed mere poor judgment.<sup>1</sup>

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<sup>1</sup> OAR 471-030-0038(1)(d) states: As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must 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.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

The employer expected claimant to treat others with courtesy while at work and wearing his work uniform, and claimant understood. The employer alleged that claimant violated that expectation on June 2, 2016 by making an inappropriate hand gesture. Claimant admitted that he made a gesture to the man, but argued that it was not inappropriate because it was merely "half a peace sign" intended to "wish[] him well," which is implausible. It is a matter of general knowledge that extending a middle finger toward another person is an obscene gesture intended to communicate disdain, and is not a gesture of peace, or half-peace, intended to communicate well-wishing. Although claimant argued that he had "emotionally had enough" at the time he made the gesture, the record does not suggest that claimant was unable to control his conduct at the time. Claimant's use of an obscene hand gesture on June 2nd was, more likely than not, a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him.

Claimant's conduct was isolated, however. The employer presented detailed evidence about only two prior incidents. In November 2015 claimant had a disagreement with a customer's mother over her use of baby wipes in his vehicle because they had an odor he considered offensive and he had safety concerns over her use of unauthorized cleansers without MSDS sheets. The record fails to show how he spoke to the customer's mother or that he otherwise acted in a way that he knew or should have known would probably violate the employer's expectations, so his conduct in that incident did not make his June 2nd conduct part of a repeated act or pattern of other willful or wantonly negligent behavior.

Claimant's conduct in the September 2015 incident, likewise, does not appear to have involved willful or wantonly negligent conduct on claimant's part. Although the employer alleged claimant had engaged in "sexual misconduct" that caused someone to feel afraid, the only details the employer provided were that he called a woman whose name he did not know by a nickname, "candy," and said her body was shaped like a cola bottle. Transcript at 8. The employer did not establish that claimant's conduct toward the person included any overt sexual overtones, obscene comments or suggestions, or otherwise inappropriate conduct that claimant knew or should have known as a matter of common sense was inappropriate, and, once the employer warned him about the conduct, the record shows that there were no subsequent incidents of a similar nature. The record therefore suggests that while the employer disapproved of his conduct in the September 2015 incident, it was likely that claimant did not know or have reason to know that his conduct would probably be considered a violation of the employer's expectations. That incident was not willful or wantonly negligent, and, therefore, it did not make his June 2nd conduct part of a repeated act or pattern of other willful or wantonly negligent conduct. For those reasons, we conclude that claimant's conduct was isolated.

Claimant's act involved judgment, as he decided while transporting a customer in a wheelchair to remove his hand from the handle and hold it up while making an obscene gesture, and claimant's judgment to willfully or with wanton negligence violate the employer's expectations was an exercise of poor judgment. The conduct did not violate the law, and was not tantamount to a law violation, however. Therefore, unless claimant's conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible, claimant's conduct is excusable as an isolated instance of poor judgment.

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(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that 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).

The circumstances under which claimant's act occurred do not suggest that an irreparable breach of trust occurred or that his act rendered a continued employment relationship impossible. The parking lot in which claimant was expected to park was difficult to navigate because the accessible parking spaces were too small for his vehicle. Although the employer's other drivers "seemed to make it work" despite the difficulty, other drivers also had a history of negative interactions with business owners in the same strip mall. Transcript at 29; Exhibit 1. Claimant described the interaction on June 2nd:

So I parked down the aisle where most traffic goes. Okay. So I went to lay [the ramp] down and all of a sudden he came up upon me, and he scared the living di – daylight's out of me . . . it's held threatening and menacing, and . . . he just kept on and stuff, for about 10 minutes while I was, you know, trying to let her off. And I tried to calmly and rationally explain to him, "Sir, I can't get into the handicapped area and lay this lift down safely to let this woman off." \* \* \* [H]e was still, you know, hollering and – and – and saying, "[ ] you'll get fired for this" . . . and I tried to ignore him as best as I could . . .

Transcript at 24. The man had not identified himself to claimant as a business owner prior to the interaction, and had never attempted to speak with claimant in a polite manner. It was not until approximately ten minutes had passed that claimant felt he "just emotionally had enough" and made a single obscene gesture. Although inappropriate, claimant's response was not disproportionate to the provocation, did not last for an extended or unreasonable period of time, does not appear to have prolonged the interaction or provoked an additional response, and did not involve oral threats or physical intimidation. Given the totality of the circumstances, we conclude that his gesture did not create an irreparable breach of trust or make a continued employment relationship between claimant and the employer impossible.

Having so concluded, claimant's conduct on June 2nd was excusable as an isolated instance of poor judgment. Because isolated instances of poor judgment are not misconduct, we therefore conclude that claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-67259 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service:** October 7, 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

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<sup>2</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

'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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