

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0393**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82920). Claimant filed a timely request for hearing. On March 21, 2017, ALJ Murdock conducted a hearing, and on March 22, 2017 issued Hearing Decision 17-UI-79396, reversing the Department's decision. On April 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not offered into evidence during the hearing. The employer did not explain why it was unable to present this information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer submitted. EAB considered only information received into evidence during the hearing when reaching this decision. ORS 657.275.

**FINDINGS OF FACT:** (1) Extreme Grocery Distributors, LLC, doing business as Everyday Deals, employed claimant as a dock worker from August 28, 2016 until November 17, 2016.

(2) The employer expected that claimant would not behave in hostile or intimidating manners toward his coworkers. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime before November 16, 2016, claimant developed what he thought was a close relationship with a female coworker. The coworker wrote claimant a letter in which she provided her phone number to him so he could readily contact her. Subsequently, claimant and the coworker began to communicate by phone.

(4) On November 16, 2016, a female acquaintance of the female coworker, who also worked for the employer, sent claimant a text message in which the acquaintance stated that the female coworker had told her that claimant had asked the first coworker out on a date and she had refused. When claimant received the text message, he was angered. Claimant later walked past a time clock where the

acquaintance and the female coworker happened to be standing. In a loud voice claimant stated to the acquaintance in the coworker's presence, "She [the female coworker] is fucking lying [about what she stated as was recounted in the text message] and whatever she says [to anyone] is a lie." Transcript at 29, 53. Claimant did not stop but continued past them and the entire incident was only a very few seconds in duration. Claimant then proceeded out a door and called a supervisor to report what he had done and what had caused it. Claimant asked the supervisor if he could leave work, and the supervisor allowed him to do so. The supervisor also told claimant that he would talk to the female acquaintance and the female coworker about what had transpired. Claimant then went home.

(5) Also on November 16, 2016, the employer's supervisors spoke to both of the female coworkers. The female coworkers told the supervisors that claimant had frightened them by his behavior earlier that day. Exhibit 1 at 4, 5.

(6) Before November 16, 2016, the employer had not considered claimant's behavior to have violated its policies or expectations. Transcript at 7, 12.

(7) On November 17, 2016, the employer discharged claimant because it had "safety concerns" based on his "major outburst" on November 16, 2017. Transcript at 12, Exhibit 1 at 1.

**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 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

For purposes of this decision, it is assumed that the very brief incident in which claimant used foul language and raised his voice on November 16, 2016 was at least a wantonly negligent violation of the employer's standards; however, even wantonly negligent behavior is not considered misconduct if it is excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern in willful or wantonly negligent violation of the employer's expectations. OAR 471-030-0038(1)(d)(A). In addition, claimant's behavior on November 17, 2016 must not have been of a type that, among other things, caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, the employer did not suggest that claimant had ever violated its standards prior to the incident on November 16, 2016. Transcript at 7, 12, 34. Accordingly, claimant's behavior on November 16, 2016 was isolated. As regards whether claimant's behavior exceeded mere poor judgment, the employer's witness at hearing contended that claimant's very brief expression of irritation in front of the female coworkers on November 17, 2016 raised employee "safety concerns." Transcript at 12; Exhibit 1 at 1. While the employer's witness broadly characterized claimant's behavior that day as "hostile," "highly

upset,” “belligerent,” “looking like he wanted to punch something,” a display of intimidating “body language” and a “major outburst,” she did not dispute that the sum total of the interaction that gave rise to these alleged subjective impressions was five or fewer seconds. Transcript at 10, 12. Claimant disputed the witness’s characterizations of his behavior during the incident and that witness did not describe any actions, gestures, appearances or circumstances from which it could reasonably be inferred either that claimant had lost control of himself or that he posed an objective risk to other employees. Transcript at 29, 30, 35. Indeed, it was claimant who, rather than prolonging the incident, immediately disengaged and left the work area where it had occurred and called his supervisor to report what had happened and ask for permission to leave for the day. From the brevity of claimant’s one-sentence expression of displeasure and irritation at the female coworkers and his prompt departure from the scene, it cannot be reasonably inferred that claimant’s behavior that day was out of control, portended an act of physical aggression or was reasonably emblematic of behavior that posed a safety concern. On this record, a reasonable employer would not have concluded that claimant’s five seconds of yelling caused a fundamental breach of the employment relationship, created a situation in which it could not reasonably trust claimant to act in compliance with its standards in the future or that claimant’s behavior made a continued employment relationship impossible. Claimant’s behavior on November 16, 2016 is excused from constituting misconduct as an isolated instance of poor judgment.

The employer did not meet its burden to show that it discharged claimant for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-79396 is affirmed.

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

**DATE of Service:** May 1, 2017

**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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