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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0492

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 61608). Claimant filed a timely request for hearing. On April 24, 2017, ALJ Janzen conducted a hearing and issued Hearing Decision 17-UI-81680, affirming the Department's decision. On April 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wal Mart Associates, Inc. employed claimant as a front end cashier from April 29, 2015 to February 17, 2017.

(2) The employer's discrimination and harassment prevention policy stated, in pertinent part, that "all individuals" "should be treated . . . respectfully without regard to their personal appearance, beliefs, culture, affiliations, or any other characteristics." Exhibit 1. The policy prohibited employees from doing their work "in any manner that . . . singles out or subjects to heightened scrutiny a person based on an individual's status." *Id.* The policy prohibited use of slurs or negative stereotyping, making offensive comments about an individual's status or appearance, and "[a]ny other conduct that shows hostility toward, disrespect for or degradation of an individual based on the individual's status." *Id.* The employer notified claimant of its policy at hire and through mandatory bi-annual online training.

(3) In approximately January 2017, claimant referred to an employee as "the fat guy" to a coworker. Transcript at 14. The coworker said he did not know who claimant meant. Claimant then identified the person by name. Claimant then called the employee "the fat guy" when speaking with a second coworker. *Id.* The second coworker asked claimant who he was talking about and claimant used other terms to identify the employee. Claimant spoke with a third coworker, and referred to a supervisor as "a fucking asshole." Transcript at 16. All three coworkers considered claimant's comments offensive and complained to the employer about them. On January 12, 2017, the employer issued claimant a written warning based in part upon the remarks he made about his supervisor. The warning stated that claimant

as expected not to use foul or demeaning language while on the employer's property, and that his employment would be terminated if he continued to do so.

(4) On February 17, 2017, claimant made remarks to a customer in his check-out line about refugees, immigrants, weapons, and ISIS. Another customer heard claimant's comments, and, while still in claimant's line, called the employer to complain that claimant had remarked that refugee immigrants should be given guns and deported "so they can go off and kill themselves." Transcript at 6. While the customer was on the phone with the manager, the manager heard claimant, through the customer's open phone line, state, "fuck all the Mexicans." *Id.*

(5) The manager approached claimant at his check-stand. The customer who had called the manager to complain was still on the phone in claimant's line. The manager told claimant he needed to keep his opinions to himself, and removed claimant from his workstation. Claimant admitted that he had spoken with a customer about immigration and guns, but denied making the specific comments alleged. The employer concluded that claimant had made the comments alleged, in violation of its discrimination and harassment prevention policy, and discharged claimant on February 17, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to be respectful of others while at work, avoid singling people out based on their physical characteristics, and avoid making discriminating, negative, or stereotypical comments about others. The employer repeatedly notified claimant of that expectation, and issued him a warning for three previous violations of that policy. Claimant therefore knew, or at a minimum should have known, the employer's expectations.

Claimant denied having stated, "fuck all the Mexicans." Claimant denied having said that immigrants should be given guns and deported to go kill themselves, but admitted that he told a customer about a social media website's suggestion that male refugees aged 18 to 30 "that were coming into the country from like Syria and all those countries that are being overrun by ISIS" be given military training and weapons, sent "back to their country" and told "to go take your country back from ISIS" and "then we will pay to ship your families back over to join you and live happily ever after." Transcript at 25. Claimant alleged that his managers lied about what he said because they just wanted to fire him in order to "save 40 hours a week" if he no longer worked there. Transcript at 24, 26. The employer's evidence

that claimant acted as alleged was, however, more plausible and reliable than claimant's denials. The manager who made the allegations received a phone call from an individual in claimant's check-out line complaining about some of claimant's comments, and personally heard claimant make other comments. The manager was still on the phone with the customer in claimant's line when he confronted claimant and removed him from duty. Although claimant alleged the employer might have had a motive to discharge him in order to "save" the wages he would otherwise earn from working full time and his comments about refugees were misconstrued, he did not suggest a reason why the manager would have accused him of making a discriminatory remark about Mexicans, nor did he suggest any reason why a customer would have spontaneously decided to call the employer from his check-out line to falsely accuse him. It is more likely than not that claimant made the comments the employer alleged.

Claimant denied knowledge of the employer's anti-discrimination policy and suggested that he "didn't see anything wrong with" talking to customers in line about sending Syrian or other refugees back to their countries of origin with weapons to "take [their] country back." Transcript at 26. Even if claimant did not read or know the specific provisions of the employer's anti-discrimination policy, however, he should have known the policy because the employer notified him of the policy upon hire and through bi-annual training. He also should have known as a matter of common sense that commenting about a controversial and politically charged issue like immigration and refugees, and making comments that demonstrated hostility or disrespect toward Mexicans, while dealing with customers in a check-out line at his place of work, was likely to cause offense to at least some of the customers in his line, and would therefore violate the standards of behavior the employer had the right to expect of him. Claimant was conscious of his conduct at the time he was uttering the comments at issue, and because he knew or should have known that they would probably violate the employer's expectations, his comments were wantonly negligent.

Claimant's comments cannot be excused as a good faith error. He did not sincerely believe, or have a factual basis for believing, that discussing immigration and refugees and making derisive comments about Mexicans with customers in his check-out line was consistent with the employer's expectations of him, nor did he had any reason to believe that the employer would condone his conduct.

Claimant's comments cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent exercise of willful or wantonly negligent poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). In January 2017, claimant violated the same policy he violated in the final incident when he twice singled out a coworker because of his physical characteristics even though he could identify the coworker using his name, and again violated it by referring to a supervisor as "a fucking asshole." Claimant did not deny that he twice referred to the coworker as "the fat guy," and the record fails to suggest any reason why claimant might have thought it was acceptable to refer to his coworker in that manner, particularly given that claimant knew the coworker's name and could have referred to him by name. Although claimant denied that he called his supervisor "a fucking asshole," his denial is not persuasive given his admission that he had been "upset" and "mad" at the supervisor at the time and thought he was talking about his supervisor with people who also disliked the supervisor. Transcript at 30. On this record, we find it more likely than not that claimant consciously violated the employer's discrimination and harassment policy on three occasions in January 2017, under circumstances where he knew or should have known that his conduct would probably violate the employer's expectations, making those three instances wantonly negligent, and his conduct on February

17, 2017 a repeated act or pattern of other wantonly negligent behavior. Claimant's February 17, 2017 conduct was, therefore, not an isolated instance of poor judgment, and it may not be excused.

For the foregoing reasons, we conclude that the employer discharged claimant for misconduct. Claimant is subject to disqualification from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-81680 is affirmed.

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

DATE of Service: May 17, 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. 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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