

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0500**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113225). Claimant filed a timely request for hearing. On March 28, 2017 and April 3, 2017, ALJ Seideman conducted a hearing, and on April 11, 2017 issued Hearing Decision 17-UI-80758, concluding claimant's discharge was not for misconduct. On May 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) YMCA of Marion and Polk Counties employed claimant, last as aquatics director, from February 18, 2013 to January 27, 2017.

(2) The employer notified claimant of its policy requiring employees to maintain a respectful demeanor in the workplace upon hire. The employer concluded claimant violated the policy a couple of times, and in November 2016, issued claimant a written warning.

(3) On January 26, 2017, claimant learned that her swim team would be barred from a regional competition due to an administrative error. Claimant felt upset that the children on her team could not compete because they had expended a great deal of effort to qualify for the regional competition. Claimant became "emotionally distraught" while speaking with the vice president on the phone. Transcript at 30. She began "crying so hard" during the conversation, lost her "wits," and yelled. Transcript at 29, 30. The vice president interjected, "who are you talking to like that?" and claimant apologized for her outburst. Transcript at 9, 34. The vice president understood that claimant was upset, but nevertheless considered her outburst disrespectful and unacceptable.

(4) On January 27, 2017, the employer discharged claimant because of her disrespectful behavior toward the vice president.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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.

There is no dispute that the employer considered claimant's behavior toward the vice president during their January 26<sup>th</sup> phone call disrespectful. For claimant's conduct to be considered misconduct, however, claimant must either have acted with disrespect intentionally or with a conscious indifference to the consequences of her conduct. During the January 26<sup>th</sup> phone call, claimant felt upset, began sobbing, and became "emotionally distraught." It was in that context that she "lost [her] wits" and yelled at the vice president, and when the vice president objected claimant immediately calmed herself and apologized for her loss of control. Based on the circumstances at the time claimant lost control of her behavior, it appears more likely than not that claimant did not yell at the vice president on purpose, nor was she conscious that she was doing so until the vice president called attention to her behavior. Claimant's conduct was, therefore, inadvertent, and, although it violated the employer's expectations, the conduct was not willful or wantonly negligent.

Claimant's discharge was not for misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-80758 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](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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