

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0589**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 11, 2017, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151503). Claimant filed a timely request for hearing. On May 9, 2017, ALJ Janzen conducted a hearing, and on May 10, 2017, issued Hearing Decision 17-UI-83064, affirming the Department's decision. On May 13, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Youngs Valley Contactx Inc. employed claimant as a lab technician from September 24, 2013 to March 23, 2017.

(2) The employer expected its employees to refrain from using obscene, abusive or threatening language or gestures while on the employer's premises. Claimant was aware of the employer's expectations.

(3) On March 23, 2017, claimant observed his manager raise his voice, he believed unfairly, at a new employee, which upset claimant. Later that day, claimant became upset and raised his voice at his manager when he complained to him about coworkers talking about claimant behind his back and "backstabbing" him, which upset claimant. Transcript at 19. At that point, the manager told claimant to clock out and go home because he was obviously upset, to which claimant replied, "Oh, so it's okay for you to get upset, but not me... you need to grow up" before clocking out and leaving. Transcript at 19-20. Other employees in other parts of the office allegedly heard claimant raise his voice at the manager and became concerned about safety.

(4) On March 24, 2017, the employer discharged claimant for losing his temper on March 23, 2017.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment and not 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. 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, claimant's first-hand testimony differed from that of the employer's witness, which was based primarily on hearsay. However, the ALJ did not explicitly find that claimant was not credible,<sup>1</sup> and in the absence of evidence demonstrating that claimant was not credible, his first-hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant's evidence.

In Hearing Decision 17-UI-83064, after finding that the employer expected its employees to refrain from using obscene, abusive or threatening language or gestures while on the employer's premises, and that on March 23, claimant yelled at his manager and told him to "grow up" which allegedly caused employees in "other office areas" who heard claimant and to become concerned about their safety, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

...Claimant yelled so loudly that employees in other areas of the office could hear him and they became concerned about the safety of the situation. Claimant should have been aware in the moment that his conduct would violate the employer's policies. Consequently, his conduct was wantonly negligent...Whether claimant realized it at the time, his conduct created a safety issue that made his continued employment impossible. Consequently, claimant's conduct exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment...

Hearing Decision 17-UI-83064 at 1, 2 and 3. We assume, without deciding, that claimant's March 23 conduct was at least wantonly negligent because it probably demonstrated some indifference to the employer's personal conduct policies, but we disagree that it is not excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Viewing the record as a whole, the employer failed to establish with first-hand evidence that any prior alleged violations of the employer's personal conduct policies were either willful or the result of conscious indifference to the employer's expectations. Accordingly, claimant's March 23 outburst was no more than an isolated instance of wantonly negligent conduct.

---

<sup>1</sup> See ORS 657.275 (2) (EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to an ALJ's implied credibility findings).

OAR 471-030-0038(1)(d)(D) also provides that some conduct, even if isolated, that is unlawful, tantamount to unlawful conduct, causes a breach of trust or otherwise makes a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused. Here, the record fails to show that claimant's outburst on March 23 was either unlawful or tantamount to unlawful conduct. Nor can we conclude, when viewed objectively and considering the employer provided no first hand evidence of coworker's reactions, that claimant's outburst was so egregious that it made a continued relationship impossible, particularly given that although claimant raised his voice he did not utter threats, use threatening body language toward the manager, refuse to leave, or otherwise unduly extend the length of his encounter with the manager. Under those circumstances, and considering that the manager at whom claimant yelled had, earlier that day, raised his voice to another employee without his conduct having been considered the type of behavior that warranted discharge, when objectively considered, claimant's behavior did not cause an irreparable breach of trust or make a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 17-UI-83064 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service: June 12, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

---

<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.