

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1151

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153813). Claimant filed a timely request for hearing. On September 6, 2017, ALJ Murdock conducted a hearing, and on September 13, 2017 issued Hearing Decision 17-UI-92433, concluding the employer discharged claimant, but not for misconduct. On September 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that included information that it did not present at the hearing. The employer explained that was belatedly offering these this new information because claimant denied at hearing that he had seen the employer's "Personal Conduct Code," which "perhaps influenced the judge's decision" in claimant's favor. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information if the party offering it shows that factors or circumstances beyond its reasonable control prevented it from presenting that information during the hearing. It generally within a party's reasonable control to prepare its case in advance of the hearing and to reasonably anticipate that the opposing party may dispute aspects of the evidence it presents in support of its position. Because the employer should reasonably have foreseen that claimant would challenge some of its allegations as to claimant's knowledge of the employer's policies and prepared its case accordingly, the employer did not show that circumstances beyond its reasonable control precluded it from offering its new information during the hearing. For that reason, EAB did not consider the information that the employer sought to present by way of its written argument when reaching this decision.

Claimant submitted a written argument in opposition to the employer's attempt to introduce new information into the record and which, itself, offered new information in support of his position. Because EAB has determined that it will not consider the employer's new information, it need not and does not consider the new information that claimant sought to present by way of his written argument.

FINDINGS OF FACT: (1) California Oregon Broadcasting, Inc. employed claimant from June 30, 2005 until June 27, 2017, last as creative services director. Among other duties, claimant produced commercials for the employer's clients.

(2) The employer expected that claimant would not behave in harassing, bullying, intimidating or humiliating ways toward coworkers or clients, and would not shout or use foul language when communicating in the workplace. Notwithstanding, some employees used foul language in the workplace and claimant understood that foul language was absolutely prohibited only on the broadcasting set where it might be inadvertently broadcast to the viewing audience. Claimant understood he was expected to refrain from bullying, intimidating, harassing or humiliating behavior as well as from shouting foul language directed at coworkers as a matter of common sense.

(3) Sometime before June 24, 2017, claimant had informed staff in the sales department that he did not want them to schedule him to shoot any commercials on his first day back from a vacation or business trip since he would not have had time to prepare for the commercials, and he needed at least one day to catch up on work that had accumulated during his absence. On Saturday, June 24, 2017, claimant went to the workplace to review his emails after having just returned from a business trip of several days. Claimant reviewed several emails from one of the employer's sales account representatives about a particular project and an email from the employer's general manager. The email from the general manager informed claimant that the project outlined by the account representative was to be claimant's "priority" after he returned to the office and that claimant was expected to complete the project by the end of Monday, June 26, 2017. Transcript at 26. Claimant also saw in the emails that had accumulated for him that a different sales account representative had scheduled him to shoot two commercials for a particular client beginning at 9:30 a.m. on Monday, June 26, 2017, his first workday back. Claimant informed the second account representative that he did not want to handle the commercials for the client on Monday because the general manager had assigned a project to him that was due on Monday, and that Tuesday, June 27, 2017 would be a better day for him to shoot the commercials for the client.

(4) On Monday, June 26, 2017 when claimant reported for work, he saw that the general manager had sent him an email telling him that the client who wanted to shoot the commercial was going to come in at 9:30 a.m. as initially planned to meet with claimant and the general manager expected claimant to meet with that client. Claimant then went to speak with the general manager and the general manager insisted that claimant meet with the client about the commercials on Monday, June 26, 2017. Upon hearing this, claimant became "pretty angry." Transcript at 26. Claimant then left the general manager's office.

(5) After leaving the general manager's office, claimant walked past the office of the account representative who had initially scheduled him to meet with the client at 9:30 a.m. Claimant stood in the doorway, and said to the account representative that he had told him "no" about meeting with the client and that the account representative must have gone "whining" to the general manager and had "ratted" claimant out about not wanting to meet with the client. Transcript at 26. Claimant told the account representative that he already had been assigned a project by the general manager that he needed to complete by the end of Monday. Claimant told the account representative that he was "fucking pissed off" that he now needed to meet with the client as well as complete the project for the first account representative on Monday, June 26, 2017. Transcript at 26. Claimant shouted at the account representative during this interaction. Claimant then left the account representative's office. Claimant immediately left the workplace and went for a drive in his car to calm down. Instead, claimant became angrier during the drive. Transcript at 26.

(6) After driving for a short time, claimant returned to the workplace. Claimant returned to the doorway of the account representative's office. Claimant was still very upset. Claimant told the account representative that he was the only person responsible for the operation of two departments and the account representative had not allowed him even one day to catch up on his work before scheduling him to shoot a commercial that conflicted with a different priority that the general manager had set for claimant. The account representative asked claimant to leave the doorway of his office. Claimant responded, "I guess it doesn't matter what [else] I have to do today as long as I suck [the client's] dick." Transcript at 26. During this interaction, claimant was shouting. Claimant then left and met with the client about the commercial. Later, claimant spoke with the account representative and the general manager. Claimant was still "angry" and he was "shaking." Transcript at 27. Claimant then left and returned to work. At the end of the workday, Claimant went home.

(7) On Tuesday, June 27, 2017, claimant reported for work and finished the first commercial for the client he had met with the day before. At that time, claimant was asked to meet with the general manager. At that meeting, claimant told the general manager, among other things, that he was not going to apologize for his behavior the previous day. The general manager discharged claimant for his behavior on June 26, 2017.

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. 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. Isolated instances of poor judgment 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).

Regardless of claimant's implicit contentions at hearing, claimant could only have known that shouting foul language at the account representative, and returning to shout foul language a second time after being asked to leave by the account representative violated the employer's expectations despite how angry, upset and unfairly treated he felt under the circumstances. Claimant's behavior on June 26, 2017 violated the employer's expectations with at least wanton negligence.

Despite having violated the employer's standards with the requisite mental state, claimant's behavior on June 26, 2017 may be excused from constituting misconduct if it was an isolated instance of poor judgment. See OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). To be excused as an isolated instance of poor judgment, the behavior of claimant that is at issue must not have "exceeded mere poor

judgment” by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In connection with whether claimant’s behavior on June 26, 2017 was isolated, the employer’s witness testified that claimant had never before engaged in behavior that resembled his behavior on June 26, 2017. Transcript at 7. Regardless of whether claimant’s or the employer’s account of events on June 26, 2017 is accepted, claimant used foul language and shouted at the account representative about having been having to meet with the client on two or three separate times that day, in fairly rapid succession. Transcript at 15-20, 26, 27. In *Perez. v Employment Department*, 164 Or App 356, 992 P2d 460 (1999), the court determined that, although claimant had made three separate phone calls to his supervisor one evening in which he used foul language about the same topic which had upset him, claimant’s behavior was excused as an isolated instance of poor judgment since each call was a continuation of the same transaction and therefore the three calls constituted a single occurrence in the employment relationship. Here, the two or three times claimant shouted at and used foul language toward the account representatives all arose from claimant’s upset about the same matter, the scheduling of the client on the first day he was back after being away from work, the otherwise separate episodes occurred close in time to each before claimant’s anger and upset had dissipated, and claimant had an otherwise unblemished employment history. Under these circumstances, it is most appropriate to consider the two or three episodes of shouting foul language as constituting ongoing components of the same single occurrence for purposes of determining whether claimant’s behavior on June 26, 2017 was isolated. On these facts, claimant’s behavior in violation of the employer’s standards on June 26, 2017 was an isolated occurrence rather than a repeated act or pattern.

In connection with whether claimant’s behavior on June 26, 2017 exceeded mere poor judgment, that claimant was upset at being scheduled without his knowledge to shoot a commercial on his first day back at work, when he had previously informed the account representative never to do so and when the general manager had already assigned him to a project with an impending deadline was understandable. While shouting and using of foul language at a coworker is not condoned under any circumstances, it appears that such an outburst was aberrational behavior for claimant that was likely was motivated by the pressures under which claimant was required to perform his work that day. Indeed, claimant had no prior disciplinary history at all with the employer. While the account representative testified that claimant’s behavior on June 26, 2017 caused him to feel “threatened” and “nervous,” nothing in his description of claimant’s behavior suggested an objective basis for him to fear for his personal safety or to feel anything other than uncomfortable with claimant’s behavior for a relatively short period of time. Transcript at 15. On these facts, an employer would have reasonably concluded that claimant’s behavior in shouting foul language at the account representative was atypical, likely a result of claimant’s reaction to having to balance of competing work priorities that day, and an outburst that was unlikely to recur. A reasonable employer would not have objectively concluded that claimant’s behavior on June 26, 2017 caused an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. Having satisfied both requirements, although claimant’s behavior on June 26, 2017 might otherwise of have constituted misconduct, it is excused from doing so as an isolated instance of poor judgment.

The employer did not meet its burden to show claimant engaged in unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-92433 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 30, 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.

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.