

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1259**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 82840). The employer filed a timely request for hearing. On October 19, 2017, ALJ S. Lee conducted a hearing, and on October 25, 2017, issued Hearing Decision 17-UI-95386, concluding the employer discharged claimant for misconduct. On November 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) DePaul Treatment Centers, a substance abuse and mental health treatment center, employed claimant as a residential counselor from February 10, 2017 to August 8, 2017.

(2) The employer expected its residential counselors to perform their jobs in a professional manner and “role mode healthy lifestyles of communication” while always “remaining respectful of the clients involved.” Transcript at 5-6. Claimant was aware of the employer’s expectations.

(3) On July 19, 2017, claimant was downstairs in the residential treatment center in which he was working and encountered two clients. Claimant explained, “One that had just been asked to leave from the building, was discharged. Another one of the clients said something to him, the “f” word, and the other client was about to rip his head off. And I had to jump in between and break them apart.” Transcript at 17. After claimant broke up the altercation, he went up the stairs, still heated, and headed to a shift change meeting. As claimant reached the second floor, a new lead counselor approached him and told him he wanted to discuss some job duties with him. Claimant responded, “It doesn’t matter,” and headed up another set of stairs to the third floor. The lead responded that it did matter and claimant replied that he “did not wish to talk further,” and that the new lead “was not his boss.” Transcript at 18. Both the lead and claimant raised their voices although their conversation was within earshot of clients. Shortly thereafter, the program manager met with claimant and clarified that the new lead was claimant’s supervisor and that loud, escalated conversations were not appropriate, particularly when

clients could possibly hear them. Claimant accepted the manager's criticism and agreed to avoid such conduct in the future.

(4) On August 4, 2017, claimant was supervising residents lining up for dinner when he observed two individuals circumvent the line and head downstairs to get their food first. Claimant asked them to return to the line three times, and when they ignored him, he yelled to them, "Get the fuck back up here," twice. A coworker told claimant he was not being appropriate in yelling at them in that manner and an argument ensued in front of the residents in line.

(5) The program manager learned of claimant's outburst and, on August 8, 2017, the employer discharged claimant for inappropriate workplace behavior based on claimant's outburst using foul language in front of and around program residents on August 4, 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).

The employer had the right to expect claimant on August 4 to communicate with or around residential clients in a respectful manner particularly after being warned for disrespectful behavior on July 19, 2017. Claimant essentially admitted that he violated that expectation by using foul language in directly speaking to residents who had tried to circumvent the dinner line. Claimant was conscious of his conduct and knew or should have known that his outburst would likely violate the employer's expectation that he perform his job in a professional manner and "role model healthy lifestyles of communication" by "remaining respectful of the clients involved." Claimant's outburst on August 4, 2017 therefore was at least a wantonly negligent violation of the employer's expectations.

However, the ALJ, without any analysis, concluded that claimant's conduct was not excusable as an isolated instance of poor judgment. Hearing Decision 17-UI-95386 at 4. We disagree. 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. The record shows that on July 19, 2017, shortly after claimant got between two residents and essentially broke up a potentially violent exchange between them, while still "heated" by that intervention, he encountered the new lead supervisor who wanted to discuss some job duties then and there. While the record shows that claimant told the lead that he "did not wish to talk further," that the new lead "was not his boss," and that they both raised their voices at each other, the record fails to show that at that time, claimant was aware that his comments could be heard by nearby residential

clients in the building. Although claimant admitted in hindsight to the program manager that his conduct had been inappropriate, the record fails to show that at the time it occurred he was conscious of the fact that his exchange with the new lead probably violated the employer's expectation that he "role model healthy lifestyles of communication" and speak "respectfully" at all times in front of clients. The record therefore fails to establish that claimant violated the employer's expectations willfully or with wanton negligence. Accordingly, claimant's August 4 outburst was no more than an isolated instance of willful or wantonly negligent behavior.

However, under OAR 471-030-0038(1)(d)(D), some acts, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant's August 4 outburst was not unlawful or tantamount to unlawful conduct and viewed objectively, was not so egregious that the employment relationship could not have been rehabilitated, and claimant trusted, after receiving a lesser form of discipline than discharge from employment. While claimant's comments showed poor judgment, they did not exceed mere poor judgment. His August 4 outburst was, therefore, no more than an isolated instance of poor judgment under OAR 471-030-0038(3)(b), and not misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-95386 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** December 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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<sup>1</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.