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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
2018-EAB-0188

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80142). Claimant filed a timely request for hearing. On January 26, 2018, ALJ Scott conducted a hearing, and on February 1, 2018 issued Hearing Decision 18-UI-102195, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant did not explain why he did not present this information at the hearing and otherwise failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present by way of his written argument. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) IFCO Systems employed claimant from July 25 or 26, 2014 until November 19, 2017, last as a day shift lead.

(2) The employer expected that claimant would not behave insubordinately toward supervisors or threaten them. The employer also expected claimant to refrain from using derogatory language in communications with or about coworkers. Claimant understood the employer's expectations.

(3) To facilitate communications among employees, the employer had set up a group text messaging system that allowed the delivery of a single text to all employees in the group. Claimant's group included the on-site manager, claimant and claimant's coworkers.

(4) Sometime shortly before September 10, 2017, claimant sent a group text message describing an interaction with a former employee who had stated he had a "surprise for us [employees of the

employer]," but refused to elaborate on the statement. Audio at ~23:19. The employer's on-site manager, who was a member of the group receiving claimant's text, responded, "I hope it [the surprise] is not something stupid." Audio at ~23:19. Claimant replied in a message that was delivered to the group, "At least I'm not a deadbeat loser [of a] dad. English is my third language and I'm better at it than you, you faggot. Learn some grammar will you? It's embarrassing reading your messages." Audio at ~23:52. On approximately September 10, 2017, the on-site manager spoke to claimant about the language he had used in the group text message, including the term "faggot." Claimant stated to the on-site manager that if the manager "wasn't a faggot, it [claimant's use of the term "faggot] should not bother [him]." Audio at ~22:19. The on-site manager advised claimant that he should not use language that could be considered "bashing" of a minority group. Exhibit 1 at 2.

(5) On November 18, 2017, claimant sent a group text message that the on-site manager considered "belligerent" and the manager sent a text message to claimant asking him to "stop the nonsense." Audio at ~12:41, ~13:39. Claimant replied to the manager, asking him to "stop the hypocrisy," to which the manager responded, "Good night, [claimant's name]." Audio at ~15:00. Claimant replied,

> You wanna go to war with me? I'll give you war like you won't believe. Btw I've seen 3 managers come and go before you. Oh and if you wanna complain to [your boss], be sure to remind him that I've been stacking evidence against him and the company for years. I have witnesses, documented violations of prior employees' rights, testimonies as well [message discontinued]

Exhibit 1 at 7; Audio at ~ 15:00. Claimant's text was interrupted by the manager's interjection, "Good night [claimant's name]." *Id.* Claimant replied, "Good night [manager's name]. Btw, I also know where you live. Sleep tight." *Id.*

(6) On November 19, 2017, claimant sent a text message to the on-site manager informing the manager that claimant was going to be absent from work that day. The onsite manager responded by text, stating in part, "After what happened last night, there's no going back. You're locked out of the building and going to go through an HR hearing." Audio at ~17:18.

(7) On November 19, 2017, the employer discharged claimant for being insubordinate to and having threatened the on-site manager by the texts he sent on November 18, 2017.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. 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).

Claimant did not dispute that he sent the group text messages of November 18, 2017 or the language that he used in them toward the on-site manager. However, claimant contended that the language he chose to use was not a "direct threat, just a statement" and that when he referred to "going to war" with the manager, he did not mean "actual physical war, but like legal war." Audio at ~ 31:00, ~32:40. However, there was no indication that claimant was involved in any ongoing legal or business dispute with the employer or the site manager to which claimant's use of the term "war" could have reasonably referred. With reference to claimant's statements in the text messages about knowing the location of the on-site manager's house, claimant stated the he meant only that "if he [the manager] wants to lock me out of the building I could still show up at his house to bring some documentation and paperwork or whatnot." Audio at ~33:36. However, at the time claimant wrote the text message at issue, the manager had not yet told him he was or was going to be locked out, and why claimant would have been bringing papers to the manager was not clear. The explanations that claimant provided in an effort to show that the language used in the text message of November 18, 2017 was innocuous were not persuasive.

The plain meaning of the language of the November 18, 2017 text message on its face constituted a threat against the on-site manager, and nothing about its context suggested otherwise or rendered it ambiguous. In addition, by sending such a communication to his supervisor, the on-site manager, stating that he was going to "go to war" with the on-site manager rather than follow instructions to stop "the nonsense," claimant was unmistakably showing defiance of the on-site manager's authority. While claimant might have been, as he contended, "frustrated" when he wrote the text message and was "not going to do anything" in relation to the on-site manager, claimant's implicit contention that he did not intend the language to threaten or intimidate the on-site manager is belied by the clarity of the words he chose to use and the reasonable interpretation of them. It is not plausible that claimant used the words that he used in the text message without reasonably knowing that the on-site manager would interpret them as a threat and as a refusal to comply with or obey his authority. By what claimant expressed in this text message of November 18, 2017, claimant willfully violated the employer's standards against issuing threats and engaging in insubordination toward a supervisor.

While claimant may have violated the employer's standards willfully or with wanton negligence on November 18, 2017, his behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an "isolated instance of poor judgment" if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, behavior may not be considered an isolated instance of poor judgment if it "exceeds mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant agreed he could have sent a group text message before November 18, 2017 in which he referred to a coworker as a "faggot," but justified his use of that term by stating that he was not referring to an "actual homosexual" but using it generally to refer to "scumbags" or "faggots in their jobs." Audio at ~35:05.[1] Claimant did not suggest that he was unaware that "faggot " was a slur or that he had not known its use was generally

[1] While claimant disputed that the employer ever issued any formal written warnings to him based on his repeated contention that he had never signed any written warnings, he affirmatively testified that the on-site manager "might have" spoken to him about his use of term "faggot" and told him to stop using it and other like terms. Audio at ~35:05, ~36:00, ~36:23.

considered offensive and derogatory even when characterizing an individual who was not homosexual. Accepting claimant's explanation about how he used the term "faggot," it is not plausible he did not know and was reasonably unaware that that his use of that term was offensive and derogatory and violated the employer's standards. By using this term even as he did, claimant violated the employer's standards with at least wanton negligence. For this reason, claimant's later willful violation of the employer's standards was not a single or isolated act.

In addition, claimant's testimony about his text message communication on November 18, 2017, while emotional, was unapologetic. His testimony was premised on the view that he had not intended the text message communication to be viewed either as intimidating or threatening despite its reasonable interpretation as being both. Given this attitude, a reasonable employer would conclude that claimant could not be trusted in the future to refrain from acting in a similar way toward supervisors, threatening or intimidating them or being insubordinate toward them. Both because claimant's behavior on November 18, 2017 was not a single act and also because it caused an irreparable breach of trust in the employment relationship, claimant's willful or wantonly negligent behavior on that day may not be excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-102195 is affirmed.

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

DATE of Service: <u>March 26, 2018</u>

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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