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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-0191

*Affirmed*
*Disqualification*

**PROCEDURAL HISTORY:** On December 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84029). Claimant filed a timely request for hearing. On January 31, 2018, ALJ Murdock conducted a hearing, and on February 2, 2018 issued Hearing Decision 18-UI-102435, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

**FINDINGS OF FACT:** (1) Liberty Mutual Insurance Company employed claimant from November 30, 2015 to November 30, 2017 as an associate claims service representative.

(2) The employer expected all claimant's interactions and discussions with his coworkers to remain professional at all times. Claimant understood as a matter of common sense that the employer expected him to behave in a respectful manner toward his coworkers and refrain from making inappropriate comments toward them.

(3) In September 2016, some female employees alleged to the employer's claim manager that they felt "uncomfortable" because claimant sometimes touched them "unexpectedly or unwelcomely," and made comments about how they looked. Transcript at 9. On September 20, 2016, the manager discussed the allegations with claimant, and on September 22, 2016 sent claimant an email reminding him to keep his conversations professional, focused on work, and "to always think before we speak to ensure that the comments made [are] appropriate for the time, place and in the right context." Exhibit 1 at 2.

(4) In October 2017, two employees complained to the employer's claim manager when claimant told a male coworker he looked like a "porn star" and asked a female employee, "[D]oesn't that make him look like a porn star?" when a male employee put on some solar eclipse glasses. Transcript at 10, 24, 25. The female employee told claimant she found his comment offensive, and claimant apologized.

Claimant's manager met with claimant about the complaint and told him to remain professional in the office, and on October 4, 2017 sent claimant an email reminding him that "all interactions with employees must remain professional." Exhibit 1 at 1.

(5) On November 10, 2017, claimant asked a female coworker at work if her breasts were "real." Transcript at 16.

(6) Later on November 10, 2017, claimant was decorating a coworker's cubicle for his birthday with the same female coworker, and another male coworker. They were blowing up balloons. Claimant told the female employee that "she knows she can blow better than that," and stated regarding the male employee, who was homosexual, that, "he's a pro at blowing." Transcript at 7, 11. Transcript at 16. The two coworkers were offended by the comments and reported them to a manager and a supervisor.

(7) On November 30, 2017, the employer discharged claimant for violating its expectations regarding workplace behavior.

**CONCLUSION AND REASONS:** We agree with the Department and the ALJ and conclude 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. 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 or a good faith error is not misconduct under OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer met its burden.

The employer's expectation that claimant maintain professional, appropriate interactions with his coworkers was reasonable. Claimant argues in his argument to EAB that he never received the employer's written code of conduct and was not "properly informed" of it. Claimant's Written Argument at 2. Because our misconduct analysis in this case focuses on the final incidents that occurred in November 2017, it is unnecessary to determine herein if claimant engaged in misconduct during the prior incidents alleged from September 2016 and October 17. However, those prior incidents are relevant to show that the employer advised claimant both verbally and in writing that he must remain professional and appropriate for a business environment during his interactions with coworkers. Thus, the record shows that claimant knew or should have known the employer expected him to behave in a professional manner in the office, even if he never received the employer's written code of conduct. Moreover, claimant knew or should have known as a matter of common sense that certain subjects and statements, such as those of a sexual nature, are rarely acceptable in the workplace.

Claimant violated the employer's expectation that he refrain from making unprofessional statements to coworkers on November 10, 2017 when he asked a coworker if her breasts were "real." Although claimant denied having made that specific comment, his denial was outweighed by the testimony at hearing of one witness who heard claimant make the inappropriate statement, and of the manager to whom the female employee complained about the incidents that day. Transcript at 29, 7, 11, 16. Regarding the incident while blowing up balloons, claimant both denied having made the statements and argued that he was "joking" and did not know his comments offended anyone. Transcript at 33. However, based on the weight of the evidence at hearing, we are persuaded that claimant made inappropriate statements to two employees about "blowing." Moreover, based on the coaching from his manager in September 2016 and October 2017, and the nature of prior complaints from his coworkers, claimant knew or should have known that such comments, even made in an attempt at humor, violated the employer's expectations regarding professionalism in the workplace. His comments were, therefore, at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an "isolated" instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's wantonly negligent conduct on November 10, 2017 was not isolated because, although the incidents occurred on the same day, claimant's statement regarding a coworker's breasts was a separate, unrelated incident from the statements he made when he and coworkers were blowing up balloons. Claimant's exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

Nor can claimant's conduct be excused as a good faith error. Claimant asserted at hearing that he thought he could "joke with" the employees he offended on November 10. Transcript at 35. However, the record does not show that claimant reasonably believed, or had a factual basis for believing, the employer would condone joking regarding sexual topics after having been warned by the employer in 2016 and October 2017 to refrain from unprofessional behavior, and by a coworker in October 2017 who told claimant she was offended by a comment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation, and until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 18-UI-102435 is affirmed.

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

**DATE of Service: <u>March 20, 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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