

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0280**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90127). Claimant filed a timely request for hearing. On March 13, 2018, ALJ Scott conducted a hearing, and on March 14, 2018 issued Hearing Decision 18-UI-105176, affirming the Department's decision. On March 21, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

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

The employer also submitted written argument and a copy of its anti-harassment policy. A copy of the anti-harassment policy was not part of the hearing record, and the employer failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, including portions of the employer's anti-harassment policy that the employer read into the record at hearing.

**FINDINGS OF FACT:** (1) The Salvation Army employed claimant from August 2016 until December 4, 2017 as a sales associate.

(2) The employer had a code of conduct policy that prohibited employees from threatening, intimidating and coercing fellow staff on the employer's premises. The policy also required employees to comply with the employer's reasonable directives, cooperate with management, and refrain from being insubordinate. This included cooperating regarding discipline. Claimant knew or should have known the employer's policies against threatening conduct and insubordination as a matter of common sense.

(3) Claimant had an anxiety disorder that made it difficult for him to communicate and think clearly at times. The employer had agreed to accommodate claimant's disability by giving him a less stressful job assignment and work schedule from 8:30 a.m. to 1:30 p.m., Monday through

Friday, and from 8:00 a.m. to 1:00 p.m. on days when store meetings occurred.

(4) On November 17, 2017, the employer held a prescheduled store meeting. Claimant was 30 minutes late for the meeting, and did not call and inform his store manager or other management that he would be late. As a result, the employer decided to give claimant a written warning for being late. Claimant disagreed that he should receive a warning.

(5) On November 29, 2017, claimant's manager called claimant in from his shift to attend a meeting with the store area director, and the human resources manager on the telephone. Claimant immediately became agitated and went to the office for the meeting, but refused to sit down. The human resources manager began to explain that the purpose of the meeting was to discuss claimant being tardy for the November 17 meeting, but claimant repeatedly interrupted when she tried to speak. The area manager asked claimant repeatedly to calm down, that they just wanted to have a conversation. Claimant shook his finger in the face of his manager, gritted his teeth, and said, "this guy." Transcript at 41. At one point, claimant became upset and started to pick up a chair off the floor and looked at the area manager in a threatening manner. The area manager was concerned claimant would throw the chair at him, and told claimant to calm down, put the chair down, and to refrain from throwing the chair at him. The human resources manager told claimant by telephone to put down the chair. Claimant put the chair down, and the managers continued to explain why they had called the meeting. The managers showed claimant the written warning. Claimant said that he would not sign it and was leaving, and began to walk out. The human resources manager on the telephone told claimant it would be job abandonment if he left. Claimant slammed the office door and told the area manager to give him the warning. Claimant ripped and wadded up the warning and made an angry utterance. The area manager told claimant not to throw the paper at him, and claimant put it on the table. Claimant told the human resources manager he wanted to put a comment on it, and she directed the area manager to give claimant a piece of the warning to write on. Claimant wrote a comment and signed the warning.

(6) During the meeting, claimant experienced symptoms of a panic attack, including a rapid heartbeat, sweaty hands, dizziness, blurred vision and a lack of focus and ability to communicate.

(7) Near the end of the meeting, claimant told the managers he was going to leave because he was sick. The human resources manager told claimant the employer would consider him to have abandoned his job if he left, and would not pay him for the rest of his shift that day. Claimant asked to have his vocational rehabilitation counselor present. The human resources manager told claimant he could not have the counselor present. The managers ended the meeting before claimant's shift ended at 1:30 p.m.

(8) After the meeting, claimant returned to his work area in the warehouse until his manager asked him to clock out for the day. Claimant clocked out and asked his manager for a work injury report. Claimant went to his doctor and obtained a letter excusing him from work on November 30. He returned to work and gave the letter to his manager and turned in a completed work injury report for stress he felt during the earlier meeting. Claimant requested additional time off work based on advice from his counselor. His doctor released him to return to work on December 8, 2017.

(9) The employer granted claimant's requests for time off work from November 30 to December 4. Claimant remained in communication with his managers but did not report to work again until the employer discharged him on December 4, 2017 for violating its code of conduct during the November

29, 2017 meeting. The employer's managers felt they could no longer employ claimant because of his threatening and aggressive demeanor towards them during the meeting.

**CONCLUSIONS AND REASONS:** We agree with 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 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 discharged claimant for behaving in an angry, aggressive and intimidating manner toward two managers during a disciplinary meeting on November 29, 2017. Claimant asserted in his written argument that the employer did not provide a copy of its employee handbook at hearing, implying that he did not receive the handbook. However, claimant knew as a matter of common sense that the employer expected him to refrain from engaging in threatening and insubordinate behavior towards his managers.

Claimant asserted at hearing and in his written argument that he did not engage in some of the threatening conduct asserted by the employer's three witnesses at hearing, such as shaking his finger at the managers and grabbing the chair, seemingly with an intent to throw it. Transcript at 65. Claimant's denials are outweighed by the managers' firsthand testimony, even though one of the managers participated by telephone. Claimant did not assert, and the record does not otherwise show, that claimant was not conscious of his aggressive conduct or that his conduct would be construed by his managers as threatening due to his disabilities, panic attack or other reason. We conclude it more likely than not that claimant willfully refused to cooperate during the meeting, shook his finger at a manager, grabbed a chair as if to throw it at a manager, slammed the office door, and tore and wadded up his warning as if to throw it at a manager.

Claimant argued that he was not at fault for his tardiness for the November 17 meeting. Transcript at 64-65. It is not necessary to decide that matter here because regardless of whether his opposition to the warning was justified, his conduct at the November 29 meeting was not. Claimant also argued that the employer discharged him because he had filed a complaint against his manager for a hostile work environment, and alternately, because he filed a worker's compensation injury report and missed work after the November 29 meeting. Transcript at 86, 61. There is no evidence in the record to support claimant's assertions. The record shows the employer did not intend to discharge claimant when it met with him on November 29, and that his conduct during that meeting was the only basis for its decision to discharge him. Claimant also implied at hearing that his employer was at fault for the tone of the November 29 meeting because the employer did not allow him to have his vocational rehabilitation counselor present and did not give him permission to leave the meeting when he felt sick. It is not

necessary to decide if the employer's denials were appropriate because neither the record nor common knowledge shows that the employer's failure to allow claimant to have his vocational rehabilitation counselor present or to leave the meeting caused claimant to engage in threatening, insubordinate conduct at the meeting. Moreover, as we concluded above, it is more likely than not that claimant was conscious of his aggressive conduct and that his conduct would be construed by his managers as threatening.

Claimant's conduct during the November 29 meeting was not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. Under that rule, an "isolated instance of poor judgment" is conduct that does not exceed 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 chose to persist in arguing angrily with his managers and physically confronting the managers, rather than attempting to resolve his concerns in a nonviolent and less disruptive way. A reasonable employer would no longer be able to trust that an employee who did what claimant did would be able to perform his job duties without resorting to aggressive arguments or physical confrontation to resolve disagreements with his coworkers. Accordingly, claimant's conduct constituted an irreparable breach of trust in the employment relationship and cannot be excused under OAR 471-030-0038(3)(b).

Claimant's conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, or present evidence showing, that he had a good faith belief that the employer would condone his actions in arguing aggressively and physically confronting his managers. Claimant's conduct therefore did not result from a mistaken understanding of the employer's expectations regarding employee behavior.

The employer discharged claimant for misconduct. He is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 18-UI-105176 is affirmed.

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

**DATE of Service:** April 17, 2018

**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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