

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0703**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 95051). The employer filed a timely request for hearing. On June 26, 2018, ALJ Janzen conducted a hearing, and on June 27, 2018 issued Order No. 18-UI-112184, affirming the Department's decision. On July 13, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Autozoners LLC employed claimant as a parts sales manager from August 2015 until it discharged claimant on April 21, 2018.

(2) The employer prohibited its employees from engaging in hostile, disruptive and unprofessional behavior at work and from using foul language at work. Claimant understood the employer's expectations as a matter of common sense. Claimant did not receive training regarding how to handle irate customers.

(3) Before March 16, 2018, claimant had never received any warnings or other discipline at work.

(4) On March 16, 2018, claimant was the only manager on duty, and therefore had only one break during his shift that day. One other employee was working with him that day. The store was typically busy on Sundays, and it was busy on March 16. Claimant had eight customers waiting and was in the middle of assisting a customer with completing a purchase when another customer called by telephone. The employer expected employees to answer telephone calls no later than by the second ring. Claimant answered the telephone promptly, determined that the employer did not have the part the customer was requesting in stock and asked the customer if he could hold. The customer refused to hold. Claimant hung up on the customer.

(5) Shortly thereafter, the customer called back and began to yell at claimant using foul language. Claimant apologized that he had not helped the customer earlier and told the customer he had been very busy. The customer continued to yell at claimant, and claimant hung up on the customer again.

(6) Approximately thirty minutes later, the customer came into the store where claimant worked, confronted claimant, and began to argue with him about how claimant treated him when he called by telephone. Both claimant and the customer yelled and used foul language toward each other. At one point, claimant tried to deescalate the situation and sat back, apologized and shook the customer's hand and told him he would help him. The customer responded that he did not want claimant's help. Claimant became frustrated and told the claimant repeatedly that he no longer cared and that the customer should leave. Claimant was not violent toward the customer and did not threaten him. Eventually, the customer left the store. There was another customer in the store at the time who was being assisted by the one other employee on duty.

(7) After his shift on March 16, 2018, claimant reported the incident with the customer to his supervisor, the store manager.

(8) The customer involved in the March 16, 2018 incident complained to claimant's district manager about the March 16, 2018 incident. Claimant admitted to the employer that his conduct toward the customer was inappropriate.

(9) Claimant continued to work until April 21, 2018, when the employer discharged him for violating its policy prohibiting hostile, disruptive and unprofessional conduct and the use of foul language at work on March 16, 2018.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ and conclude 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. OAR 471-030-0038(3)(a) (January 11, 2018) 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because of his unprofessional conduct toward a customer on March 16, 2018. As a matter of common sense, claimant reasonably should have known that the employer would not permit him to hang up on a customer, argue, use foul language or yell at a customer. Claimant's conduct toward the customer was at least a wantonly negligent violation of the employer's expectations. Moreover, claimant himself acknowledged to the employer that his conduct on March 16 was inappropriate, showing that he did not have a good faith belief that the employer would condone his conduct.

Although claimant's behavior on March 16 was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471030-0038(3)(b). An "isolated instance of poor judgment" is behavior that 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). To be excused, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant had no prior incidents for which the employer warned or disciplined him. The employer's witness at hearing asserted that the employer considered claimant's conduct to be severe because it was repeated conduct throughout the day, both on the telephone and inside the store. Audio Record at 18:11 to 18:39. The Oregon Court of Appeals has consistently held that a series of ostensibly separate acts arising from the same precipitating episode or cause are collectively considered a single, continuing instance of poor judgment for purposes of OAR 471030-0038(3)(b).<sup>1</sup> Because claimant's conduct occurred on the same day over a short period of time, and involved the continuation of one argument with the same customer arising from the initial interaction between claimant and the customer on the telephone, claimant's behavior on March 16 was a single isolated instance.

Nor does the record establish that any reasonable employer would have concluded that claimant's conduct on March 16 caused a breach of trust or made a continuing employment relationship with claimant impossible. Not only did claimant report the incident to his manager, he acknowledged that he did not handle the situation appropriately. Moreover, claimant's conduct was mitigated by the stress of his circumstances when the incident occurred, having not had a break for most of the day and not having the ability to excuse himself from the situation because no other manager was on duty. Moreover, claimant had not received training regarding how to handle an irate customer, but did attempt to deescalate the situation with the customer by apologizing to him on the telephone and in the store, and by shaking hands and offering to help him. Nor did claimant become physically aggressive toward the customer or threaten him verbally. Considering the totality of the circumstances and mitigating factors present in this case, we cannot say that any reasonable employer would conclude that claimant's conduct had caused an irreparable breach of trust in the employment or otherwise made a continued employment relationship impossible. We therefore conclude that claimant's conduct did not exceed mere poor judgment.

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<sup>1</sup> See *Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (when a claimant willfully refused to comply with his supervisor's instruction on one day and on the next day willfully engaged in a vulgar outburst when the same supervisor rebuked him for his behavior on the previous day, claimant's behavior on both days was a single isolated instance of poor judgment because each day's behavior was motivated by the supervisor's behavior on the first day and was a continuation of claimant's reaction to it); *Waters v. Employment Division*, 125 Or App 61, 865 P2d 368 (1993) (when a claimant left several separate "harassing and abusive" messages on a coworker's answering machine following a conflict over work schedules, claimant's behavior, although comprising technically separate acts, was a single occurrence of poor judgment because all the messages were motivated by the same underlying conflict and each subsequent message was a continuation of claimant's reaction to the same conflict); *Goodwin v. Employment Division*, 35 Or App 299, 581 P2d 115 (1978) (when a claimant argued with another manager, the supervising store manager told both claimant and the other manager to stop and then told claimant to "shut up" when claimant protested to the store manager about the other manager's behavior, and claimant followed the store manager upstairs loudly complaining about the other manager's behavior, claimant's behavior, although comprising ostensibly separate episodes of wantonly negligent behavior, was properly considered a single instance of poor judgment since each episode was motivated by the claimant's "continuing conflict" with the other manager and claimant's same continuing "hotheadedness").

For the foregoing reasons, we conclude that the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 18-UI-112184 is affirmed.

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

**DATE of Service:** August 13, 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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