

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0074

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On October 23, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #72018). Claimant filed a timely request for hearing. On December 17, 2013, ALJ Vincent conducted a hearing, and on January 10, 2014 issued Hearing Decision 14-UI-08353, concluding the employer discharged claimant for misconduct. On January 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant 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.

**FINDINGS OF FACT:** (1) W. E. Given Contracting, Inc. employed claimant from November 11, 2008 to October 1, 2013 as a painter foreman.

(2) The employer occasionally required employees to work weekends when necessary to meet contract deadlines. The employer also expected employees to contact the employer before leaving work if they had to leave work before the end of the regular eight-hour workday. Claimant understood the employer's expectations and, when required, had worked weekends.

(3) On approximately September 4, 2013, claimant requested time off from September 21 to September 28, 2013 for a vacation trip to Hawaii. The employer generally required employees to request vacation time one month in advance for scheduling reasons. The employer and claimant agreed claimant could take the vacation time if he worked additional weekends so the employer would meet its contract deadlines.

(4) On September 19, 2013, claimant reported to work. He completed some work at the job site, and then left work three hours early without contacting the employer. Claimant went to another job site, where he performed work for a different employer.

(5) Claimant returned to work from his vacation on September 30, 2013. On October 1, 2013, the employer told claimant he was scheduled to work on October 5 and 6, 2013. Claimant refused to work those days because he planned to go elk hunting. The employer warned claimant the employer would discharge him if he refused to work.

(6) On October 1, 2013, the employer discharged claimant because he refused to work on October 5 and 6, 2013.

**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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Generally, employers may reasonably expect employees to work weekends. Claimant had worked weekends in the past, and knew the employer might require him to work weekends during October due to claimant's recent vacation. Claimant did not show that his personal plans to go elk hunting made it impossible or impractical for claimant to work on October 5 and 6, 2013. When claimant refused to work on October 5 and 6, 2013, he willfully violated a reasonable employer expectation.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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). Acts that create irreparable breaches of trust in the employment relationship exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). In this case, less than two weeks prior to the final incident, on September 19, 2013, claimant left work three hours early without first obtaining approval from the employer. Claimant's conduct on that occasion demonstrated indifference to the employer's expectations, and therefore was wantonly negligent. Claimant's conduct on October 1, 2013 therefore was not a single or infrequent occurrence. Moreover, absent exigent circumstances that do not exist here, claimant's refusal to work as scheduled violated a fundamental requirement of any employment relationship, and was sufficient to create an irreparable breach of trust that made a

continued relationship impossible.<sup>1</sup> Claimant's conduct therefore exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error. Claimant knew refusing to work on October 5 and 6 violated the employer's expectations. His conduct therefore was not the result of an error in his understanding of those expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-08353 is affirmed.

Susan Rossiter and D. E. Larson;  
Tony Corcoran, not participating.

**DATE of Service:** February 11, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

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<sup>1</sup> *See, e.g., Michael A. Bruce* (Employment Appeals Board, 12-AB-3095, December 14, 2012)(taking unauthorized time off work was a willful act of insubordination that exceeded mere poor judgment); *Dennice L Grover* (Employment Appeals Board, 12-AB-0152, March 22, 2012) (employers may reasonably expect employees to work as scheduled; claimant's refusal, in no uncertain terms, to work Saturdays willfully violated that expectation and, because refusing to work as assigned is fundamental to the employment relationship, her refusal made a future employment relationship impossible); *Kimberly L. Hammond-Legree* (Employment Appeals Board, 11-AB-3412, January 6, 2012) (refusal to cancel vacation plans or attempting to find another employee to cover her shifts was a refusal to work that caused a breach of trust in the employment relationship); *Zachary P Branch* (Employment Appeals Board, 10-AB-0936, May 4, 2010) (refusal to cancel vacation plans was a refusal to work when scheduled, which was an act of insubordination sufficient to create an irreparable breach of trust in the employment relationship that makes a continued relationship impossible).