

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0312

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #104234). The employer filed a timely request for hearing. On February 5, 2014, ALJ Shoemake conducted a hearing, and on February 14, 2014 issued Hearing Decision 14-UI-10401, concluding the employer discharged claimant for misconduct. On February 24, 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) Mainstream Housing, Inc. employed claimant from September 6, 2011 to November 8, 2013 to oversee maintenance on the employer's properties.

(2) On October 7, 2013, the employer discharged its executive director. The discharged director had some personal documents in her office. The interim director collected some of her belongings and documents, and put them in a plastic bag that he left in his office.

(3) After work on October 8, 2013, claimant had dinner with the former director and the employer's finance director. Claimant knew the employer had discharged the former director. Claimant and the finance director agreed to assist the former director in retrieving her personal belongings from the employer's office. At approximately 8:00 p.m., claimant drove her truck to assist the former director in removing her printer and other personal belongings from the office, which was closed and locked. Neither claimant nor the finance director requested permission from the employer to enter its office.

(4) Claimant did not supervise the former director while she was in her former office. Claimant knew the employer kept personnel documents in that office. Claimant removed the former director's printer from another employee's office while the former director collected documents from her office and added them to the papers that were in the plastic bag of belongings the interim director had collected the prior day. Claimant knew the former director removed the plastic bag of documents and other belongings from the office.

(5) On October 9, 2013, the interim director noticed the plastic bag with the former director's belongings was missing. He also noticed the personnel files were in a state of disarray. The interim director asked claimant if she had taken the bag. Claimant told the interim director she had taken the bag to give it to the former director, but did not tell the employer about entering the office with the former director on October 8, 2013.

(6) On approximately October 30, 2013, the interim director noticed disciplinary documents were missing from claimant's personnel file.

(7) On November 6, 2013, the interim director learned through hearsay that the former director and the finance director had entered the employer's office after the employer discharged her.

(8) On November 7, 2013, the employer's interim director and its vice president interviewed claimant. Claimant did not tell the employer she had assisted the former director with removing items from the office until mid-way through the interview when she told the employer she had been lying to the employer.

(9) On November 8, 2013, the employer discharged claimant for facilitating and participating in the former director's unauthorized entry into the employer's office, and for dishonesty during the employer's investigation into the incident.

**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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

Claimant assisted a discharged employee with entering the workplace when it was closed, without the employer's knowledge, to remove the discharged employee's personal belongings from the workplace.

The employer had a right to expect claimant to refrain from doing so. At hearing, claimant testified that she felt it was the former director's "right" to retrieve her personal belongings. Transcript at 30. However, the record does not show the employer withheld the former employee's property from her, or that she could not retrieve it with the employer's permission. It had been less than a day since the employer discharged the director, and the interim director had already collected some of the former employee's belongings to return to her. The record does not show that either claimant or the finance director had the express or implied authority to allow the former director into the workplace, or to remove items from the workplace. Moreover, claimant's attempt to conceal her participation in the October 8 incident shows she knew her conduct violated the employer's expectations. Claimant's conduct in assisting the former employee with entering and removing property from the workplace, without the employer's permission, was a willful violation of those expectations.

The employer also had the right to expect claimant to be honest during workplace investigations. We infer claimant understood that expectation as a matter of common sense. Claimant testified that the former director filled the plastic bag with her belongings, including papers, when she and claimant entered the office on October 8. When the interim director asked claimant about the bag, claimant said she had taken the bag herself, rather than truthfully telling the interim director about the incident the night of October 8. Claimant also withheld information about her participation in the October 8 incident until halfway through the November 7 interview with the interim director. The preponderance of the evidence shows claimant tried to conceal the October 8 incident, and her involvement in the incident, from the employer. In failing to be truthful to the employer, claimant willfully violated the standards of behavior that an employer has the right to expect of an employee.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant's behavior showed she did not sincerely believe, or have a factual basis for believing, that the employer would approve or condone her conduct on October 8. Claimant did not request permission from the employer to enter the workplace with the former director after hours. Her subsequent attempts to conceal the incident, and her participation in the incident, also show claimant did not sincerely believe the employer would condone her conduct. Thus, her conduct cannot be excused as a good faith error in her understanding of the employer's expectations. Nor does the record show claimant had a good faith basis to believe that being dishonest to the interim director was acceptable to the employer.

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 exercised poor judgment when she willfully disregarded the employer's reasonable expectations on October 8, and again when she lied about who took the plastic bag containing the former director's belongings, and again when she failed to disclose her involvement in the October 8 incident to the employer until halfway through the November 7 interview with the interim director. Claimant's exercise of poor judgment therefore was not a single or infrequent occurrence. Moreover, 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). OAR 471-030-0038(1)(d)(D). Claimant's attempts to conceal the October 8 incident by lying about who took the plastic bag of documents, and by failing to disclose her involvement in the October 8 until a month after the incident occurred were acts of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible.

Her conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

In sum, the employer discharged claimant for misconduct. Claimant therefore is disqualified from the receipt of unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-10401 is affirmed.

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

**DATE of Service:** March 19, 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.