

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0583

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On February 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 94514). The employer filed a timely request for hearing. On April 2, 2014, ALJ Lohr conducted a hearing, and on April 3, 2014 issued Hearing Decision 14-UI-14231, affirming the Department's decision. On April 10, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Express Employment Professionals employed claimant from December 1, 2010 to February 3, 2014. Claimant last worked for the employer assigned to Oregon Wine Service (OWS) as a warehouse worker.

(2) On January 11, 2012, the employer warned claimant that he was not permitted to accept assignments with one company then decide not to go to that assignment when OWS needed someone. He was also warned to keep his commitments and contact the employer before he made any changes to his assignments.

(3) On February 3, 2014, claimant committed to working at a three-day assignment for a company. After agreeing to work for that company, claimant heard that OWS needed him and notified the employer he was going to work for OWS instead of the other assignment.

(4) On February 3, 2014, at approximately 1:00 p.m., the employer notified claimant that he needed to report to the office that day to receive a written warning. Claimant agreed to report to the office as required, but did not do so.

(5) On February 4, 2014, claimant reported to the office. He acknowledged that he knew he was supposed to report to the office the day before and had not. Claimant argued that he could not report to the office because his son was sick, but acknowledged that he had not returned the employer's calls,

either. Claimant reviewed the warning and became argumentative about its contents and about communicating with the employer about his assignments.

(6) On February 4, 2014, the employer discharged claimant for failing to report to the office on February 3, 2014.

**CONCLUSIONS AND REASONS:** 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.

The employer discharged claimant for failing to report to the office to receive a written warning as he had been instructed. The ALJ concluded that his conduct was wantonly negligent, and we agree, as claimant knew or should have known that failing to report to the office when he had been instructed and had agreed to do so would probably violate the standards of behavior the employer had the right to expect of him. However, the ALJ also concluded that claimant's conduct was an isolated instance of poor judgment, reasoning that he "had no prior warnings or discipline." Hearing Decision 14-UI-14231 at 3. We disagree.

On February 3, 2014, claimant decided on his own that he was going to work at OWS instead of reporting to work at the three-day assignment he had already accepted. Claimant had been warned in the past that doing so violated the standards of behavior the employer expected of him, and knowingly disregarded the employer's expectations in that respect. Claimant's conduct therefore demonstrated indifference to the consequences of his conduct, under circumstances where he was both conscious of his conduct and knew that his conduct would probably violate the employer's expectations. His conduct on February 3, 2014 was, therefore, wantonly negligent.

Conduct can only be excused as an isolated instance of poor judgment if it is isolated, which requires that the conduct *not* be part of a "pattern of other willful or wantonly negligent behavior." See OAR 471-030-0038(3)(b); OAR 471-030-0038(1)(d)(A). Here, claimant's conduct on February 3 was part of a pattern of wantonly negligent conduct, as the conduct included two separate instances in which claimant ignored the employer's expectations in favor of acting as he pleased, first in choosing not to work at an assignment he had agreed to accept, and in a separate incident later the same day, in choosing not to report to the office despite having agreed to do so.

Claimant alleged to the employer that he was prevented from reporting to the employer's office because his son was sick. Although absences due to illness of an individual or his dependent family members are generally not considered misconduct (*see* OAR 471-030-0038(3)(b)), such illness, if it existed, does not excuse claimant's behavior on February 3, 2014 considering that not only did he not report to the

office as instructed, he also failed to notify the employer that he was not going to do so, and he failed to respond to any of the employer's calls that afternoon. Nothing in this record shows that claimant was prevented by reason of his son's illness from calling the employer, answering one of the employer's calls, or returning one of the calls to notify the employer he was unable to report to the office as he had agreed.

For the foregoing reasons, we conclude that claimant's failure to report to the office on February 3 was wantonly negligent, and cannot be excused as an isolated instance of poor judgment because it was part of a pattern of other wantonly negligent conduct. Claimant's discharge was, therefore, for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation until he has requalified by earning four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 14-UI-14231 is set aside, as outlined above.

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

**DATE of Service:** May 6, 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.