

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0645

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 124036). The employer filed a timely request for hearing. On March 31, 2014, ALJ McGorin conducted a hearing and issued Hearing Decision 14-UI-13871, affirming the Department's decision. On April 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Bruce Chevrolet, Inc. employed claimant as finance manager from January 18, 2010 to February 1, 2014.

(2) In mid-January 2014, claimant and a supervisor had a disagreement about some paperwork pertaining to an auto sale. The supervisor assigned the task of processing the sale to another finance manager and claimant left work for the day.

(3) On February 1, 2014, claimant and a supervisor had another disagreement about paperwork pertaining to an auto sale. The supervisor instructed claimant to prepare the paperwork a certain way and claimant initially refused. The employer decided to discharge claimant because, to the employer's perception, it was the second dispute in which claimant had refused to follow instructions with respect to preparing paperwork. Claimant then approached the supervisor and agreed to prepare the paperwork the way the supervisor had instructed, but the supervisor discharged claimant, effective immediately.

**CONCLUSIONS AND REASONS:** 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) (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 has the burden of persuasion to establish misconduct in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to comply with instructions from a supervisor. Claimant knew or should have known that expectation as a matter of common sense. In the final instance on February 1st, claimant violated the employer's expectations when he refused to follow a supervisor's instructions with respect to preparing some paperwork. The parties were in dispute as to whether it was reasonable to expect claimant to follow the supervisor's instructions, given claimant averred it would have been unethical to follow the instruction and the employer averred it would have been unethical not to do as instructed. Given that claimant ultimately offered to complete the paperwork the way his supervisor had instructed him to do so, however, it is more likely than not that the instruction was a reasonable one, and claimant's refusal to follow that instruction was a conscious violation of the standards of behavior the employer had the right to expect of him. Claimant's conduct in the final incident was, therefore, wantonly negligent.

However, wantonly negligent conduct is excusable as an isolated instance of poor judgment if it is a single or infrequent wantonly negligent occurrence that did not exceed mere poor judgment by causing a breach of trust or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A), OAR 471-030-0038(1)(d)(D), OAR 471-030-0038(3)(b).

The employer alleged that two weeks prior to the final incident claimant had violated the same expectation, after which the supervisor sent him home from work and informed him he could be sent home or discharged if any further instances occurred. Claimant testified, however, that he was not sent home, was not warned, and left work when he did because it was the end of his shift. Absent evidence tending to show that the employer's version of events was more probable than claimant's, or a reason to conclude that claimant's testimony was not credible, the evidence as to what occurred in the mid-January 2014 incident is, at best, equally balanced. Since the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to prove that claimant violated the employer's expectation that he follow instructions in the mid-January 2014 incident, much less that the violation was either willful or wantonly negligent. We therefore conclude that claimant's conduct in the final incident on February 1st was an isolated wantonly negligent act.

We further conclude that claimant's conduct in that incident did not exceed mere poor judgment. On this record, the conduct occurred due to a dispute about whether the supervisor's instruction was ethical, and claimant ultimately agreed that he would follow the instruction, albeit too late to save his job. Objectively considered, claimant's expression of his ethical concerns and ultimate capitulation was not so egregious that the employer could no longer trust him to follow instructions in the future, and was not shown to have made a continued employment relationship impossible.

Because claimant's conduct in the final incident was isolated and did not exceed mere poor judgment, the conduct was an isolated instance of poor judgment, which is not misconduct. The employer

therefore discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 14-UI-13871 is affirmed.

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

**DATE of Service:** May 20, 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.