

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0810

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 105643). Claimant filed a timely request for hearing. On April 17, 2014, ALJ M. Davis conducted a hearing, and on May 2, 2014 issued Hearing Decision 14-UI-16731, affirming the administrative decision. On May 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) From May 1, 2010 through February 28, 2014, Home Care Workers employed claimant as a homecare worker. Claimant's duties included providing care for consumer HP.

(2) Homecare workers work hours authorized by a caseworker. They record hours worked for each client on a voucher which is signed by the client and sent to a local office.

(3) In 2013, HP's caseworker began to suspect that claimant had forged HP's signatures on some of the vouchers she submitted, and falsely claimed hours worked on her vouchers that she had not actually worked. After an investigation, the employer issued a notice of termination of claimant's employment, effective November 1, 2013.

(3) Because claimant was well liked by the people for whom she cared, the managers overseeing claimant's work decided not to immediately terminate her employment. The employer proposed postponing the decision to discharge claimant, contingent on claimant's acceptance of certain conditions. One of these conditions was the requirement that claimant "[i]mmediately begin recording hours worked per day." (Exhibit 1, p. 4). The manager believed that if claimant fulfilled these conditions, the decision to terminate claimant's employment might be overturned. Claimant accepted

the requirement that she begin to keep track of her work hours and began to do so. (Transcript at 22). The employer postponed the decision to terminate claimant's employment.

(4) On January 1, 2014, Adult Protective Services (APS) received a report that claimant had been neglectful in her care of HP. An APS investigator interviewed HP, HP's ex-husband (who lived with HP), other family members, and the client's caseworker. Based on the information she received, the investigator began driving by HP's house during times when claimant was scheduled to work for HP to see if claimant's car was parked outside of HP's mobile home. The APS investigator also asked the manager of the mobile home park where HP lived to check for claimant's car outside of HP's mobile home during times when claimant was scheduled to work for HP. The APS investigator knew the mobile home in which HP lived, because she had visited it before, and checked the registration of claimant's vehicles with the Department of Motor Vehicles to confirm the license plate numbers for claimant's vehicles. In addition, the investigator observed the particular spot where claimant customarily parked her car when working for HP.

(5). For the month of January 2014, claimant filled out a "Daily Tracking Sheet" in which she recorded the days she worked for HP, and the time she began and ended her work on each day worked. On January 8, 21 24, 28 and 29, the APS investigator, one of the employer's managers, or the manager of the mobile home park where HP lived, drove by HP's house at least once per day and did not see claimant's car parked outside of HP's home during times that claimant stated she was working for HP on her "Daily Tracking Sheet." (Transcript at 13; Exhibit 1).

(6) On February 28, 2014, the employer terminated claimant's employment for falsely claiming time worked for HP in January 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer met its burden of proof to show that claimant falsely recorded time worked for HP. The observations of the APS investigator, the manager of the mobile home where HP lived, and the employer's manager provided persuasive evidence that claimant was not working for HP during times that claimant stated she was working for HP on her "Daily Tracking Sheet." Claimant's arguments – that the APS investigator may have not recognized claimant's car and may not have known where HP lived – are not supported by the record. The investigator knew the vehicles claimant drove because she verified the license plate numbers with DMV. The investigator and the employer's manager knew

where HP lived because they had previously visited HP in her home, and the manager of the mobile home park obviously knew where HP lived.

Claimant knew that the employer expected her to accurately track time worked for HP. In November 2013, claimant faced imminent discharge for falsely claiming hours worked for HP. The employer postponed claimant's discharge only on the condition that she begin to accurately record her work hours. Claimant knew, or should have known, that the employer expected her to comply with this condition. Claimant's failure to comply with the employer's expectation constituted at least wanton negligence.

Claimant argues, however, that her method of tracking time worked for HP resulted from a good faith belief that it would be acceptable to the employer. *See* OAR 471-030-0038(3)(b) (a good faith error does not constitute misconduct). According to claimant, she often worked extra hours for HP, outside of her normal schedule. Claimant testified that she did not record these extra hours on her "Daily Tracking Sheet" because she was told during orientation that she did not need to maintain a regular schedule; claimant "thought it would make it easier for the State" to omit these additional hours from the records she submitted. (Transcript at 36). Claimant's assertion is not credible. Claimant avoided discharge in November 2013 only because she agreed to keep accurate records of her work hours. We find it implausible that claimant held a good faith belief that she need not do so.

Claimant's actions in falsely claiming time worked for HP cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent act rather than a repeated occurrence or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The record shows that during January 2014, claimant falsely claimed time worked for HP on five occasions. (Finding of Fact 4). Claimant's falsification of her work records was at least a wantonly negligent violation of the employer's standards. Because claimant's actions in January 2014 constituted a repetition of wantonly negligent behavior, they are not excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-16731 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** June 24, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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