

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0921

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123134). Claimant filed a timely request for hearing. On May 15, 2014, ALJ Wiperman conducted a hearing, and on May 23, 2014, issued Hearing Decision 14-UI-18338, affirming the Department's decision. On May 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also 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 as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Middlefield Oaks, an elder care facility, employed claimant as an administrator from June 14, 2013 to March 25, 2014.

(2) The employer expected staff members who initiated a 911 call for a resident medical emergency to stay with the resident until emergency personnel arrived. The employer's expectation was set forth in its handbook, which claimant helped create in 2011 by typing the policies and was accessible to claimant at all times. Claimant also received group instruction on the employer's expectation at various times during her employment. Claimant should have been aware of the employer's expectation.

(3) On March 24, 2014, claimant arrived at work, was informed that a resident's call alert had been on for some time and decided to investigate. She asked a maintenance employee to push her to the resident's room as she was wheel chair bound due to a recent injury. When she arrived, she concluded the resident, who was lucid, needed to be transported to the hospital and sent the maintenance employee to find a medical aide to call "911" pursuant to the employer's procedure. After waiting with the

resident for five minutes without other personnel appearing, claimant had the maintenance employee, who had returned, push her “downstairs” to verify that emergency personnel had been summoned. Transcript at 11. By that time, the medical aide assigned to the resident’s floor had arrived at resident’s room and handled the situation from there. Later that day at the hospital, the resident died, unrelated to claimant’s actions.

(4) During a subsequent investigation, the employer determined that claimant had left the resident alone for several minutes during an emergency situation in violation of its policy. On March 25, 2014, the employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We disagree with the Department and ALJ. The employer discharged claimant, but not for misconduct.

As a preliminary matter, claimant’s first-hand testimony differed with the testimony of the employer’s witness, based largely on hearsay, on a number of issues. In the absence of evidence demonstrating that claimant was not credible, her first-hand testimony was at least as credible as the employer’s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant’s evidence.

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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

In its initial determination, the Department concluded claimant was discharged for misconduct, finding as fact that claimant was discharged after she “left a resident alone during an emergency to follow up on arrangements for the resident” in violation of the employer’s 911 emergency policy. Decision # 123134. Notably the Department failed to mention that claimant had no prior policy violations and did not address whether claimant’s conduct exceeded mere poor judgment and accordingly could not be excused as an isolated instance of poor judgment.

The ALJ concluded the employer discharged claimant for misconduct, reasoning that claimant should have known as an administrator involved in creating the employer’s handbook that leaving a resident alone during a medical emergency violated a reasonable employer expectation and despite her “sincere desire to aid the resident during the medical emergency”, by leaving the resident alone, claimant demonstrated indifference to the employer’s expectation and was wantonly negligent. Hearing Decision 14-UI-18338 at 3-4. He further concluded that claimant’s policy violation could not be excused as an isolated instance of poor judgment because “a central aspect of [the employer’s] work include[d] trusting employees to provide effective assistance during medical emergencies” and the employer asserted it could no longer trust claimant’s judgment. Hearing Decision 14-UI-18338 at 3-4. Claimant disputed that she was aware of the “911” emergency policy in question. Transcript at 11. However, assuming, *arguendo*, that claimant’s violation of the employer’s “911” emergency policy was wantonly

negligent, we disagree with the ALJ that claimant's conduct did not constitute an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Here, there was no dispute that claimant's policy violation was an isolated instance. Transcript at 8. However, OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible exceeds mere poor judgment and cannot be excused. The employer asserted it could no longer trust claimant's judgment but failed to establish that claimant's March 24 conduct was unlawful, tantamount to an unlawful act or of the sort, when viewed objectively under the circumstances described, that would cause an employer to lose trust in claimant to the extent it made a continued employment relationship impossible, particularly where, as the ALJ found and we agree, claimant's conduct in leaving the resident's room was motivated by her "sincere desire to aid the resident during the medical emergency." Transcript at 8. Moreover, claimant worked as an administrator and there was no evidence that she typically was involved in assisting in medical emergencies. Under the circumstances, claimant's decision to leave the resident alone for a few minutes was not so egregious that a continued employment relationship became impossible.

Accordingly, the employer discharged claimant because of an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 14-UI-18338 is set aside, as outlined above.

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

**DATE of Service:** July 8, 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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