

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0930

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 6, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112306). On December 26, 2013, decision # 112306 became final without a request for hearing having been filed. On February 25, 2014, claimant filed an untimely telephone request for hearing. On March 14, 2014, ALJ Kangas issued Hearing Decision 14-UI-12439, dismissing claimant's request for hearing as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.<sup>1</sup> On December 9, 2014, the Office of Administrative Hearings (OAH) received claimant's response. On April 24, 2014, OAH issued notice of a hearing scheduled for May 8, 2014 at 9:30 a.m. On May 8, 2014, ALJ Murdock conducted a hearing at which claimant appeared and testified, and on May 9, 2014, issued Hearing Decision 14-UI-17165, allowing claimant's late request for hearing, but affirming the Department's decision. On May 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) American Metal Products Company employed claimant from June 18, 2007 until September 13, 2013.

(2) The employer provided claimant with an employee handbook. The employer policy stated that the employer expected a phone call within one hour of the shift if an employee was unexpectedly absent from scheduled work. The policy also stated that three days of absence without notice constituted a voluntary termination from employment. Claimant understood the policy.

(3) Claimant was incarcerated after being arrested and charged with driving under the influence of intoxicants. Due to his incarceration, claimant was unable to report to work on September 11, 12, and 13, 2013. Claimant had no access to his phone numbers or memory of them to call anyone and arrange

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<sup>1</sup> Hearing Decision 14-UI-12439.

for someone to notify the employer of his absences during that time. He contacted the employer when he was released on September 14, 2013.

(4) Claimant knew that driving while under the influence of intoxicants could result in his arrest or incarceration.

(5) The employer discharged claimant for three consecutive “no-call-no-shows”.

**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 because as a result of his incarceration, and did not notify the employer of his absences, he missed three days of work. Claimant knew the employer expected a phone call within one hour of the shift if he was unexpectedly absent from scheduled work. When a claimant's inability to comply with an employer's expectation is caused by claimant's incarceration, *Weyerhaeuser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) holds that, for purposes of determining whether claimant is disqualified from benefits, the issue is whether claimant willfully or with wanton negligence created the situation that made it impossible to comply with the employer's expectation. In this case, claimant's incarceration was caused by his arrest for driving under the influence of intoxicants. Claimant created the situation which led to his incarceration with the mental state required for finding willfulness or wanton negligence. The situation which made it impossible for him to comply with the employer's expectations was caused by claimant's misconduct.

Claimant's inability to comply with the employer's expectations during his incarceration was not excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. An “isolated instance of poor judgment” means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Due to his incarceration, claimant was unable to report to work and admitted he was not available during all of the days of his incarceration. Claimant's willful or wantonly negligent failure to comply with the employer's expectations was prolonged, continued over the several days until he was discharged and was not isolated. Nor was claimant's failure to comply with the employer's expectations excused under OAR 471-030-0038(3)(b) as a good faith error. Claimant did not assert or present evidence showing he sincerely believed, or had a factual basis for believing, that the employer would condone his failing to comply with the employer's expectations if he was incarcerated.

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

**DECISION:** Hearing Decision 14-UI-17165 is affirmed.

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

**DATE of Service:** June 27, 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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