

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0960

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 92111). The employer filed a timely request for hearing. On May 15, 2014, ALJ Wyatt conducted a hearing, and on May 21, 2014 issued Hearing Decision 14-UI-18111, concluding claimant's discharge was for misconduct. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Ingram Distribution employed claimant from February 25, 2013 to February 24, 2014.

(2) The employer expected claimant to report to work as scheduled, or notify the employer if he was unable to do so. Claimant understood that expectation.

(3) In mid-February, the employer reduced claimant's hours upon his request, and changed his schedule accordingly. On February 19, 2014, a supervisor and manager met with claimant and notified him that he was expected to work Sundays, Mondays and Tuesdays beginning February 23, 2014. Claimant expressed that he thought his application contract stated that he would be expected to work Tuesdays, Wednesdays and Thursdays, and he expressed a preference for that shift. The supervisor and manager showed claimant the application form which indicated that he would be scheduled to work Tuesdays, Wednesdays and Thursdays, but that the employer could change his work schedule if needed.

(4) At the end of the February 19, 2014 meeting, the supervisor told claimant his schedule would include Sundays, Mondays and Tuesdays. She told claimant she did not yet know what time claimant would be expected to report to work on Sunday, February 23, 2014, or to which department he would be expected to report, and said claimant she would call him as soon as she learned those details. After leaving the February 19th meeting, claimant left town to go camping in an area outside cell phone range.

(5) On February 21, 2014, the supervisor called and left claimant a message instructing him to report to work in the picking Department at 6:30 a.m. Sunday, February 23, 2014. In the message, the supervisor told claimant he was also expected to work Monday, February 24, 2014, as well, and should ask the picking department supervisor he worked with on Sunday what time he should report to work on Monday.

(6) Claimant did not receive the supervisor's phone message until the evening of February 23, 2014, hours after missing his entire 6:30 a.m. shift. Claimant listened to the message and understood he had missed the February 23, 2014 shift and was expected to report to work on February 24, 2014, although he did not know what time the February 23, 2014 shift was supposed to begin since he had not spoken with a supervisor.

(7) On February 24, 2014, claimant called the supervisor at 11:22 a.m. He asked, "have I been fired yet for not showing up for a couple of shifts?" Audio recording at ~14:40. The supervisor asked claimant why he had missed the shifts. Claimant told the supervisor that he had missed the shifts because he "had to be firm about only working Tuesdays, Wednesdays and Thursdays." *Id.*

(8) On February 24, 2014, the employer discharged claimant for failing to report to work or notify the employer he would be absent from his February 23, 2014 shift.

**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.

As a preliminary matter, we agree with the ALJ's conclusion in Hearing Decision 14-UI-18111 that, for the reasons the ALJ explained, the consistent testimony provided by the employer's witnesses was more credible than claimant's testimony to the contrary. Where the facts were in dispute, we have found facts in accordance with the employer's evidence.

The employer had the right to expect claimant to report to work as scheduled, or notify the employer if he was going to be absent from work. Claimant understood the employer's expectations with respect to his attendance, and violated the employer's expectations on February 23, 2014 and February 24, 2014.

Claimant argued that he missed his February 23rd shift because he was away from home and out of cell phone range, did not receive the supervisor's voicemail, and therefore did not know or have reason to know that he was expected to work that day. However, the preponderance of the evidence is that claimant was informed on February 19<sup>th</sup> that he was expected to work on Sunday, February 23<sup>rd</sup>, and told that the supervisor would call him with his scheduled arrival time. Claimant's decision to travel out

of cell phone range, when he knew he was expected to work on Sunday, February 23<sup>rd</sup>, and knew to expect a phone call with his scheduled arrival time, demonstrated that he was indifferent to the standards of behavior the employer had the right to expect of him. Claimant's failure to report to work as scheduled on February 23<sup>rd</sup>, or notify the employer he would be absent, was at least wantonly negligent.

Claimant also argued that he missed work on February 24<sup>th</sup> because he did not know when he was scheduled to work. The record supports claimant's argument. However, claimant knew the night of February 23<sup>rd</sup> that he was scheduled to work on February 24<sup>th</sup>, and chose not to make any effort to find out what time he was scheduled to work until 11:22 a.m. that day, under circumstances where claimant often was scheduled to work as early as 6:30 a.m. Claimant's decision to wait until late morning to contact the employer about what time he was to begin work that day demonstrated his indifference to the employer's expectation that he report to work that day, and his indifference to the consequences of his conduct.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). Upon contacting his supervisor on February 24<sup>th</sup>, claimant's first question was whether he had been fired for missing his shifts. Claimant's comment demonstrates that he was aware that he was engaging in conduct that could cause his discharge from work, and was not acting in good faith when he left cell phone range while expecting a call about his work schedule and missed two shifts of work without notifying the employer he would be absent either day. Claimant's conduct was not the result of a good faith error.

For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct, and, regardless, it cannot exceed mere poor judgment by causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d). Claimant's conduct was not isolated. His failure to make himself available for a call about his February 23<sup>rd</sup> schedule, causing his failure to report to work that day, was a wantonly negligent exercise of poor judgment. His decision on the night of February 23<sup>rd</sup>, after having been told he was expected to report to work the next day, not to contact the employer until 11:22 a.m. the following day, thereby making it impossible for him to report to work a second time even though he knew he was scheduled to work that day, was a separate wantonly negligent exercise of poor judgment. Moreover, claimant's conduct exceeded mere poor judgment because his decisions to leave cell phone range and not work shifts he had been told he would be scheduled to work was motivated by his desire to "be firm" about limiting his work schedules to Tuesdays, Wednesdays and Thursdays. Given that claimant abandoned two separate shifts to make a point about his work schedule, the employer could reasonably conclude that claimant could not be trusted to report to work his scheduled hours in the future, should he desire to work other days or object to his work schedule.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 14-UI-18111 is affirmed.

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

**DATE of Service: July 9, 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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