

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0971

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On April 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 114156). The employer filed a timely request for hearing. On May 12, 2014, ALJ Francis conducted a hearing, and on May 16, 2014, issued Hearing Decision 14-UI-17850, concluding the employer discharged claimant for misconduct. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Triptych Construction LLC (Triptych) employed claimant as its construction manager from January 2013 to January 31, 2014.

(2) Claimant was one of three employer owners and owned 25% of the company formed in January 2013. Claimant's co-owners were LaMont (51%) and Murphy (24%). Claimant possessed the construction contractor's license and was the only owner with construction experience. Between January and approximately November 2013, claimant bid and then managed the employer's concrete construction jobs onsite and received wages for those services. LaMont and Murphy were the employer's administrators and managed the employer's finances.

(3) The employer expected claimant to follow company directives and refrain from disclosing internal problems or disagreements to clients to avoid the loss of client confidence in the employer's ability to deliver services or even client business. Claimant was aware of the employer's expectations as a matter of common sense.

(4) Around June 2013, LaMont and Murphy instituted an employer policy that prohibited employees from smoking on job sites. The employer had received complaints from clients about cigarette litter and wanted to both improve the company's image and avoid problems at medical job sites where patients

were treated for respiratory illnesses. LaMont and Murphy directed claimant to have his construction employees sign copies of the policy acknowledging their awareness of the prohibition against smoking at job sites. When they discovered claimant's construction employees had not signed the policy, they asked claimant why and he admitted he had directed them not to because he disagreed with it.

(5) Because claimant had routinely granted construction employees overtime that resulted in expenses exceeding his accepted contractual bids, beginning around May 2013, LaMont and Murphy insisted on being consulted prior to claimant submitting future bids, which he agreed to do. However, between May and November 2013, LaMont and Murphy became frustrated over claimant's failure to consult with them prior to submitting various bids. They also became dissatisfied with claimant's onsite management and refusal to follow established directives regarding materials acquisitions. Around the end of November, LaMont and Murphy notified claimant that his job duties had been changed; he would only prepare job bids as agreed and no longer would be allowed on job sites, which would be managed by Fildentrigger, an employee he helped select for that role. Claimant's wages were not affected and he acknowledged his changed role. Claimant was warned that if he did not comply, the employer would "move in a different direction." Transcript at 18-19.

(6) In mid-January 2014, claimant received a call from a client's principal who was frustrated with Fildentrigger's management of a Medford job. The client had accepted claimant's contractual bid after working with him on it for several months. Without consulting with LaMont or Murphy, claimant drove to Medford and attempted to resolve the issues on the job rather than leave the matter for Fildentrigger to resolve. Fildentrigger notified Murphy about claimant's presence and interference. Murphy contacted claimant and ordered him off the site. Shortly thereafter, LaMont and Murphy decided to negotiate a buyout with claimant and remove him from the company. On January 28, 2014, they submitted a handwritten offer to him which included the possibility of him taking over the Medford contract and asked him to respond at a meeting the next day.

After then claimant discussed with the Medford client's principal his management disagreements with the other owners, and the buyout discussions. He also failed to attend the meeting on the 29<sup>th</sup>. When claimant missed the meeting, LaMont told him the offer was being withdrawn. The Medford principal then sent the employer a letter, notifying it that her company was cancelling the Medford contract due to the uncertainties created by the employer's management and ownership difficulties. On January 31, 2014, LaMont and Murphy called a company meeting at which they discharged claimant as an employee primarily for discussing internal company matters with the client resulting in the loss of the contract.

**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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right, as a matter of common sense, to expect claimant to refrain from disclosing to a client internal management and ownership matters that might cause the client to lose confidence in the employer or cancel its contract. Claimant violated that expectation on or about January 28, 2014 when he discussed the employer's internal management disagreements and potential ownership changes with the Medford client under contract with the employer. By admitting that a main focus in having the discussions was "myself" and keeping "my" customer happy, claimant demonstrated that he was consciously indifferent to *his employer's* interests in maintaining business and fulfilling contracts. Transcript at 88. Consequently, claimant's conduct in discussing the employer's internal problems with the client was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. An act of poor judgment is isolated only if it is 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). Claimant also exercised poor judgment in June when he directed his construction employees to not sign the employer's no-smoking policy because he disagreed with it and in January 2014 when he went to a jobsite and attempted to intervene in managing the job in violation of an acknowledged directive. Nor can claimant's January 28 conduct be excused as a good faith error in his understanding of the employer's common sense expectation that he avoid conduct that might undermine its contractual relationships. Claimant admitted at hearing that a main focus of his in having the discussions with the Medford client was on his own self-interest and that of his client rather than those of the employer.

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-17850 is affirmed.

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

**DATE of Service:** July 15, 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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