

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1033

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On April 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121641). Claimant filed a timely request for hearing. On May 15, 2014, ALJ Wipperman conducted a hearing, and on June 3, 2014 issued Hearing Decision 14-UI-18839, affirming the Department's decision. On June 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Grain Millers, Inc. employed claimant to bag product from July 3, 2013 to March 27, 2014.

(2) The employer gave claimant a copy of its attendance system at hire. The policy provided for progressive discipline based on the points an employee lost for each attendance violation. The employer expected claimant to report to work on time for his scheduled shift, and to notify the employer at least one hour prior to the scheduled work time if he would be absent or tardy. Claimant understood the employer's expectations.

(3) On February 3, 2014, claimant called the employer 20 minutes before his shift to state he would be late for work. Claimant reported to work 21 minutes late. Claimant was not late due to illness or traffic.

(4) On March 14, 2014, claimant left work for his lunch break. He was scheduled to return at 1:30 p.m. Claimant did not return to work at 1:30 p.m. because he saw his son at lunch, and decided to spend time with his son because it had been a long time since he had seen him. At 4:05 p.m., claimant called his manager, explained why he did not return to work after lunch, and asked for the remainder of his shift off from work.

(5) On March 27, 2014, the employer discharged claimant for violating its attendance policy.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ and conclude 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he violated its attendance policy. Barring illness or other exigent circumstances, the employer reasonably expected claimant to work his scheduled shifts, or to notify the employer in a timely manner if he was unable to work or report to work on time. Claimant understood the employer's attendance expectations. Although the employer discharged claimant because his attendance point balance fell below zero, the immediate or "but for" cause of the employer's decision to discharge claimant was claimant's failure to return to work or notify the employer that he would miss work after his scheduled lunch break on March 14, 2014. Accordingly, claimant's conduct on March 14 is the initial focus of the misconduct analysis. There is no evidence in the record to show that claimant failed to contact the employer in a timely manner or return to work on March 14 due to illness or other circumstances beyond his control. Because claimant showed indifference to the consequences of his conduct when he knew his actions would probably violate the employer's reasonable attendance expectations, claimant's failure to call the employer in a timely manner or report back to work on March 14 was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be "isolated" the exercise of poor judgment must be 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). Claimant's conduct was not isolated under OAR 471-030-0038(1)(d)(A) because it was a repeated act. Claimant violated the employer's attendance policy before, having been late for work on February 3, 2014. Claimant did not explain his tardiness on February 3, 2014 because he could not recall at hearing why he was late for work that day. Claimant had told the employer he was ill or overslept on occasions when he missed work for those reasons. Audio Record ~ at 10:18 to 10:30, 12:20 to 12:40. Because claimant did not tell the employer he was late due to illness or other exigent circumstances on February 3, we infer that his tardiness that day was not due to those reasons. Claimant's prior attendance violation was wantonly negligent. Thus, his conduct on March 14, 2014 was not a single or infrequent occurrence and cannot be excused as an isolated instance of poor judgment.

Claimant argued at hearing that the employer deducted more points from his attendance balance than his manager told him would be deducted when claimant called his manager at 4:05 p.m. on March 14, and

that the violation therefore should not have resulted in discharge under the employer's point system. Audio Record ~ at 17:18 to 17:46. However, the record does not show that claimant relied on the manager's assertion because claimant spoke to the manager after claimant had already missed more than two hours of work without calling the employer. Nor does the record show that claimant sincerely believed, or had a factual basis for believing, that the employer would excuse his failure to contact the employer or return to work. Thus, claimant's conduct cannot be excused as a good faith error under OAR 471-0030-0038(3)(b).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-18839 is affirmed.

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

**DATE of Service:** July 22, 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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