

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1316

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On June 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143446). Claimant filed a timely request for hearing. On July 22, 2014, ALJ R. Davis conducted a hearing, and on July 31, 2014 issued Hearing Decision 14-UI-22616, concluding the employer discharged claimant, but not for misconduct. On August 6, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Tandem NW employed claimant from March 1, 2013 to May 30, 2014 as a care provider in the employer's care facility for developmentally disabled individuals.

(2) The employer expected claimant to accurately record work time by clocking in immediately before she began working, and clocking out immediately after finishing work, and to refrain from clocking in or out for another employee. The employer also expected claimant to refrain from removing medications from their containers early, before the time to administer the medications to residents. The employer expected claimant to behave in a professional manner during workplace investigations. Claimant understood the employer's expectations.

(3) On May 17, 2014, claimant's coworker was upset by a disagreement with another coworker while working. The upset coworker called claimant and asked her to work for her while she took a break from work to calm down. Claimant worked from 11:00 a.m. to 2:00 p.m. for the coworker. Claimant did not record the time she worked for the other employee.

(4) On May 22, 2014, the employer's executive director conducted an investigation regarding claimant's failure to record work time on May 17, 2014 and other allegations. During the investigation, the director perceived claimant's mannerisms and tone of voice as defensive and verbally "aggressive." Transcript at 9. Claimant did not use foul language when communicating with the director.

(5) On May 22, 2014, a staff member told the director that claimant had removed residents' medications from their containers before the time scheduled to administer the medications to the residents. Claimant did not remove medications from their containers early.

(6) On May 22, 2014, a staff member told the director that claimant had offered to "clock out" a staff member when the staff person was not at work. Claimant did not clock out or offer to clock out other employees.

(7) On May 30, 2014, the employer discharged claimant because she failed to accurately report the time she worked on May 17, 2014, and because she allegedly failed to follow medication procedures, offered to clock out coworkers who were not at work, and behaved in an unprofessional manner during a workplace investigation.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, not 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, for allegedly violating medication procedures and clocking out for coworkers. Claimant testified that she did not remove medications from their containers before dispensing them to residents, and that she never clocked out or offered to clock out coworkers not at work. Exhibit 1; Transcript at 24, 27-28. The employer's testimony regarding those allegations was based entirely on hearsay consisting of vague statements from claimant's coworkers. In the absence of evidence showing claimant was not a credible witness, her firsthand testimony was at least as credible as the employer's hearsay testimony. 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. Consequently, the employer failed to show by a preponderance of evidence that claimant violated medication procedures or clocked out for coworkers.

The employer also discharged claimant, in part, because the executive director perceived claimant's behavior during the final workplace investigation as unprofessional. Claimant testified that she was a "little angry" during the investigation because she disagreed with the accusations that she removed medications early and offered to clock out her coworkers, but that she was not aggressive, disrespectful or unprofessional toward the director. Transcript at 25, 26. Because the evidence regarding claimant's

conduct during the investigation is, at best, equally balanced, the employer failed to show by a preponderance of evidence that claimant's conduct during the investigation was unprofessional.

As for claimant's failure to record the time she worked for her coworker on May 17, 2014, claimant's conduct was a willful disregard of the employer's reasonable expectation that she accurately record her work time, and not a good faith error. Although claimant testified that she did not want to contact the supervisor on her weekend off work, and believed that she would be on duty for her coworker for only a "little while" (Transcript at 26, 21), claimant also testified that she understood the employer would not condone her conduct, and did not correct her time record later when her coworker failed to return to work for three hours. Transcript at 22. Claimant's failure to record her work time on May 17 was a willful violation of the employer's reasonable expectation that she accurately record her work time.

Although claimant's failure to record her work time on May 17 was a willful violation of the employer's expectations, it is excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is defined as a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct that does not exceed mere poor judgment. OAR 471-030-0038(1)(d)(A), (D). The employer failed to show that claimant violated its medication procedures or falsified coworkers' time records, other than failing to record her own work time on May 17. The employer also failed to show that claimant willfully or with wanton negligence behaved unprofessionally during a workplace investigation. As such, claimant's failure to record the three hours she worked for a coworker on May 17 was an isolated willful act. Nor did her conduct exceed mere poor judgment because it was not unlawful or tantamount to unlawful conduct, or so egregious as to cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 14-UI-22616 is affirmed.

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

**DATE of Service:** September 11, 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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