

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1348

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102227). Claimant filed a timely request for hearing. On July 18, 2014, ALJ Wyatt conducted a hearing, and on July 24, 2014 issued Hearing Decision 14-UI-22095, affirming the Department's decision. On August 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Albany General Hospital employed claimant as a housekeeper from October 21, 2002 to March 31, 2014.

(2) The employer allowed its housekeepers to leave work early with a manager's permission if their work was done and no co-workers needed their assistance. The employer expected housekeepers to ask their co-workers if they needed their assistance before asking a manager if they could leave work early. Claimant understood that expectation.

(3) On March 22, 2014, claimant informed a manager that her work was done and asked if she could leave work early, although claimant had not asked her co-workers if they needed her assistance. Claimant knew failing to ask her co-workers if they needed her assistance before asking the manager's permission to leave work early violated the employer's expectations.

(4) Claimant falsely stated to the manager that she had asked her co-workers if they needed her assistance, and that they had stated that they did not. Claimant knew lying to the manager violated the employer's expectations.

(5) The manager gave claimant permission to leave work early and instructed her to "sign out" of her pager and give it to a co-worker, so that the co-worker could sign in and "cover any needs for [claimant's] area." Transcript at 15; Exhibit 1 at 3. However, the co-worker told claimant that she was too busy to cover claimant's area, and that claimant needed to inform the manager. Claimant instead signed out of her pager, left it with the co-worker, and left work. Claimant knew leaving work early after the co-worker told her she was too busy to cover claimant's area violated the employer's expectations.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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 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 had a right to expect claimant to ask her co-workers if they needed her assistance before asking the manager if she could leave work early. The employer also had a right to expect claimant refrain from falsely stating to the manager that she had asked her co-workers if they needed her assistance. The employer also had a right to expect claimant to refrain from leaving work early after her co-worker stated she was too busy to cover claimant's area. Claimant knew her conduct on March 22, 2014 violated the employer's expectations, and therefore willfully violated those expectations.

Claimant's conduct on March 22, 2014 cannot be excused as an isolated instance of poor judgment. For an act 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). In addition, acts that create irreparable breaches of trust in the employment relationship exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). In this case, claimant's acts were not isolated because she willfully violated the employer's expectations three times in one day, establishing a pattern of such behavior. In addition, claimant's decisions to lie to the manager and leave work early knowing that her co-worker was too busy to cover her area were sufficient to create an irreparable breach of trust in the employment relationship. Claimant's acts therefore exceeded mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct on March 22, 2014 cannot be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, her conduct complied with the employer's expectations.

**DECISION:** Hearing Decision 14-UI-22095 is affirmed.

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

**DATE of Service:** September 16, 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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