

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1373

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93055). Claimant filed a timely request for hearing. On July 25, 2014, ALJ S. Lee conducted a hearing, and on July 30, 2014 issued Hearing Decision 14-UI-11539, affirming the Department's decision. On August 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) S. Delaney Hanlon employed claimant as a legal assistant from sometime in August 2008 until May 30, 2014.

(2) The employer was an attorney in sole practice who shared office space with three other attorneys. Claimant was employed only by that attorney and not by any of the other attorneys in the office. The attorney who employed claimant was very frequently out of the office performing interviews, home visits, court appearances and miscellaneous tasks, sometimes for complete work days. The attorney relied on claimant's presence to keep her office open during the regular business hours when the attorney was not there, to run the office without onsite supervision and to be available on the attorney's behalf for her clients who called or who came in person to the office. Claimant was aware that, as a matter of common sense, the attorney was relying on him for these purposes.

(3) The attorney specifically expected claimant to remain in the office during the hours that he was scheduled to work, and to obtain the attorney's permission before leaving the office during those hours. Claimant was aware of the attorney's expectations as a matter of common sense and based on his customary practices. Throughout claimant's employment, he regularly notified the attorney if he wanted to leave work early and close the office, or if he was going to be out of the office during scheduled work hours.

(4) Sometime before November 1, 2013, the attorney told claimant that she wanted him to move some of her closed files from the offsite storage facility at which they were stored to a different offsite facility. Claimant told the attorney that he was able to borrow a pick-up to move the closed files. Claimant and the attorney did not decide on a day when claimant was going to get the pick-up or move the closed files. On November 1, 2013, one of claimant's scheduled work days, the attorney was not in the office due to a client appointment. When the attorney remotely sent an email request for some information from claimant, claimant did not respond. Claimant did not report for work on November 1, 2013 and did not notify the attorney that he was not going to be out of the office that day. Claimant later told the attorney that he had not been in the office because he needed to get the pick-up to move the closed files. Exhibit 1 at 2.

(5) On January 5, 2014, the attorney sent an email to claimant notifying claimant that she was reducing his work hours to part-time as a result of business slowdown. In the email, the attorney told claimant that "I will also need to have you to have set [work] hours. It's really important for me to know exactly when you are in and out of the office since there are time-sensitive things that I sometimes need you to do \*\*\* [and] there are time when I send clients to the office to pick things up or drop things off and I need to know [that] someone will be there." Exhibit 2 at 3. The attorney told claimant that, as of February 1, 2014, his work schedule was 1:00 p.m. to 5:00 p.m., Monday through Friday. In the email, the attorney told claimant that "I want also to let you know what my expectations are going forward" and, among the things listed, she stated that she wanted claimant to become a notary public and that she would pay the costs necessary for him to do so. Exhibit 1 at 3, 4. On February 15, 2014, the attorney sent an email to claimant telling him, among other things, that she had heard nothing from him about taking action to become a notary. The attorney asked claimant to explain this inaction. Exhibit 1 at 2.

(6) Late in the afternoon on Friday, May 23, 2014, one of claimant's scheduled workdays, the attorney and claimant were the only people remaining in the shared office space. Sometime near 4:00 p.m., the attorney told claimant she was leaving to buy some supplies and that she was not going to return to the office after she made the purchase. She told claimant to have a good weekend before she left. After making her purchases, the attorney realized she had forgotten to take a file with her and returned to the office to retrieve it. As the attorney entered the office parking lot at approximately 4:15 p.m., she observed claimant driving out of it in his personal vehicle. The attorney returned to the office space and confirmed claimant was not there. The attorney stayed at the office until 5:00 p.m. and claimant did not return to complete the workday. Claimant had not asked the attorney for permission to leave early or notified her that he intended to do so.

(7) On May 30, 2014, the attorney discharged claimant, telling him that she was no longer able to employ him. The attorney did not explain the specific reasons, or that she was discharging claimant for leaving early, without her permission, on May 23, 2014.

**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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant agreed that he understood that the attorney expected him to remain in the office until 5:00 p.m. and we infer that, absent exigent circumstances, he understood that he was not permitted to leave earlier unless he had the attorney's permission. Transcript at 15. Claimant did not dispute that he did not have the attorney's permission on May 23, 2014 to leave before 5:00 p.m. and his testimony, although difficult at times to follow, appeared to be that he had "no idea" whether he actually left the office, without permission, before 5:00 p.m. on May 23, 2014. Transcript at 16, 17, 28. Taking the sum of claimant's testimony into account, including the many explanations he provided for why he might have left early, it appears to concede that he very possibly could have left his shift early on May 23, 2014 after he thought the attorney had left for the weekend. Transcript at 16, 17, 28. Although claimant asserted in his written argument that the employer provided "no proof" that he left work early on May 23, 2014, this assertion ignores the evidentiary significance of the attorney's detailed testimony of the events of that day based on her personal observations. Claimant's Written Argument at 1. The attorney's very specific recall and first-hand observations of claimant's early departure at 4:15 p.m. on May 23, 2014, as well as claimant's failure to return to the office that workday outweighs claimant's vague and uncertain testimony about that day. The employer established, more likely than not, that claimant left his shift early on May 23, 2014, without permission. Based on claimant's understanding of the employer's expectations and his failure to present any evidence that exigent circumstances caused his early departure, that he left work at 4:15 p.m. on May 23, 2014, without permission, was a willful or wantonly negligent violation of the employer's expectations. It was misconduct.

Claimant's willful or wantonly negligent behavior on May 23, 2014 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and is not an occurrence that exceeds mere poor judgment by, among other things, creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). In this case, it appears that claimant had previously violated the attorney's expectations with at least wanton negligence on November 1, 2013, when he did not show up for work and did not notify the attorney that he was not going to be in the office. Although claimant contended that he was not at work that day because he needed to borrow a pick-up truck located some distance away from the attorney's office to move files for the attorney, claimant agreed that he neither told the attorney he was not going to be in the office on November 1, 2013 nor had he and the attorney previously set a specific date for him leave the office to retrieve the pick-up. Transcript at 21, 22. Leaving the attorney's office unattended for an entire workday when the attorney was not there, without telling the attorney in advance, was at least wantonly negligent behavior, even if one of the purposes for the absence was ostensibly to serve a need of the attorney's business. Because claimant's behavior on November 1, 2013 was at least a wantonly negligent violation of the employer's standards, his later willful or wantonly negligent violation on May 23, 2014 was not isolated as required to excuse it from misconduct as an isolated instance of poor judgment. In addition, claimant's willful or wantonly negligent behavior on May 23, 2014 was also a type of behavior that cannot be excused as an isolated instance of poor judgment because it exceeded mere poor judgment. The attorney was often away from

her office and, during her frequent absences, relied on claimant to run her office without her onsite supervision and to maintain availability, on her behalf, to her clients during regular business hours. Claimant's reliable presence in the office during business hours was integral to the appearance of stability and continuity in the attorney's sole practice. A reasonable employer could objectively conclude that, by leaving the office early and unattended during business hours, without telling the attorney, claimant had irreparably breached the employment relationship because the attorney could not reliably trust that he would fulfill an important function for which she had hired him.

Nor was claimant's behavior on May 23, 2014 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence showing that he left the workplace early on May 23, 2014, believing that the employer would condone his early departure. As such, claimant failed to make a threshold showing that his behavior on May 23, 2014 was based on a mistaken understanding of the employer's expectation, or a good faith error.

At hearing, claimant contended that the attorney did not discharge him for his early departure on May 23, 2014, but because her business was failing. Transcript at 26. Although the attorney agreed that financial exigencies had caused her to reduce claimant's work hours to part-time work February 2014, claimant did not present any evidence to support his contentions about the alleged true reasons for his discharge other than his assertions about the financial prospects of the attorney's business. Transcript at 26. Notably, claimant did not present reliable evidence that he did not engage in misconduct on May 23, 2014 and that, for this reason, the alleged ground for his discharge could only have been a pretext. On this record, there is insufficient evidence to conclude that the misconduct for which the attorney alleged she had discharged claimant was a guise to cover up that she was discharging claimant due to the financial position of her business.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-22539 is affirmed.

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

**DATE of Service:** September 24, 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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