

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1407

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103212). Claimant filed a timely request for hearing. On August 18, 2014, ALJ Holmes-Swanson conducted a hearing, and on August 19, 2014 issued Hearing Decision 14-UI-23701, concluding that claimant's discharge was not for misconduct. On August 26, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

**FINDINGS OF FACT:** (1) Eugene Water & Electric Board employed claimant as a security officer June 4, 2010 to June 23, 2014.

(2) The employer expected its security officers to perform their assigned patrols as instructed. The employer also expected security officers to communicate changes in procedure during shift changes. Claimant understood those expectations.

(3) Claimant's supervisor instructed the employer's security officers to patrol around, and not through, a construction area. In late May or early June 2014, claimant went on patrol with a security officer trainee. Claimant led the trainee on patrol through the construction area because a security officer who worked another shift had told claimant that security officers now were allowed to patrol through the area. Unknown to claimant, the other security officer was mistaken.

(4) The security officer trainee reported to the employer that claimant had led him on patrol through the construction area, and failed to perform foot patrols around the perimeter of the employer's building as assigned. The security trainee also reported that when he questioned claimant's conduct, claimant told him that security officers could do whatever they wanted.

(5) The discharged claimant based on the security officer trainee's report.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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 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). 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 written argument, the employer asserts it discharged claimant for multiple incidents of misconduct during the last several months of his employment. At hearing, however, the employer's senior human resources consultant testified that it was the incident involving the security officer trainee in late May or early June 2014 that led the employer to discharge claimant. Transcript at 6-7. We therefore focus on that incident as the reason for claimant's discharge, and address other incidents only if necessary to determine whether the employer discharged claimant for an isolated instance of poor judgment.

The employer discharged claimant, in part, because the security officer trainee reported that claimant failed to perform foot patrols around the perimeter of the employer's building as assigned, and that when he questioned claimant's conduct, claimant told him that security officers could do whatever they wanted. However, the security officer trainee did not testify at the hearing. Claimant testified that he performed the assigned foot patrols around the perimeter of the employer's building. Transcript at 21-22. He also testified that he told the security officer trainee "there's times that your supervisor's not around and you're going to use your own judgment, you know, and for emergencies only," and not that security officers could do whatever they wanted. Transcript at 19. We find the evidence on those issues, at best, equally balanced. The employer therefore failed to meet its burden to show by a preponderance of evidence that claimant failed to perform the assigned foot patrols, or told the security officer trainee that security officers could do whatever they wanted.

The employer also discharged claimant, in part, for violating his supervisor's instruction to patrol around, and not through, a construction area. However, claimant went through the construction area

because a security officer who worked another shift had told him that security officers now were allowed to patrol through the area. Although claimant arguably should have known going through the construction area probably violated the employer's expectations, the record shows he sincerely believed, and had a rational basis for believing, it did not. Transcript at 19-21. Claimant's conduct therefore was a good faith error, and not misconduct.

In sum, the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-23701 is affirmed.

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

**DATE of Service:** September 26, 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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