

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1630

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 95401). The employer filed a timely request for hearing. On October 3, 2014, ALJ Shoemake conducted a hearing, and on October 7, 2014 issued Hearing Decision 14-UI-26531, concluding the employer discharged claimant for misconduct. On October 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. We considered the entire hearing record.

**FINDINGS OF FACT:** (1) Target employed claimant from September 13, 2012 to June 13, 2014 as an electronics team member.

(2) The employer expected claimant to report to work as scheduled, or notify the employer not later than two hours after his scheduled start time if he was unable to report to work. Claimant was given the employer's attendance policy at hire, and understood the employer's expectations.

(3) The employer posted the work schedule ten days in advance, every Thursday at 10:00 a.m. Each page of the schedule was labeled at the top with the dates for that week. The schedule was located above the time clock the employees used to clock in and out each for each shift.

(4) On May 5, 2013, claimant failed to report to work for his scheduled shift or notify the employer he would miss work. Exhibit 1. He had requested the day off from work, and mistakenly assumed the manager had approved his request.

(5) On July 24, 2013, claimant failed to report to work for his scheduled shift or notify the employer he would miss work. Claimant told the employer he missed work because he wrote his schedule down incorrectly.

(6) On or about January 1, 2014, claimant failed to report to work for his scheduled shift or notify the employer he would miss work. The employer issued claimant a warning stating claimant would be discharged if he violated the attendance policy again within the next twelve months. Exhibit 1.

(7) On or about June 6, 2014, claimant was scheduled to work from 8:00 a.m. to 12:00 p.m. Claimant reported to work at 12:00 p.m. and told the employer he had misread the schedule. He did not notify the employer before he missed his shift that day.

(8) On June 13, 2014, the employer discharged claimant for violating its attendance policy.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that 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, good faith errors, and absences due to illness or other physical or mental disabilities 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he violated the employer's attendance policy. Barring illness or other exigent circumstances, the employer had a right to expect claimant to report to work as scheduled or notify the employer if he was going to be tardy or absent. Claimant understood the employer's expectations. Claimant testified at hearing that he must have written down the wrong week when he wrote down his schedule for June 6, 2014, because he had been scheduled to work from 8 a.m. to 12:00 p.m. the two weeks before June 6, 2014. Audio Record at 34:16 to 34:29. By relying on his prior work schedule, and not carefully checking his schedule for June 6, 2014, claimant consciously engaged in conduct he should have known would probably result in his failure to comply with the employer's expectations. Claimant had previously violated the employer's expectations for the same reason in July 2013, and was given a third attendance warning in January 2014 stating further attendance violations would result in discharge. The record is devoid of evidence that claimant took any steps to

avoid making mistakes in writing down his schedule after the warnings. Moreover, the employer posted the schedule at least ten days in advance, and labeled each page of each week of the schedule separately. Claimant was able to ready the schedule successfully on other occasions. The preponderance of the evidence shows that claimant unreasonably relied on his schedule for the two weeks before June 6, 2014, and failed to carefully check and record his shift start time from the posted schedule. As a result, he did not appear for his scheduled shift, and did not call to report he would be absent. His reliance on his prior schedule and failure to carefully read the schedule and note the time of his shift does not justify his failure to report to work under those circumstances, and his resulting absence was a wantonly negligent violation of the standard of behavior that the employer had a right to expect of claimant.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant had previously violated the employer's expectations by failing to report to work or notify the employer of his absence. On May 5, 2013, claimant was absent without permission because he assumed his request for time off work had been granted. However, the employer's attendance policy stated that employees would receive notification from the employer of the approval or denial of a request for time off, and claimant did not show he received notification of an approval before he missed work on May 5, 2013. Exhibit 1. Claimant provided no reason at hearing for his "no show, no call" on January 1, 2014. His conduct in the final incident was, therefore, not isolated, and cannot be excused as an isolated instance of poor judgment.

For conduct to be considered a good faith error, claimant must establish that he sincerely believed, and had a factual basis for believing, that the employer would condone his failure to report to work or notify the employer that he would be absent on June 6, 2014. Claimant understood the employer's expectation and, based upon his prior warnings, did not sincerely believe, or have a factual basis for believing, that the employer would excuse or condone his conduct on June 6, 2014.

Therefore, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-26531 is affirmed.

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

**DATE of Service:** December 1, 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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