

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1671**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105354). Claimant filed a timely request for hearing. On October 3, 2014, ALJ R. Davis conducted a hearing, and on October 9, 2014 issued Hearing Decision 14-UI-26740, affirming the Department's decision. On October 21, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Mark Jones Trucking, Inc. employed claimant from July 29, 2013 to July 31, 2014 as a watchman.

(2) Claimant's position required him to watch the employer's equipment on a logging site when the logging crew was not there, and prevent the use or theft of equipment and fuel, and damage to the equipment. Claimant was not required to use logging equipment to perform his job duties as watchman.

(3) The employer prohibited claimant from using the employer's logging equipment without permission. The employer instructed claimant at hire that only authorized employees were permitted to operate company equipment or power tools.

(4) In or about August 2013, the supervisor told claimant he could use a backhoe to put gravel around his recreational vehicle in his campsite. On occasion, the employer gave claimant permission to drive its log loader to claimant's camp site to use it to put air in his truck tires. On one occasion, a supervisor directed claimant to transport himself and another supervisor throughout the jobsite that day in the employer's vehicle. The employer never told claimant he was authorized to use the employer's equipment without permission.

(5) On July 28, 2014, after the logging crew left the job site, claimant used the employer's log skidder to help move his truck, which was stuck. The skidder had been "tagged" for a tire repair before claimant used it. Claimant did not notice the tire was damaged, and further damaged it by using the skidder. Claimant did not request permission to use the log skidder. On July 29, 2014, the supervisor told

claimant that he was not permitted to use the employer's equipment, and claimant told the supervisor he would not operate the employer's logging equipment again.

(6) On July 30, 2014, after the logging crew left the job site, claimant used the employer's log loader to load a log into his personal truck to use for artwork. Claimant accidentally disabled the loader's controls, delaying work for the logging crew the next day until a mechanic was able to adjust the controls. Claimant did not request permission to use the log loader.

(7) On July 31, 2014, the employer discharged claimant for operating the employer's equipment without authorization.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to prohibit claimant from using its logging equipment without permission. Claimant knew the employer required him to have permission to use its equipment, having been told that at hire and again after he used the employer's skidder without permission on July 28, 2014. Nevertheless, on July 30, 2014, claimant used the employer's log loader to move a log for personal use, without the employer's permission. In doing so, claimant willfully violated the standards of behavior the employer had the right to expect of him.

Claimant's conduct on July 30, 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). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible 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).

Before July 2014, claimant used the employer's equipment on several occasions, but only with the employer's express permission. On July 28, 2014, claimant did not ask for or receive permission before he used the employer's skidder. Claimant's conduct on that occasion was, at minimum, wantonly negligent. Claimant's exercise of poor judgment on July 30 therefore was a repeated act, and not a single or infrequent occurrence. Claimant's use of the employer's equipment without permission for the second time in three days also created an irreparable breach of trust in the employment relationship. The employer hired claimant to watch the equipment and protect it from such misuse. As the employer's

witness testified at hearing, “[Claimant’s] responsibility [was] to make sure that that equipment [wasn’t] damaged over the weekend or over the night. And he was the one damaging it.” Transcript at 9. Objectively considered, the employer could no longer trust claimant to responsibly protect the employer’s equipment, making a continued employment relationship impossible. Claimant’s conduct therefore exceeded mere poor judgment.

Claimant’s conduct on July 30, 2014 cannot be excused as a good faith error. Claimant asserted at hearing that, because the employer gave claimant permission to use the employer’s equipment on several occasions throughout his employment, the employer had “rescinded” its rule and, thereafter, claimant was permitted him to use the employer’s equipment. Transcript at 24, 25. However, only two days before the final incident, the employer told claimant he was prohibited from using the employer’s equipment, and claimant showed he understood the employer’s expectation by promising he would not use the equipment again. Claimant failed to show that he had a sincere belief, or a factual basis for believing, the employer would condone his using the employer’s equipment without permission.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 14-UI-26740 is affirmed.

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

**DATE of Service: December 5, 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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