

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1824

*Reversed  
Disqualification*

**PROCEDURAL HISTORY:** On September 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 113736). The employer filed a timely request for hearing. On November 3, ALJ Clink conducted a hearing at which claimant failed to appear, and on November 10, 2014 issued Hearing Decision 14-UI-28484, affirming the Department's decision. On November 26, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) American Best Inns employed claimant as a front desk administrator from December 27, 2013 to September 5, 2014.

(2) The employer expected its front desk administrators to count the money in the employer's till at the start and end of their shift. The employer prohibited them from removing money from the till and taking it home with them. The employer expected employees to refrain from insubordinate behavior toward the employer's general manager and report for work as scheduled. Claimant understood those expectations.

(3) On August 2, 2014, a guest paid for a room with \$142.50 cash, including a \$50 refundable deposit. Claimant forgot to "log" the transaction, and therefore could not account for the \$142.50 at the end of his shift. Exhibit 1. Claimant took the \$142.50 from the employer's till and took it home. In early September 2014, claimant repeatedly neglected to perform a till count at the start or end of his shift.

(4) On September 4, 2014, the general manager gave claimant a warning for poor customer service. At the end of his shift, claimant told another employee that he did not like working for the employer, and that he did not want to quit his job, but that he was "alright" with being discharged, as he would file a claim for unemployment insurance benefits. Exhibit 1.

(5) On September 5, 2014, claimant was scheduled to start work at 2:00 p.m. That morning, the other employee told the general manager about his conversation with claimant on September 4. At

approximately 12:00 p.m., the general manager sent claimant a text message asking him to let her know if he no longer wanted to work for the employer, noting that he had repeatedly neglected to the count the money in the till at the start or end of his shift, and stating the he would be discharged if he continued to deliberately neglect his duties. Claimant replied with a text message stating that he did not care and was insulted the general manager would bring up the till counts. Claimant also accused “Mexican” employees of falsely telling people the employer had no vacancies, and asked the general manager if she was “f-ing” kidding” him by “getting on” him for customer service. Audio Record at 21:55. Claimant stated in the text message that he was not quitting work and that the employer could discharge him. He concluded by falsely asserting, “By the way, I’m sick,” and that he was not coming in to work that day. Audio Record at 21:55.

(6) The employer discharged claimant for insubordination.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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, good faith errors and absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-28484, the ALJ found that claimant was discharged in the “final instance when he called in sick” on September 5, 2014, and concluded that the employer therefore discharged him for an absence due to illness, and not misconduct.<sup>1</sup> However, the record shows that the employer discharged claimant for the insubordinate nature of his reply to the general manager’s text message on September 5, and not merely because he stated that he was sick and would not come in to work that day. Audio Record at 19:50-24:30. The employer had a right to expect claimant to refrain from insubordinate behavior and report for work as scheduled. We infer that claimant understood those expectations as a matter of common sense. Claimant knew or should have known that replying to the general manager’s text message by stating that he did not care and was insulted, accusing “Mexican” employees of improper behavior, and asking the general manager if she was “f-ing” kidding” him, probably violated the employer’s expectations. In addition, given the timing, context and flippant nature of claimant’s assertion that he was sick, we find it likely that he was not. Claimant knew or should have known that falsely asserting he was sick and refusing to report for work as scheduled probably violated the employer’s expectations. Claimant’s conscious decision to reply to the general manager’s text

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<sup>1</sup> Hearing Decision 14-UI-28484 at 2.

message as he did demonstrated indifference to the consequences of his actions, and his reply therefore was, at best, wantonly negligent.

Claimant's conduct on September 5 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). On August 2, 2014, claimant took money from the employer's till and took it home, although he understood he was prohibited from doing so. During first week of September 2014, claimant repeatedly neglected to perform a till count at the start or end of his shift, although he knew he was expected to do so. Claimant knew or should have known his conduct probably violated the employer's expectations, and his conscious decisions to engage in such conduct demonstrated indifference to the consequences of his actions. Claimant conduct during those prior instances was, at best, wantonly negligent, and his conduct on September 5 therefore was part of a pattern of willful or wantonly negligent behavior, and not a single for infrequent occurrence.

Claimant's conduct on September 5 cannot be excused as a good faith error. Claimant understood as a matter of common sense that he was expected to refrain from insubordinate behavior and report for work as scheduled. The record fails to show claimant sincerely believed, or had a rational basis for believing, the employer complied with the employer's expectations as he understood them.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-28484 is set aside, as outlined above.

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

**DATE of Service:** January 9, 2015

**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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