

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1857

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152052). Claimant filed a timely request for hearing. On November 24, 2014, ALJ Lohr conducted a hearing, and issued Hearing Decision 14-UI-29227, affirming the Department's decision. On December 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) HR Support, Inc. employed claimant as a tow truck driver from August 14, 2012 to October 6, 2014.

(2) Claimant worked in a 24-hour position. He was required to be with his tow truck in Portland, Oregon from 7:00 a.m. to 7:00 p.m. and on call from 7:00 p.m. to 7:00 a.m. each workday. The employer expected claimant to answer any calls he received, and respond to the location of disabled vehicles within approximately 20 minutes of receiving a call.

(3) In February 2014, claimant dropped his tow truck keys in the snow and was unable to find them. As a result, he was unable to operate his truck. He notified the employer immediately and requested a new set of keys, but was told that the employer could not replace the keys for several days. Claimant notified the employer that because he could not drive or answer calls, he was going to turn off his phone until the employer had replaced his keys.

(4) In September 2014, claimant was dispatched while on call. Claimant began to drive to the location of the call but got stuck in traffic. After approximately 30 minutes claimant received a call regarding his status, and informed the dispatcher that he was still approximately 30 minutes away. Because claimant was unable to respond to the call within a specified time period, the dispatcher cancelled the call and called a different tow company. The same day, claimant did not respond to two other calls for unknown reasons.

(5) On October 4, 2014, claimant did not answer two calls for unknown reasons.

(6) On October 5, 2014, claimant's wife had a dental emergency that caused her to writhe on the floor in pain. Claimant determined that his wife required emergency medical treatment because of her pain. He used the employer's tow truck to drive his wife to the emergency room, accompanied by their daughter. He did not have permission to use the employer's tow truck for personal reasons, but used the tow truck anyway because he was on call at the time, understood the employer expected him to be near his tow truck at all times, and felt it was an emergency. Claimant knew he was not permitted to use the tow truck for personal reasons unless he had permission to do so, and had previously asked for and received permission to transport his family in the tow truck.

(7) After claimant took his wife to the emergency room, the employer called to dispatch him to a disabled vehicle with two passengers he would need to provide with transportation. Claimant refused the call and told the employer he could not accommodate two passengers because his daughter was in the tow truck with him. Thereafter, claimant's supervisor attempted to call claimant five times to ask why claimant had his daughter in the tow truck. Claimant did not receive the calls because it was a new phone and he had problems with coverage, but called the supervisor immediately after realizing that he had missed calls.

(8) On October 6, 2014, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that the employer discharged claimant for an isolated instance of poor judgment, which is not 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.

The final incidents that prompted the employer to discharge claimant involved his October 5th unauthorized use of the tow truck for personal reasons and failure to answer five calls from a supervisor. The employer had the right to expect claimant to refrain from using the tow truck for personal reasons unless he had permission, and to answer calls pertaining to work as expected. Claimant understood both of those expectations and violated them.

With respect to his failure to answer the calls from the supervisor, however, claimant's violation was not willful or wantonly negligent. Claimant missed the calls due to problems with his phone, and whether those problems were caused by coverage issues or claimant's unfamiliarity with a new phone, he did not miss the calls intentionally or with indifference to the consequences of his conduct, and he attempted to rectify his violation as soon as he realized it had occurred.

With respect to transporting his wife and daughter in the employer's tow truck without permission, however, claimant's violation was wantonly negligent. He understood the employer prohibited the conduct and he had complied with the employer's expectations in the past. Although facing somewhat exigent circumstances, claimant failed to either contact the employer to seek permission to use the tow truck, contact the employer to request time off work to attend to his wife, or use his personal vehicle to transport his wife to the emergency room. Because claimant was conscious of his conduct and knew or should have known it would violate the employer's expectations, his conduct was wantonly negligent.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined as a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct, and it must not exceed mere poor judgment. OAR 471-030-0038(1)(d).

Here, claimant had a somewhat significant history of missed work, missed calls, or failures to respond in time to calls to which he was dispatched, but in order for those prior violations to result in a finding of misconduct, they, too, must have been committed with a willful or wantonly negligent mental state. In February, claimant failed to answer calls because he accidentally lost his keys. Although he did not answer calls while his keys were missing, he was not working during that time, did not have the capacity to answer calls, and he had notified the employer of his intent to turn off his phone. In September, claimant's failure to respond in time to a dispatch occurred because he was stuck in traffic, and not because he was unwilling to do so. Both of those instances were caused by circumstances outside claimant's control, and, although they constituted violations of the employer's expectations, neither violation was attributable to claimant as willful or wantonly negligent conduct.

The employer's witness testified that claimant missed two other calls on September 29th, and two calls on October 4th, but failed to provide any details about those missed calls. In a discharge case, the employer bears the burden of proving that the discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show that, more likely than not, the events that led to the discharge occurred, and were the result of willful or wantonly negligent conduct on claimant's part. Given that most of claimant's previous missed calls in this case were caused by factors outside his control, and he missed five calls on October 5th because of problems with his phone, the mere fact that he missed those four calls fails to establish that it is more likely than not that he did so on purpose, or because he was indifferent to the consequences of his conduct.

Claimant's unauthorized use of the employer's tow truck for personal reasons on October 5th was, therefore, an isolated instance of poor judgment. Given that there were exigent circumstances associated with his use of the truck, including an urgent need to obtain emergency treatment for his wife's painful condition, take his daughter with him, and need to remain close by the tow truck in case the employer dispatched him to a disabled vehicle call, coupled with the fact that the employer had, on prior occasions, authorized claimant to use the tow truck to transport his family members, the record fails to show that claimant's single unauthorized use of the employer's tow truck was such egregious conduct that the employer could no longer trust claimant or that it made a continuing employment relationship between claimant and the employer impossible.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 14-UI-29227 is set aside, as outlined above.

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

**DATE of Service:** January 16, 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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