

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0051**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 92416). The employer filed a timely request for hearing. On January 5, 2015, ALJ C. Smith conducted a hearing, and on January 7, 2015 issued Hearing Decision 15-UI-31435, concluding the employer discharged claimant for misconduct. On January 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At hearing, the ALJ identified and marked as Exhibit C-1 claimant's January 2, 2015 facsimile cover page, work schedule and shift reports, and admitted them into the record without objection. Audio Record at 10:11 to 10:51; 47:27 to 47:32. A complete marked copy of Exhibit C-1 was not included in the record, however. To complete the record, those documents have been marked as EAB Exhibit C-1.

**FINDINGS OF FACT:** (1) Barica Hen Dundee employed claimant from February 12, 2014 to October 19, 2014 as a restaurant server.

(2) The employer expected claimant to report for work on time. Claimant understood the employer's expectations.

(3) Claimant reported to work late on September 2 and 6, 2014. On September 7, 2014, claimant reported to work 37 minutes late because he overslept. The employer gave claimant a written warning instructing claimant to report for work on time.

(4) On October 11, 2014, claimant reported to work 15 minutes late. Claimant did not give the employer a reason for his tardiness. The employer warned claimant to report for work on time.

(5) On October 12, 2014, claimant reported for work 18 minutes late because he had difficulty finding his work book and apron before he left for work.

(6) On October 19, 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 and good faith errors 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).

At hearing, claimant asserted that the employer discharged him because he had a disagreement with a manager on October 14, 2014. Audio Record at 40:20 to 41:00. However, the employer's witnesses testified that the employer decided to discharge claimant on October 12, 2014 as a result of his tardiness, but kept him on the schedule for the remainder of the week to lessen the burden on the other employees. Audio Record at 29:17 to 29:38, 16:00 to 17:18, 32:00 to 32:19. Absent a reasonable basis for concluding that the employer's witnesses were not credible, their testimony regarding the reason for claimant's discharge outweighs claimant's uncorroborated testimony on that issue. We therefore find that the employer discharged claimant for failing to report for work on time on October 12, 2014.

Claimant was late for work on October 12 because he misplaced some work items at home. Claimant was late for work on four prior occasions within two months, and knew or should have known that his failure to take steps to ensure he reported for work on time would probably result in his continued tardiness. However, claimant did not assert or show that he took precautions to avoid reporting for work late again, such as placing his work items in a safe place at home, or preparing earlier to leave for work. Claimant's failure to take such precautions demonstrated a conscious indifference to the consequences of his actions, and his failure to report for work on time was wantonly negligent.

Claimant's conduct on October 12 cannot be excused as an isolated instance of poor judgment under 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 wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant was late for work on four prior occasions within two months. In failing to take steps to ensure he reported for work on time on those occasions, claimant repeatedly exercised poor judgment. His exercise of poor judgment on October 12 therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant understood the employer's expectation that he report for work on time, and did not sincerely believe, or have a factual basis for believing, that the employer would excuse or condone his failure to do so on October 12, 2014.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-31435 is affirmed.

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

**DATE of Service:** March 12, 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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