

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0135**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 142329). The employer filed a timely request for hearing. On February 2, 2015, ALJ Clink conducted a hearing, at which claimant did not appear, and on February 6, 2015 issued Hearing Decision 15-UI-33140, concluding the employer discharged claimant for misconduct. On February 11, 2015 filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the hearing record. In her argument, claimant wrote: "I miss (sic) read the letter and thought I was to wait by the phone for a call...Please allow me another chance to be present for the hearing." Claimant's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing.

Claimant missed the hearing because she thought the ALJ would call her. However, page 1 of the Notice of Hearing that claimant received stated: "At the time of the hearing, you must call 1-877-622-4041." Emphasis in the original. Claimant had it within her reasonable control to carefully read the notice of hearing and follow the instructions that accompanied it. Therefore, claimant's request to have EAB consider additional evidence must be denied.

**EVIDENTIARY RULINGS:** In Hearing Decision 15-UI-33140, the ALJ wrote that no exhibits were offered into evidence.<sup>1</sup> However, the ALJ marked 5 pages submitted by the employer as Exhibit 1 and admitted them into evidence during the hearing.<sup>2</sup> EAB considered Exhibit 1 when making its decision.

<sup>1</sup> Hearing Decision 15-UI-33140 at 1.

**FINDINGS OF FACT:** (1) Albertina Kerr Centers Inc. employed claimant as a training specialist from December 30, 2013 through November 3, 2014.

(2) On October 24, 2014, claimant and a client in her care were involved in an auto accident which occurred when claimant made an unauthorized personal stop while on the job.

(3) The employer received a report of claimant's accident on October 27, 2014, and asked claimant for an explanation. Claimant initially denied being involved in an accident or making a personal stop while on duty. The employer investigated and substantiated the allegations. Claimant subsequently admitted to the employer that she had been involved in an accident and made an unauthorized personal stop while on duty with a client in her care, and admitted she lied about it because she feared losing her job.

(4) The employer had not disciplined claimant prior to the final incident, and she had never before engaged in similar behavior while at work.

(5) The employer discharged claimant on November 3, 2014 for dishonesty.

**CONCLUSIONS AND REASONS:** 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer reasonably expected claimant to be honest. Claimant understood the employer's expectation as a matter of common sense. When confronted by the employer initially, claimant denied being involved in an accident and denied attending to personal business while she was transporting a client. Claimant subsequently admitted lying to the employer about the situation because she feared she would lose her job. Claimant's decision to lie to the employer about the events in question constituted a willful violation of the standards of behavior the employer had the right to expect of her.

Although the employer's witness testified that claimant had no prior incidents of misconduct, claimant's conduct cannot be excused as an isolated instance of poor judgment. 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

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<sup>2</sup> Audio recording at ~ 3:04.

or wantonly negligent behavior; however, even isolated 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). Here, claimant initially denied being involved in an accident and attending to personal business while on duty with a client. Because claimant willfully lied to the employer, and admitted having lied to the employer, about her conduct with respect to a client in her care during work hours, the employer could no longer trust her with the care of its clients, or to be honest about the events that occurred in the course of performing her job. Claimant's decision to lie about the final incident to protect her job created an irreparable breach of trust in the employment relationship, thus exceeding poor judgment.

Claimant's conduct cannot be excused as a good faith error. The record fails to show claimant sincerely believed, or had a rational basis for believing, that the employer condoned dishonesty.

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

**DECISION:** Hearing Decision 15-UI-33140 is affirmed.

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

**DATE of Service:** February 18, 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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