

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0156**

*Affirmed*  
*Disqualification*  
*(Descalificación)*

**PROCEDURAL HISTORY:** On January 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110055). Claimant filed a timely request for hearing. On February 10, 2015, ALJ Shoemake conducted a hearing, and on February 12, 2015 issued Hearing Decision 15-UI-33445, affirming the Department's decision. On February 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc. employed claimant as a finger joint machine feeder from July 14, 2013 until December 19, 2014.

(2) The employer expected claimant to report for work as scheduled or to personally call the employer to explain why he was going to be absent. Claimant was aware of the employer's expectation.

(3) A "long time" before December 15, 2014, claimant's driver's license was suspended. Transcript at 11. Claimant knew that if he drove a car while his license was suspended he could be arrested.

(4) On December 15, 2014, claimant was scheduled to work and tried to drive himself to the workplace. On his way, claimant was involved in automobile accident. The police officer responding to the accident determined that claimant's driver's license was suspended and took him into custody. Claimant was transported to the local jail. Claimant did not call the employer to report his absence on that day because he was unable to do so from the jail.

(5) On December 16, 2014, claimant did not report for work because he was still incarcerated and did not personally call the employer to notify it of his absence. Sometime that day, claimant's daughter called the employer and told the employer that claimant had been in an automobile accident on December 15, 2014 and was in jail.

(6) On December 17, 18 and 19, 2014, claimant was scheduled to work. He did not report for work and did not call the employer to report his absences because he remained incarcerated. During those days, the employer did know claimant's status, whether he was still in jail or when, if ever, he was going to report for work again. On December 19, 2014, the employer discharged claimant for failing to report for work and failing to personally notify the employer of his absences.

(7) On December 24, 2014, claimant was released from custody and contacted the employer. On that day, the employer informed claimant that he had been discharged effective December 19, 2014.

**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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified that he was aware the employer expected him to report for work or to personally contact the employer to notify it that he was going to be absent, but was unable to do either because he was incarcerated in jail. Transcript at 9, 10. When a claimant was unable to comply with the employer's attendance policy because he was incarcerated, the appropriate inquiry to determine if he engaged in work-related misconduct is whether he willfully or with wanton negligence created the situation that made it impossible to attend work or otherwise comply with that policy. *Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) (so stating). Claimant testified that he had known for a long period of time before December 15, 2014 that his driver's license was suspended and that, if he encountered law enforcement personnel while driving, he could be arrested. Transcript at 11. Although claimant testified that no one was available to give him a ride to work on December 15, 2014, he nonetheless chose to drive on that day rather than calling in absent. By making the conscious decision to drive when he was aware that he could be arrested if his driving was discovered by law enforcement personnel, claimant created the situation that led to his inability to comply with the employer's attendance policy with at least wanton negligence. Claimant's failure to abide by the employer's attendance policy from December 15, 2014 through December 19, 2014 as a result of his incarceration is misconduct unless it falls within one of the exculpatory exceptions of OAR 471-030-0038(3)(b).

Claimant's failure to comply with the employer's attendance policy on December 15, 2014 through December 19, 2014 is not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To constitute an "isolated instance of poor judgment," claimant's behavior must have been 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). Claimant's behavior in violating the employer's standards on those five days must also not have exceeded "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, claimant's wantonly negligent

absences from work persisted over five days. Because claimant's absences were prolonged and continuing, they were not the type of single or infrequent events that may qualify as isolated instances of poor judgment. Furthermore, after December 16, 2014, the day that claimant's daughter called, the employer did not know claimant's whereabouts, his status or when, if ever, he was going to report for work. Because an employer needs relatively certain information about an employee's availability in order to schedule that employee for work in a manner that accommodates its requirements, the lack of information from claimant over several days made a continued employment relationship impossible. For this reason, as well, claimant's behavior is not excusable as an isolated instance of poor judgment.

Claimant's behavior also is not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, or provide any evidence showing that he thought the employer would condone his failures to report for work and not reporting his absences. Nor did he contend that his failure to comply with the employer's attendance policy was the result of a good faith misunderstanding of the employer's expectations rather than due solely to the constraints of his incarceration. There was no evidence in the record to support excusing claimant's behavior as a good faith error.

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

**DECISION:** Hearing Decision 15-UI-33445 is affirmed. *Decisión de la Audiencia 15-UI-33445 queda confirmada.*

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

**DATE of Service:** March 31, 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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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**NOTA:** *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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