

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0307**

*Late Application for Review Allowed*  
*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85158). Claimant filed a timely request for hearing. On February 11, 2015, ALJ Vincent conducted a hearing, and on February 13, 2015 issued Hearing Decision 15-UI-33526, affirming the Department's decision. The hearing decision stated that to be timely an application for review was required to be filed on or before March 5, 2015. On March 19, 2015, claimant filed an untimely application for review with the Employment Appeals Board (EAB).

EAB considered the written statement and fax confirmation receipt that claimant submitted to explain the reason that she filed a late application for review. As her written argument, claimant also submitted written statements from herself and her daughter expanding on their testimony at hearing. Claimant failed to certify that she provided a copy of these statements to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). These statements also contained information that was not part of the hearing record, and claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering the new information contained in those statements during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Good Samaritan Hospital employed claimant as a housekeeper from October 31, 2011 until October 31, 2014.

(2) The employer expected that if claimant was going to be absent from a scheduled shift, she would notify the employer in advance of that shift. Claimant understood the employer's expectations.

(3) In 2004, claimant was convicted of the crime of theft in the first degree in the state of Oregon. As a condition of the judgment of conviction, claimant was ordered to pay \$8,000 in restitution and to report to a probation officer. Shortly after claimant's conviction, she moved to Minnesota. Claimant never reported to a probation officer as she had been ordered in the 2004 judgment. Sometime before October 31, 2011, claimant returned to Oregon. Claimant obtained work with the employer.

(4) On approximately October 13, 2014, claimant called emergency services to report that the apartment complex in which she was living had caught fire. Emergency services determined that a warrant for claimant's arrest was outstanding. On approximately October 16, 2014, claimant was arrested on the outstanding warrant because she had violated the 2004 criminal judgment by failing to report to a probation officer. Claimant was incarcerated in the local county jail for violating the 2004 judgment.

(5) On Thursday October 17, 2014, claimant was not scheduled to work. On October 18, 2014, claimant was scheduled to work but was unable to report because she was in jail. That day, claimant's daughter called and left a message for the housekeeping department stating that claimant was absent from work because of a "family emergency." Audio at ~8:11. On October 19, 2014, claimant also failed to report for a scheduled work shift and claimant's daughter again left message for the housekeeping department stating that claimant still was unable to report for work due to a "family emergency." Audio at ~8:22.

(6) By Monday, October 20, 2014, the employer's housekeeping manager had observed on the website for the local jail that claimant was incarcerated there. At the request of the housekeeping manager, the employer's director of human resources tried to reach claimant by telephone to learn whether she had been released from jail and whether she was able to report for her shifts, but claimant's phone was not accepting calls. The human resources director called claimant's daughter and spoke to her about claimant's current status. The daughter told the director that claimant had been taken into custody based on a warrant that had been issued some years before, and that claimant was still incarcerated. The daughter told the human resources director that claimant was "working very hard" on arranging for work release, which would allow claimant to report to work while incarcerated. Audio at ~9:32. The director told claimant's daughter that she would record claimant as absent through the "end of the week," or Friday, October 24, 2014, but to contact her "by the end of the week" to inform her if claimant had been able to arrange for work release and, if so, when claimant might be available for work. Audio at ~9:30.

(7) Sometime around October 20, 2014, claimant appeared in court for failing meet the conditions of the 2004 criminal judgment. A judge sentenced claimant to a 60 day term of incarceration for violating the terms of the criminal judgment. Based on this sentence, claimant's anticipated date of release from the jail was approximately December 16, 2014.

(8) By Friday, October 24, 2014, claimant's daughter had not contacted the human resources director to report on the status of claimant's attempt to enter the work release program or when claimant might be able to again report for work. On Monday, October 27, 2014, the human resources director called claimant's daughter seeking more information about claimant's status and, when she was unable to reach the daughter, left her a message. The daughter did not call the director in response to her message. On October 29, 2014, the human resources director again called claimant's daughter and left her a message. Again, the daughter did not return this call. From October 27, 2014 through October 31, 2014, claimant did not report for her scheduled work shifts and neither claimant nor her daughter called to report her absences or to provide information on claimant's status or if she remained incarcerated.

(9) On October 31, 2014, the employer discharged claimant for failing to report to work or to communicate about her ability to continue to report for work.

(10) On November 4, 2014, claimant was performing work on the jail's "work crew" and was able to call the employer's human resources director and left her a message to report her status. Audio at ~27:53. The director returned claimant's call and told claimant that she had been discharged because of her failure to communicate about her ability to continue working for the employer, and that her housekeeping position had been filled.

(11) On February 24, 2014, claimant went to her local WorkSource Office to fax her application for review of Hearing Decision 15-UI-33526 to EAB. A staff member faxed the application for review to EAB at its correct fax number on February 24, 2014 at 4:20 p.m. and the staff member gave claimant a fax confirmation receipt for her records. EAB did not receive that fax on the date it was transmitted and did not receive it until it was faxed again on March 19, 2014. Written Argument at 1, 2.

**CONCLUSIONS AND REASONS:** Claimant's late request for hearing is allowed. On the merits, the employer discharged claimant for misconduct.

**Late Application for Review.** OAR 471-041-0070(1) (March 20, 2012) states that a timely application for review must be filed within 20 days after the mailing of the hearing decision, or in this case by March 5, 2014. The filing period for an application for review may be extended a reasonable time beyond 20 days if the applicant shows good cause. OAR 471-041-0070(2). "Good cause means that the applicant presents satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented the applicant from a timely filing. OAR 471-041-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b).

That a WorkSource employee faxed the application for review for claimant on February 24, 2014, well in advance of the March 5, 2014 date that the period to appeal the hearing decision expired, and EAB did not receive that fax, was obviously a factor or circumstance beyond claimant's reasonable control. Claimant's contention that she arranged for a WorkSource employee to timely file the application for review on her behalf is corroborated by the fax confirmation receipt she submitted to EAB. While the fax confirmation appears to lack some information about the transmission that it would be expected to contain, it nowhere indicates that the transmission failed and it is reasonably inferable that the WorkSource employee did not indicate to claimant that the fax was other than successfully transmitted. In addition, although claimant's explanation does not provide information about how or when she first became aware that EAB had not received her application for review, there is no evidence that claimant did not act promptly when she obtained this information, or that she did not respond by re-faxing her application for review within seven days after she was first aware that EAB had not received it. Claimant has shown good cause for filing her application for review on March 19, 2014.

**The Work Separation.** 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. When a claimant is unable to comply with the employer's reasonable attendance policy because claimant is incarcerated in jail, the standard for determining whether claimant's non-compliance is disqualifying misconduct is whether claimant willfully or wantonly created the situation that resulted in the incarceration. See *Weyerhaeuser Company v. Employment Division*, 107 Or App 505, 509, 812 P2d 505 (1991).

In this case, claimant contended that, when her daughter spoke with the human resources director on October 20, 2014, the director told her daughter that the daughter or claimant only needed to call the employer to report on claimant's status if it changed. Audio at ~17:33, ~24:41, ~26:48. In essence, claimant is suggesting that the employer agreed to hold her position for her until she was released from jail, whether or not she or someone on her behalf kept in communication with the employer. Although claimant's daughter testified that the human resources director told her that she did not need to maintain contact with the employer unless claimant's status changed, the human resources director testified that she told the daughter on October 20, 2014 that the daughter needed to call her by Friday, October 24, 2014 to report on whether claimant would be available to work while incarcerated through the work release program. Audio at ~9:37, ~35:44. While it makes sense that the human resources director might continue claimant's employment if claimant was able to arrange for work release, and the director might have absolved the daughter of the need to call in for one work week (until October 24, 2014) while claimant tried to make such arrangements, it is implausible that the director expressly or implicitly agreed that claimant would retain her position until her anticipated release date of approximately December 16, 2014 if she was not able to arrange to work through the jail's work release program. In addition, although the testimony of claimant and her daughter were consistent in asserting that the human resources director had not required further communication by October 24, 2014 or by any definite future date, their testimony was suspect for reasons other than its implausibility. Throughout the hearing, claimant and her daughter had whispered conferences while testifying, suggesting that coaching was occurring. Eg. Audio at ~24:34, ~25:49. Moreover, neither claimant nor her daughter disputed that the human resources director called and left unanswered messages for the daughter on October 27, 2014 and October 29, 2014 to determine whether claimant was able to continue reporting for work through the jail work release program, suggesting strongly that the director had not agreed to keep claimant's position open for her if she did not obtain entry to that program. Audio at ~9:44, ~35:44. The preponderance of the evidence shows, more likely than not, that the human resources director did not agree on October 20, 2014 to keep claimant's position for her for an open-ended period of time and did not agree that the employer did not need further communication from claimant (or her daughter on her behalf) as to the status of claimant's availability for work.

Claimant violated the employer's reasonable expectations that she would communicate with it about her availability for work because she was incarcerated and could not readily call the employer. Audio at ~28:45. Although claimant was initially vague and appeared evasive about whether she knew ten years ago that the 2004 judgment required her to report to a probation officer, she ultimately agreed that she knew the conditions of the judgment when it was entered. Audio at ~22:30. Claimant's failure to report to the probation officer ten years ago as required by the 2004 judgment of conviction was wantonly negligent behavior. Because claimant's failure to report to the probation officer was the event that precipitated the warrant on which claimant was arrested on approximately October 16, 2014 and led to the incarceration that prevented claimant from complying with the employer's requirement that she communicate her work availability to the employer, under the principles of *Weyerhaeuser*, claimant's

failure to communicate her absences was a wantonly negligent violation of the employer's standards within the meaning of OAR 471-030-0038(3)(a).

Claimant's wantonly negligent failure to communicate with the employer about her absences was not excused from constituting misconduct as an isolated instances of poor judgment under OAR 471-030-0038(3)(b). To be excusable under this exception, 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). Although the employer's human resources director, might have foregone notification of claimant's status for work until October 24, 2014, the date she gave to claimant's daughter as when she needed to learn if claimant had arranged to work through the work release program, nothing she said to the daughter was reasonably construed as relieving claimant from the employer's notice requirement on and after October 24, 2014. On several separate work days, beginning on October 24, 2014 and continuing through October 31, 2014, claimant's failure to communicate her status to the employer was a wantonly negligent violation of the employer's standards. Since claimant's wanton negligence was prolonged, continuing and occurred on several days, it was repeated and formed a pattern of wantonly negligent behavior. It does not meet the standard to be excused as an isolated instance of poor judgment.

Nor was claimant's negligent failure to communicate with the employer about her absences excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Although claimant contended that the human resources director did not require her to communicate about her absences after October 20, 2014, she did not assert or suggest that her failure to notify the employer arose from a mistaken understanding of the employer's policies about such notification. Moreover, for the reasons addressed above, it is implausible that claimant sincerely believed that the human resources director had excused her from complying with the employer's notification requirements from October 20, 2014 until she was released from jail. The excuse of good faith error is not applicable to claimant's wantonly negligent violation of the employer's standards.

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

**DECISION:** Hearing Decision 15-UI-33526 is affirmed.

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

**DATE of Service:** May 7, 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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