

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0329**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65808). Claimant filed a timely request for hearing. On March 2, 2015, ALJ Shoemake conducted a hearing, and on March 3, 2015 issued Hearing Decision 15-UI-34410, affirming the Department's decision. On March 19, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument and new information not offered into evidence at the hearing. Information not received into evidence at the hearing will not be considered on review unless claimant establishes it is relevant and material to EAB's determination, and that factors or circumstances beyond his reasonable control prevented him from offering the information into evidence at hearing. OAR 471-041-0090(2) (October 29, 2006). Claimant submitted the first page of a restraining order obtained after the hearing, but failed to establish that it is relevant and material to EAB's determination. Claimant submitted other documents and witness statements, but failed to establish that factors or circumstances beyond his reasonable control prevented him from offering that information into evidence at hearing. For this reason, EAB did not consider the new information when reaching this decision. EAB considered only information received into evidence at the hearing. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) A & M Transport, Inc. employed claimant from December 7, 2004 to December 17, 2014 as a mechanic.

(2) Claimant worked from 7:30 a.m. to 4:00 p.m., Saturday through Wednesday. The employer expected claimant to report for work on time, or notify the employer by 8:00 a.m. if he was unable to do so. Claimant understood the employer's expectations.

(3) Claimant reported to work late several times in the three months before September 15, 2014. On September 15, 2014, the employer gave claimant a final written warning, directing claimant to report to work by 7:30 a.m., and to call the employer's land line by 8:00 a.m. and speak to one of two supervisors

if he was going to be absent or tardy that day. The land line telephone number was included in the written warning.

(4) In October 2014, the employer changed claimant's start time to 9:30 a.m. because claimant continued reporting late to work.

(5) On the evening of December 15, 2014, claimant contacted the police because an individual claimant knew was outside his home, yelling and kicking his doors. The police told claimant it would take an hour for them to arrive at his home. The individual did not have a vehicle. Claimant went outside, got into his own vehicle, and drove approximately thirty minutes to a remote wooded area twelve miles from his home. Approximately two hours later, claimant realized his vehicle was stuck in mud. Claimant was intoxicated and slept in his vehicle until the following day.

(6) On December 16, 2014, claimant freed his vehicle and drove home. He arrived home at approximately 3:00 p.m. He did not report to work, and did not call the employer's land line to notify a supervisor that he was going to be absent that day.

(7) On December 17, 2014, claimant was late for work and apologized to his supervisor. Claimant also apologized for missing work on December 16, 2014, explaining that he was unable to report for work after becoming intoxicated the night of December 15, 2014. Claimant did not punch in on his time card on December 17, 2014.

(8) The employer discharged claimant for failing to report to work or notify the employer of his absence on December 16, and failing to report to work on time on December 17, 2014.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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 had a right to expect claimant to report to work on time, and call the employer's land line and notify a supervisor if he was unable to do so. Claimant understood the employer's expectations. Claimant did not report to work on December 16, 2014. In written argument, as at hearing, claimant asserted that he had a good reason for failing to report to work because he was stuck in the mud in the woods, having gone there to get away from a "stalker" at his house. Audio Record at 23:42 to 24:07.

However, claimant made a series of choices on December 15 that he knew or should have known would probably prevent him from reporting to work as scheduled on December 16, 2014. Instead of waiting for the police to address the problem he was having with a person outside his home, claimant left his home, drove to a remote wooded area, became intoxicated, and slept in his vehicle until the following day. Claimant's actions demonstrated indifference to the consequences of his actions, and his failure to report for work on December 16 was thus wantonly negligent.

The preponderance of the evidence also shows claimant failed to contact the employer at its land line and speak to a supervisor when he returned home on December 16. Claimant testified at hearing that he left a message on his supervisor's cell phone at 3:00 p.m. on December 16, but admitted he did not call the employer's land line as required by his final warning. Audio Record at 30:15 to 33:58. In failing to call the employer's land line to speak to a supervisor, claimant consciously engaged in conduct he knew or should have known probably violated the employer's expectations. Claimant's conduct demonstrated indifference to the consequences of his actions, and therefore was wantonly negligent.

The preponderance of evidence at hearing shows claimant also failed to report to work on time on December 17, 2014. Claimant asserted at hearing that he reported to work on time on December 17, and punched in at the employer's time clock when he arrived. Audio Record 45:48 to 46:12. However, the employer's operations manager testified that claimant arrived late for work and apologized to his supervisor for being late on December 17, and for missing work on December 16 because he became intoxicated on December 15. We find the employer's testimony more plausible because claimant's time card contained no entry for December 17. Absent an explanation for being late, we find it likely that claimant consciously failed to report for work on time, or consciously engaged in other conduct he knew would probably result in his failure to do so. Claimant's conduct demonstrated indifference to the consequences of his actions, and therefore was, at best, wantonly negligent.

Claimant's conduct was not the result of 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 or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A) (August 3, 2011). Claimant exercised poor judgment on multiple occasions from December 15 through 17, resulting in three violations of the employer's attendance expectations in two days. Claimant's exercise of poor judgment therefore was a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct was not the result of a good faith error. Claimant understood that the employer expected him to report for work as scheduled, or notify the employer if he was unable to do so. His conduct was not the result of an error in his understanding of the employer's expectations.

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

**DECISION:** Hearing Decision 15-UI-34410 is affirmed.

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

**DATE of Service: May 11, 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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