

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0386**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 153525). The employer filed a timely request for hearing. On March 11, 2015, ALJ Holmes-Swanson conducted a hearing, and on March 17, 2015 issued Hearing Decision 15-UI-35278, concluding that claimant's discharge was for misconduct. On April 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Sharis Management Inc. employed claimant as a server from March 25, 2013 to May 5, 2014.

(2) The employer expected employees to report for work as scheduled. The employer expected employees who were going to be late for work to notify the employer before their shift started. The employer expected employees who were going to be absent from work to notify the employer at least four hours before their shift started. Claimant understood the employer's expectations.

(3) In early April 2014, claimant failed to report for work on time or notify the employer she would be late because, unknown to claimant, the employer changed her scheduled start time.

(4) The employer discharged claimant because she failed to report for work on May 4, 2014 or notify the employer she would be absent.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant's discharge was not 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 are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In Hearing Decision 15-UI-35278, the ALJ concluded that claimant's failure to report for work on May 4, 2014 or notify the employer she would be absent was a willful violation of the employer's reasonable expectations.<sup>1</sup> The ALJ further concluded that claimant's conduct cannot be excused as an isolated instance of poor judgment because claimant violated the employer's policy regarding tardiness in April 2014.<sup>2</sup> However, the ALJ's analysis overlooks the fact that in April 2014, claimant failed to report for work on time or notify the employer she would be late because, unknown to claimant, the employer changed her scheduled start time. Claimant did not deliberately fail to report for work on time or notify the employer she would be late, and the record does not show she consciously engaged in conduct she knew or should have known would probably result in her failure to do so. Thus, even if claimant's conduct on May 4, 2014 was a willful violation of the employer's reasonable expectations, the record fails to establish that it was a repeated act or part of a pattern of other willfully or wantonly negligent behavior.

Finally, claimant's conduct on May 4, 2014 did not violate the law, was not tantamount to unlawful conduct, and was not so egregious that it created an irreparable breach of trust in the employment relationship. Nor did the employer assert, or does the record show, that claimant's conduct otherwise made a continued relationship impossible. We therefore conclude that the employer discharged claimant for, at worst, and isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-35278 is set aside, as outlined above.

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

**DATE of Service:** May 21, 2015

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<sup>1</sup> Hearing Decision 15-UI-35278 at 3-4.

<sup>2</sup> *Id.* at 4.

**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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