

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0681**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80404). Claimant filed a timely request for hearing. On May 29, 2015, ALJ Shoemake conducted a hearing, and on June 2, 2015 issued Hearing Decision 15-UI-39419, affirming the Department's decision. On June 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which presented additional information that was not offered at the hearing. Claimant did not explain why she did not offer this new information during the hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider this new information. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Telmate, LLC employed claimant from September 16, 2014 until April 2, 2015, last as a customer service representative in the employer's call center. Sometime after claimant was hired, she was assigned to take calls as part of the employer's team in the visitation department. In October 2014, claimant was removed from the visitation department and assigned to take calls as part of the employer's general customer service team.

(2) The employer expected claimant to follow the instructions of her supervisors, and specifically to accept the employer's assignments to answer calls for other of its departments during times of high call volume. Claimant understood the employer's expectations. On five occasions after October 2014, claimant complied with her supervisors' instructions to temporarily answer calls to the visitation department when it was experiencing a high volume of calls, even though she usually answered calls for the customer service department.

(3) On April 1, 2015, claimant's immediate supervisor told her to she needed to answer calls to the visitation department because that department needed help. When claimant told the supervisor that she

did not have access to electronic information that would allow her to deal efficiently with calls to the visitation department, the supervisor told claimant that he still wanted her to answer those calls. When claimant still resisted, the supervisor left and then returned to speak with claimant along with one of the employer's managers. The manager told claimant that he wanted her to answer calls to the visitation department. Claimant told the manager that she did not have access to the information she needed to answer those calls, and the manager stated to her that, because she had worked previously in the visitation department, she should be able to handle calls to that department. Claimant refused to answer any calls to the visitation department. The manager told claimant he was going to decide how to deal with her refusal, and both he and claimant's immediate supervisor left.

(4) On April 2, 2015, the director of call center operations spoke with claimant to learn why she had refused to answer calls for the visitation department the previous day. Claimant told the director that she had been "asked to do something that wasn't my responsibility." Audio at ~21:28. The director instructed claimant that "you have experience, you were in that department [visitation department]" and "you have to help in that department when it [the call volume] is high." Audio ~21:40. The director of operations then took claimant along with her to meet with the employer's director of human resources. Both directors told claimant that she was refusing to perform the duties of her job, which included answering calls for other departments during high call volumes. Audio at ~22:56. Claimant stated that she did not want to answer calls to the visitation department, but that she had not refused to answer calls that fell within her duties as a customer service representative. Audio at ~23:04. The director of human resources then asked claimant, "Are you completely refusing [to answer calls for the visitation department]?" and claimant stated that she was. Audio at ~13:20, ~35:33. The director of human resources asked claimant if she understood that her refusal could lead to disciplinary action and possible termination, and claimant stated that she understood and was still refusing to answer calls to the visitation department. Audio at ~30:18, ~35:17. Claimant left the meeting. After the meeting, claimant did not contact her supervisor, the manager or either of the directors to state that she had reconsidered and was now willing to answer calls for the visitation department.

(5) Sometime after claimant left the meeting on April 2, 2015, the director of call center operations went to claimant's workspace. The director told claimant that she was discharged for her refusal to answer calls to the visitation department on both April 1 and 2, 2015.

**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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute that the employer expected her to answer calls directed to other departments when she was instructed to do so by a supervisor. Claimant contended, in essence, that it was impossible for her to answer any calls to the visitation department on April 1 or 2, 2015 because she did not have

“access” to the information needed to allow her to promptly and efficiently respond to customer inquiries to that department. Audio at ~18:52, ~21:28, ~23:26, ~25:19. However, both the director of call center operations and the director of human resources testified consistently and identically that claimant did not raise this justification as the ground for her refusal to take those calls when they spoke to her. Audio at ~29:33, ~34:40. Moreover, claimant affirmatively testified that one of the employer’s representatives who spoke with her on April 1 or 2, 2015 told her that if she needed access to additional information to adequately address issues raised during calls to the visitation department, she could ask one of the other members of the visitation team for assistance. Audio at ~ 25:47. Claimant did not contend that visitation team members would not have provided adequate information to her, but justified her continued unwillingness to answer calls to the visitation department only on the ground that it would have been inconvenient for her to obtain the needed information from another team member. Audio at ~29:15. In light of the weight of the testimony of the two employer directors, and the fact that claimant had a reasonable means of access to the information she asserted was required to enable her to handle calls to the visitation department, even if she thought the means of access was not optimal, her asserted lack of direct access to necessary information was not a reasonable ground for her refusal to follow her supervisors’ direct instructions.

Claimant also contended that she did not flatly refuse to accept the temporary assignment to answer calls for the visitation department. Audio at ~24:34. However, claimant’s testimony on this issue appeared evasive and was contradicted by the consistent testimony of both employer directors. Audio at ~21:28, ~24:31, ~30:18, ~31:42, ~35:17. In addition, the account that claimant gave of the discussion with both directors on April 2, 2015, in which she testified that the directors repeatedly stated that they were considering her behavior to be a refusal to answer calls for the visitation department, raises the strong inference that she did refuse outright to answer those calls and, if that inference is incorrect, then directors’ statements put her at least on notice that if she continued to raise objections to answering those calls, the directors considered that behavior to constitute a refusal to perform assigned work. Audio at ~22:47, ~23:06, ~23:17. In either case, by her continued objections to performing the work that the employer’s representatives instructed her to undertake, claimant was strongly communicating her unwillingness to follow the instructions of the employer’s supervisors, managers and directors.

An employer has a right to expect an employee to follow reasonable instructions from a supervisor about workplace assignments. Claimant was aware that the employer would on occasion assign her to answer calls to the visitation department, as evidenced by the five times before April 1, 2015 that it had done so, and claimant had complied. By refusing to answer calls for the visitation department on April 1 and 2, 2015 after two supervisors and two directors had clearly instructed her to do so, claimant could only have known that she was violating the employer’s expectations by her continuing unwillingness. Claimant’s refusals were a willful violation of the employer’s standards.

Claimant’s refusal to perform assigned work for the employer on April 1 and 2, 2015 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To satisfy the standards for an isolated instance of poor judgment, claimant’s behavior in violation of the employer’s expectations, 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). The behavior to be excused also must not have exceeded “mere poor judgment” by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D). Here, claimant’s willful defiance of the

employer's instructions occurred on two successive days, and involved two separate decisions: the initial decision on April 1, 2015 to refuse to answer calls in the visitation department as instructed by her supervisors, and a second decision on April 2, 2015 to disregard the authority of the directors and to continue in her refusals after a sufficient time had passed to comprehend the significance of her behavior. Because claimant's willful behavior in violation of the employer's expectations was not a single or infrequent event, but formed a pattern of discrete acts and decisions, it is excluded from the types of behavior that may be excused as an isolated instance of poor judgment. As well, it is fundamental to the employment relationship that an employee will comply with the reasonable instructions of the employer's supervisors and managers in work assignments, and not willfully defy their workplace authority. By her behavior in conspicuously refusing to follow the direct instructions of her supervisors and the employer's directors, after repeated requests, and in attempting to unilaterally dictate the work she was willing, and not willing, to perform, claimant caused a major rupture in the employment relationship. On these facts, a reasonable employer would objectively conclude that it could no longer trust claimant to follow the reasonable instructions of her supervisors if she preferred not to. For this reason, claimant's behavior on April 1 and 2, 2015 is not excusable as an isolated instance of poor judgment because it was the type of behavior that caused an irreparable breach of trust in the employment relationship.

Claimant's behavior on April 1 and 2, 2015 also is not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence that suggested she misunderstood the instructions of the supervisor, manager and the directors or that she subjectively believed, in the face of those instructions, that the employer would condone her actions in refusing to perform them. Claimant did not make a threshold showing that her behavior was excusable as an isolated instance of poor judgment.

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

**DECISION:** Hearing Decision 15-UI-39419 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;  
J. S. Cromwell, not participating

**DATE of Service:** August 6, 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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