

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1194**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 172301). Claimant filed a timely request for hearing. On October 1, 2015, ALJ McGorin conducted a hearing, and on October 2, 2015 issued Hearing Decision 15-UI-45312, concluding claimant voluntarily left work without good cause. On October 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) De Paul Treatment Centers Inc. employed claimant from July 25, 2015 to August 4, 2015 as a cook.

(2) The employer expected claimant to report to work and complete his shifts, or notify his supervisor prior to his starting time or as soon as possible if he needed to miss work due to illness or other acceptable excuse. Claimant received a copy of the employer's attendance policy at hire, and understood the employer's expectations.

(3) On July 26, 2015, claimant was scheduled to work from 5:00 a.m. to 1:30 p.m. Claimant reported to work, but left work before 6:00 a.m. because he was dissatisfied with the prep cook's failure to crack eggs for a recipe claimant planned to prepare. Later that morning, claimant's supervisor contacted him and asked him why he was not at work and why he did not contact her. Claimant told his supervisor he left work early and did not notify her he had left work because he was upset. Claimant and the supervisor discussed claimant's concerns and planned to meet with the other cooks and discuss his concerns when the supervisor returned from her vacation in approximately one week. Claimant confirmed he would report to work on July 27, 2015.

(4) On July 27, 2015, claimant did not report to work for his scheduled shift or contact the employer. Claimant's supervisor sent claimant a text message asking why he did not report to work. Claimant did not respond to his supervisor by text message until July 30, 2015, stating that he still wanted to work for the employer, but providing no explanation for his July 27, 2015 absence.

(5) On August 4, 2015, the employer terminated claimant's employment because he violated the employer's attendance policy.

**CONCLUSIONS AND REASONS:** We conclude that the employer discharged claimant for misconduct.

The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The employer decided it would discharge claimant, and would not permit him to return to work after he violated the employer's attendance policy for a second time on July 27, 2015. Although claimant showed he was willing to continue working by sending his supervisor a text message on July 30, 2015 stating that he wanted to continue working for the employer, the employer did not permit him to return to work. Because claimant was willing to continue to work for the employer for an additional period of time, but was not allowed to do so by the employer, the work separation was a discharge.

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

The employer discharged claimant because he violated its attendance policy. The final incident occurred on July 27, 2015, when claimant failed to contact the employer or report for work. Barring illness or other exigent circumstances, the employer reasonably expected claimant to report to work for his scheduled shifts or to notify the employer before his shift if he was unable to work. Claimant understood the employer's attendance policy because he received a copy of it at hire, and as a matter of common sense.

Claimant did not contest the employer's testimony that he failed to report to work or contact the employer on July 27. However, claimant testified that he was ill that day and attempted to contact his supervisor before his shift began at 5:00 a.m., was not able to "connect with anyone," and did not leave a telephone message because it was early, and his supervisor was on vacation. Audio Record at 30:19 to 31:21. Claimant's reason for failing to contact the employer or leave a message is implausible. The supervisor was willing to receive telephone calls, as was evident by the detailed conversation she had

with claimant on July 26. The record fails to show the employer instructed claimant to refrain from contacting his supervisor during her vacation, or follow a different procedure for notifying the employer of absences. Moreover, it is implausible that claimant called the supervisor before 5:00 a.m. on July 27 but did not leave a telephone message regarding his plan to miss work that day. Nor did claimant allege, or does the record show, that he was too ill to contact the employer. More likely than not, claimant deliberately failed to report for work on July 27 or contact the employer until July 30. His conduct demonstrated indifference to the consequences of his actions when he knew or should have known his conduct probably violated the employer's expectations. Claimant's failure to report for work on July 27 therefore was, at best, wantonly negligent, as was his failure to notify the employer he would be absent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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). Claimant's also violated the employer's attendance policy on July 26, 2015. Claimant provided no plausible reason for leaving work early or failing to notify the employer he was doing so. Feeling upset about a coworker's work performance is not an acceptable excuse for failing to complete one's shift, especially where the record does not show claimant was unable to perform his duties without the cracked eggs. Claimant's failure to remain at work was, at best, wantonly negligent, as was his failure to notify his supervisor that he was leaving work early. Claimant's exercise of poor judgment on July 27, 2015 therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct on July 27, 2015 cannot be excused as a good faith error under OAR 471-0030-0038(3)(b). Claimant understood he was expected to report for work as scheduled or notify the employer if he was unable to do so. Claimant's 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 receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-45312 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 28, 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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