

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1270**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85331). Claimant filed a timely request for hearing. On October 21, 2015, ALJ Vincent conducted a hearing, and on October 23, 2015 issued Hearing Decision 15-UI-46460, concluding the employer discharged claimant, but not for misconduct. On October 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pacific Crest Sporthorse employed claimant from February 23, 2011 to August 17, 2015.

(2) The employer generally expected employees to report for work as scheduled or notify their supervisor before the start of their shift if they were unable to do so. The employer allowed claimant to leave work at noon on Thursdays to accommodate doctor appointments, and therefore expected claimant to schedule doctor appointments for Thursday afternoons, if possible. If not, the employer expected claimant to notify her supervisor more than one day in advance if she was going to miss work for a doctor appointment. Claimant understood the employer's expectations.

(3) In January 2014, the employer gave claimant two written warnings for twice failing to report for work or notify her supervisor that she was going to be absent.

(4) In July 2015, claimant required medical treatment for excessive bleeding during menstruation, and scheduled a doctor appointment for a Thursday afternoon approximately one month prior to her work separation. However, claimant had to work late the Thursday of her pre-planned appointment, and therefore rescheduled the appointment. Claimant was unable to reschedule the appointment for a Thursday afternoon within the following month. She therefore rescheduled the appointment for the morning of Friday, August 14, intending to later reschedule it for a prior Thursday afternoon if an opening became available. However, claimant later forgot that she had rescheduled the appointment. She therefore did not attempt reschedule the appointment for a prior Thursday afternoon, or notify the employer before August 13, 2015 that she had a doctor appointment on August 14.

(5) On August 13, 2015, claimant's doctor's office reminded her that she had an appointment the following morning. Claimant asked if she could reschedule the appointment for the afternoon of August 13. Claimant was told that she could not do so, but that she could reschedule it for the afternoon of August 14. Claimant notified her supervisor that she had a doctor appointment the following morning, but that she could reschedule it for the following afternoon if the employer preferred. Claimant's supervisor instructed her to reschedule the appointment for the afternoon so that she could report for work on time. Claimant attempted to reschedule her appointment for that afternoon, but by the time of her attempt her doctor's office had filled that appointment slot and no longer had an opening. Claimant decided to keep her morning appointment and report for work late. She chose to notify her coworkers that she would be late, but not her supervisor.

(6) On August 14, 2015, claimant failed to report for work as scheduled or notify her supervisor she would be late. The employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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 and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant for failing to report for work as scheduled on August 14, 2015, claimant missed work to obtain medical treatment for a health problem. Her absence therefore was due to illness or other physical disabilities, and not misconduct. However, with regard to the timing of her absence, the employer had a right to expect claimant to notify her supervisor that she could not reschedule her doctor appointment, and therefore would be late for work. Claimant knew or should have known that notifying only her coworkers probably violated that expectation. Her conscious failure to notify her supervisor demonstrated indifference to the consequences of her actions, and therefore was wantonly negligent.

However, claimant's failure to notify her supervisor she could not reschedule her appointment and would be late for work was an isolated instance of poor judgment, and not misconduct. 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 and do not fall within the exculpatory provisions of OAR 471-030-0038(3)

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).

Claimant violated the employer's expectation that she schedule her doctor appointment for a Thursday afternoon, or notify the employer before August 13, 2015 that she was going to miss work for a doctor appointment on Friday, August 14, 2015. However, claimant initially was unable to reschedule her appointment for a Thursday afternoon, and forgot that she had rescheduled it for Friday, August 14 until her doctor's office reminded her on August 13. Claimant therefore did not willfully violate the employer's expectations, and the record fails to show she consciously engaged in conduct she knew or should have known would probably result in her violating those expectations. Claimant's failure to remember that she had rescheduled her appointment for a Friday was careless, arguably negligent, but it did not rise to the level of *wanton* negligence as defined under OAR 471-030-0038(1)(c).

In January 2014, the employer gave claimant two written warnings for twice failing to report for work or notify her supervisor that she was going to be absent. However, the record fails to show that claimant violated the employer's expectations willfully or with *wanton* negligence from January 2014 until she failed to notify her supervisor that she could not change her doctor appointment and would be late for work on August 14, 2015. The record therefore fails to establish that claimant's exercise of poor judgment on August 14, 2015 was not an infrequent occurrence. Finally, claimant's failure to notify her supervisor that she could not change her doctor appointment and would be late for work on August 14 did not violate the law, was not tantamount to unlawful conduct and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship. Nor does the record show that it otherwise made a continued employment relationship impossible. Claimant's conduct therefore did not exceed mere poor judgment.

We therefore conclude that the employer discharged claimant for an 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-46460 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** November 19, 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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