

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1416**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153916). The employer filed a timely request for hearing. On November 17, 2015, ALJ Murdock conducted a hearing, and on November 20, 2015 issued Hearing Decision 15-UI-48089, concluding claimant voluntarily left work without good cause. On November 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the opposing party as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's written argument also contained information that was not part of the record, and failed to include an explanation of the circumstances or factors beyond her control that prevented her from presenting the information at the time of the hearing. Under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) St. Alphonsus Medical Center employed claimant as an interpreter from March 8, 2010 to August 13, 2015.

(2) Claimant worked part time and from the time she began her employment, her schedule generally consisted of working every other Friday for ten hours, days. She also was required to work an on-call shift at night in rotation with four other interpreters - essentially one week per month. During the night shift, which ran from 5:30 p.m. to 7:00 a.m., she was required to be available by pager to come to the hospital on an as-needed basis within 15 minutes of a page. Claimant worked that schedule until approximately September 2014 when she was preparing to be married. From that time until August 2015, she did not work the on-call shift per her request, which the employer accommodated.

(3) Around August 2015, one of the interpreters left his employ with the employer. On August 11, 2015, the employer's human resources director met with claimant and others and informed claimant that

going forward she was required to resume her place in the on-call night shift rotation. Claimant notified the employer that she refused to work any night shifts. Claimant's supervisor and the human resources director reminded her that working the on-call shift was one of the requirements of her position and if she refused, her employment would end. The human resources director gave claimant until 10:00 a.m. the next day to notify her that she would resume her position in the on-call night shift rotation.

(4) At approximately, 11:00 a.m. on August 12, claimant notified the human resources director by phone that she would not work any night shifts. That day the employer terminated her employment, effective August 13, 2015, in part, for that reason.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant is disqualified from receiving benefits. We disagree with the ALJ that claimant quit work, however, and instead conclude that the basis of claimant's disqualification is that the employer discharged her for misconduct.

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).

In Hearing Decision 15-UI-48089, the ALJ found that "claimant voluntarily left work when her duties changed," reasoning, "claimant was given the option to continue working under all of the terms and conditions of her job description...[but]... evinced an unwillingness to [do so]. The work separation was a voluntary leaving." Hearing Decision 15-UI-48089 at 1, 3. We disagree. Both the employer and claimant characterized the work separation as a discharge and there was no dispute that claimant was willing to continue to work for the employer as long as she was not required to work within the on-call night shift rotation. Transcript at 4, 7, 33. The employer found claimant's unwillingness to work at night unacceptable and terminated her employment, in part, for that reason. Because claimant was willing to continue to work for the employer in some capacity after August 12 but the employer would not allow her to continue working in any capacity, 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) 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 discharged claimant, in part, for categorically refusing to resume working the night rotation as she had prior to her marriage ten months earlier. Transcript at 40-41. Barring exigent or compelling circumstances, the employer had the right to expect claimant to agree to work as scheduled, including within an on-call night shift rotation. Claimant was aware of that expectation when she was hired and complied with it by working within the night rotation from the time she was hired until approximately September 2014.

Claimant also understood that on August 11 that the employer again was requiring her to work within the on-call night shift rotation, likely because it was shorthanded after one interpreter left its employ.

On August 11 and 12, 2015, claimant violated that expectation by categorically refusing to work any future night shifts. Claimant's refusal constituted a willful disregard of the employer's interest in assigning its employees to work as necessary.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d)(D). Claimant's refusal to work all future nights amounted to a refusal to work when scheduled, an act of insubordination with respect to a fundamental aspect of the employment relationship. Absent reasonable mitigating circumstances, which are absent here, such an act is sufficient to create an irreparable breach of trust and make a continued employment relationship impossible.

Claimant's refusal to work at night was not the result a good faith error. Claimant clearly understood the employer's expectation from her meeting on August 11 and the telephone conversation on August 12. Claimant's refusal to work at night as scheduled was not the result of an error in her understanding of the employer's expectation or a sincere belief that her refusal to work was acceptable to the employer.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of her work separation until she has earned four times her weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 15-UI-48089 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** January 8, 2016

**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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