

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0079**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 111707). The employer filed a timely request for hearing. On January 7, 2016, ALJ Murdock conducted a hearing, and on January 11, 2016 issued Hearing Decision 16-UI-50779, concluding claimant's discharge was for misconduct. On January 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Woodburn School District 103C employed claimant, last as an educational assistant for special education, from December 9, 2011 to October 16, 2015.

(2) The employer expected employees to request planned unpaid leave 30 days in advance, and not to take unpaid leave without authorization. Claimant understood the employer's procedures for requesting unpaid time off. She also understood it was her responsibility to make sure her unpaid leave request was approved before she took time off work.

(3) On September 8, 2015, claimant requested unpaid leave for September 14, 2015 through September 16, 2015, and paid leave from September 17, 2015 and September 18, 2015. She had been feeling unwell and planned to take a trip. She received an email that confirmed she had submitted a request for the time off work.

(4) The employer denied claimant's unpaid leave request and allowed claimant's paid leave request. On September 10, 2015, the employer sent an email to claimant and her principals notifying them all that claimant's unpaid leave request was denied. On September 11, 2015, the employer delivered a printed letter to claimant's workplace inbox that also notified her that her unpaid leave request was denied. The employer modified claimant's records in the time system so it would show her paid leave request had been approved; the system did not show that her unpaid leave request was approved. The employer also notified claimant's principals of the denial.

(5) On September 11, 2015, claimant's last workday before the unpaid leave she had requested, claimant was unsure if her leave requests had been allowed or denied. She asked a school office employee, who said she was not sure. Claimant and the school office employee tried to contact a district office employee, but they were unable to reach her. Claimant did not find out from either employee whether or not her unpaid leave request had been approved or denied. Claimant did not check her workplace inbox or her email before leaving work for the day. Claimant did not ask either of her principals about her leave requests. Although claimant had the ability to use her phone to check her work email, she did not do so before leaving work for the day or at any point prior to missing work on Monday, September 14, 2015. After leaving work on September 11, 2015, claimant did not make any attempt to find out whether or not the employer expected her to report to work on September 14, 2015.

(6) Claimant did not report to work on September 14, September 15 or September 16, 2015. She did not notify the employer that she was going to be absent from work those days.

(7) On September 19, 2015, the employer's human resources director met with claimant to discuss her use of unauthorized unpaid leave. Claimant admitted to the director that she had not checked with her supervisors about the status of her unpaid leave request and had not checked her email or inbox before leaving. She also admitted to the director that she knew she was not have authorized to take unpaid leave and had figured she would deal with the consequences of taking it when she returned to work.

(8) On October 16, 2015, the employer discharged claimant for failing to report to work when scheduled and taking unpaid leave without authorization.

**CONCLUSIONS AND REASONS:** We agree with the ALJ, and conclude that 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. 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer reasonably expected claimant to obtain authorization before taking planned unpaid leave from work. Claimant understood the employer's expectation, she understood how to request unpaid leave, and she knew it was her responsibility to verify that she was authorized to take unpaid leave before she took time off work. Nevertheless, claimant took three days of unauthorized planned unpaid time off work.

Claimant argued, in essence, that the reason she took planned unpaid leave was that she thought it had been approved. She claimed a school office employee told her, when claimant asked if her unpaid leave was approved, "it looks like you're alright." Transcript at 18. However, claimant also testified that the

same person had been so unsure about whether claimant's unpaid leave request was approved that she had called a district office employee to ask if it had been approved. Transcript at 31. Claimant's claim that she "thought I was okay" because the district office employee had not answered her phone is not plausible. *Id.*

Claimant also argued, in essence, that her decision to take the unpaid leave despite the fact that she did not know whether or not it had been approved should be excused because she was justifiably confused about whether or not the leave was approved. For claimant's conduct to be considered a good faith error, and, therefore, be excused from constituting misconduct, claimant must have held a sincere belief that her request for unpaid leave was approved. The record fails to show that her belief was sincere, however, given that she knew she should get approval before taking time off work, she got nothing from the employer affirmatively approving her time off, she did not check her email account or her workplace inbox to see if her request was approved, and she did not ask either of her principals if her request was approved or denied. *See* Transcript at 18, 20. The time system showed that claimant's paid leave request was approved, not her unpaid leave request, but claimant had never requested paid and unpaid leave at the same time and was so unsure about whether or not her leave was approved after checking the time system that she then asked a school office employee about it. Transcript at 21-22. The school office employee was so uncertain that she and claimant unsuccessfully attempted to ask a district office employee for assistance. Claimant's reliance on her own knowledge, or that of the school office employee, about the status of claimant's leave request just before claimant left work on September 11, 2015 was unreasonable. Considering the facts in this record, claimant did not reasonably or sincerely believe that the employer had authorized her to take unpaid leave.

Claimant therefore took three days of unauthorized, planned unpaid leave despite the fact that she did not know whether or not the request was approved. By failing to take any reasonable steps to verify whether her request was approved before taking the time off work, *i.e.* checking her workplace email account or inbox for news of her request or asking one of her supervisors, claimant demonstrated that she was indifferent to the consequences of her conduct, under circumstances where she was conscious at the time that she had not received express or implied authorization to take the time off work, and knew taking time off work under those circumstances would probably violate the employer's expectations. Claimant's conduct was, therefore, wantonly negligent.

As previously noted, claimant's wantonly negligent use of unauthorized, unpaid planned time off work cannot be excused as a good faith error. Nor was claimant's conduct excusable as an isolated instance of poor judgment. Although claimant's conduct was, more likely than not, isolated, isolated conduct may still be considered misconduct if it involved poor judgment and did not exceed poor judgment. *See* OAR 471-030-0038(1)(d).<sup>1</sup> Claimant's conduct involved poor judgment because it involved a conscious decision to be absent from work without determining whether or not her request unpaid leave was approved, which resulted in a wantonly negligent violation of the employer's reasonable expectation. *See* OAR 471-030-0038(1)(d)(C) (defining "poor judgment"). Claimant's conduct exceeded mere poor judgment because it created irreparable breach of trust in the employment relationship. *See* OAR 471-

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<sup>1</sup> Claimant's conduct was, more likely than not, isolated, because, although her absence spanned three days, her decision to be absent from work despite not knowing whether or not her request for that time off had been approved likely involved one conscious decision to take the time off rather than three separate decisions to take each individual day off work. OAR 471-030-0038(1)(d)(A)-(B) (defining "isolated" and "judgment"). However, the issue in this case is whether claimant's conduct exceeded mere poor judgment.

030-0038(1)(d)(D) (setting forth the types of conduct that exceed mere poor judgment). Claimant admitted to the employer that she knew she had not received notice that her request for unpaid leave was approved at the time she decided not to report to work, and had decided to take the time off and deal with the consequences when she returned, which amounts to an intentional temporary job abandonment.<sup>2</sup> Claimant's temporary job abandonment was an irreparable breach of trust with the employer, which could no longer rely on claimant to comply with its unpaid leave request procedures or (absent exigent circumstances) report to work when necessary if the employer denied such a request. Under the circumstances, no reasonable employer would continue to trust and employ a worker who had chosen to temporarily abandon her job even a single time. Claimant's conduct therefore exceeded mere poor judgment and cannot be excused.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-50779 is affirmed.

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

**DATE of Service:** February 23, 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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<sup>2</sup> Claimant and her representative argued that claimant's statements to the HR director were not reliable because of her mental state at the time she made them. Transcript at 44. However, claimant did not specifically refute the director's assertion that claimant admitted she knew she had violated the employer's expectations and did so knowing there would be consequences when she returned to work. The record shows that claimant did not receive any affirmative indication that her request for unpaid leave was approved, yet decided to take time off, and did so without first checking her inbox, email (at work or on her phone prior to taking time off), or even making an attempt to ask either of her supervisors if her request was approved. This behavior is consistent with the behavior of an individual who was aware that her request had not been approved, and decided to take the unpaid leave anyway and face the consequences when she returned. Because we have concluded that claimant's actions were consistent with an individual who had decided to violate the employer's expectations and face the consequences later, we conclude that the statement claimant made to that effect to the HR director was reliable evidence of her mental state at the time of the events at issue.