

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0608**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73820). Claimant filed a timely request for hearing. On February 6, 2016, ALJ Vincent conducted a hearing, and on February 20, 2016 issued Hearing Decision 16-UI-52712, affirming the Department's decision. On February 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On April 7, 2015, EAB issued Appeals Board Decision 2016-EAB-0242, reversing Hearing Decision 16-UI-52712 and remanding this matter for further development of the record. On May 3, 2016, ALJ Vincent conducted a hearing at which the employer did not appear, and on May 6, 2016 issued Hearing Decision 16-UI-59080, again affirming the Department's decision. On May 25, 2016, claimant filed an application for review with EAB.

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Umpqua Property Services Corp. employed claimant as a maintenance and repair person from March 1, 2010 until October 8, 2016.

(2) The employer expected claimant to notify it in advance if he was going to be absent from work. The employer also expected claimant to follow the reasonable instructions of his supervisors. Claimant understood the employer's expectations.

(3) Beginning in early 2015, claimant's working relationship with his supervisor deteriorated. Claimant's supervisor began to call him unflattering names. Claimant perceived his supervisor was treating him poorly to induce him to leave work.

(4) Claimant's house was heated in winter solely by wood. Claimant generally burned nine cords of wood each year for heat and he cut that wood himself to save money. By early October 2015, claimant had not been able to cut the wood he needed for the upcoming winter because the forests had been closed from cutting due to fire danger through the summer. Claimant also had a temporary water line that ran to his house laying exposed on the surface of the ground. The water line needed to be buried to

avoid freezing in the cold weather. Claimant needed bury the pipe and cut the wood before the fall rains came, which would prevent him from digging a trench and cutting dry burnable wood before winter.

(5) Sometime shortly before approximately October 2, 2015, claimant's supervisor and another supervisor spoke in front of other employees in the shop about how they were going to deal with claimant. Audio at ~ 8:40. They discussed moving claimant into an assignment that would be "hell" for him so he would leave work. Exhibit 1 at 1. One of the employees who heard their discussion asked them why they did not just discharge claimant, and that employee was told it would be "better if we can get him to quit" and the "plan" was to force him to quit. *Id.* On October 2, 2015, claimant's supervisor told him he was being assigned to work a day shift starting on his next scheduled day of work, October 6, 2015. Up to then, claimant had been working a graveyard shift, which would have allowed him to cut wood and dig a trench for the exposed water line during the daylight hours of between approximately 9:00 a.m. and 1:00 p.m. until he needed to sleep. Claimant explained to his supervisor he needed to put in enough firewood for winter and deal with the water pipe and he could not do so if he was working a day shift and asked to remain working the graveyard shift for the two weeks he thought those projects would take him to complete. The supervisor refused and told claimant he needed to start working the graveyard shift on October 6, 2015. Claimant asked his supervisor if he could think about this reassignment over the weekend, and the supervisor allowed him to do so.

(6) On October 5, 2015, when he was otherwise off work, claimant met with his supervisor, another supervisor and a representative from the employer's human resources department. Claimant explained to them the importance of completing his household projects and asked them if they would allow him to take two weeks of vacation to complete the work he needed to prepare for winter. They refused. Claimant became angry. Claimant thought they were treating him unfairly and should allow him to take the vacation since he had ample accrued vacation time and his household projects were important. Claimant told the employer representatives that he was not going to be at work until he had completed the wood cutting and the pipe laying projects, he thought that would take about two weeks, but if he accomplished those tasks sooner he would report for work then and would be able work the day shift. Audio of May 3, 2016 Hearing (Audio 2) at ~5:37, ~7:12. Claimant told the employer representatives he did not care if they recorded him as not showing up for work on October 6, 7 or 8, 2015 or on any other days he needed off to finish household projects. Claimant then left the workplace.

(7) On October 6 and 7, 2015 claimant did not report for work. Claimant did not call the employer to report that he was going to be absent because he had already notified the employer that he would not report for work until he had completed his household projects. On October 7, 2015, a coworker called claimant and told him that his supervisor and another supervisor had commented to the shop employees that claimant had "finally quit" the day before. Audio 2 at ~19:56.

(8) On October 8, 2015, claimant did not report for work. On that day, the employer discharged claimant because he allegedly did not notify the employer of his absences from work on October 6 and 7, 2015. At the time of the discharge, there had been no incidents in which the employer considered that claimant had violated its expectations other than the supposed failures to report for work or call in on October 6 and 7, 2015.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for misconduct.

In Hearing Decision 16-UI-59080, the ALJ concluded the work separation was a discharge and that claimant was disqualified from benefits because the employer demonstrated that the discharge was for misconduct. The ALJ found, as fact, that claimant did not notify the employer of his absences on October 6 and 7, 2015 and thereby determined that he violated the employer's standards with at least wanton negligence.. Hearing Decision 16-UI-59080 at 3. We disagree.

At the outset, the nature of the work separation must be determined. The employer contended it believed the separation was a voluntary leaving when claimant did not report for work on October 6 and 7, 2015 and claimant did not appear to take a position on how his work separation should be characterized. Audio of February 20, 2015 Hearing (Audio 1) at ~9:00, ~15:19. The standard for determining the proper characterization of the work separation is set out at OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If 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 separation was a discharge. OAR 471-030-0038(2)(b).

The employer was not present to dispute claimant's testimony at the remand hearing that he told his supervisor, another supervisor and a human resources representative on October 5, 2015 that he would not report for work again until he finished the preparations he needed to make at his home to ready it for winter, which he thought would require an absence from work of around two weeks. Audio 2 at ~4:01, ~5:17, ~5:55, ~7:12. Claimant's statement shows that he wanted to return after he took two weeks off, did not intend to sever the work relationship during that two weeks, and was willing to continue working for the employer. From the testimony of claimant's supervisor, it was clear that the employer was not willing to allow claimant to work after October 8, 2015 when it took formal steps to process his termination. Audio at 1 ~9:30. While the employer never formally announced to claimant he was discharged, the attitudes of the parties and the weight of the evidence demonstrate that the work separation was most likely a discharge on October 8, 2015.

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

In his testimony at the first hearing, the employer's witness emphasized the employer's view that claimant did not notify the employer of his absences on October 6 and 7, 2015 in violation of the employer's standards. Audio 1 at 9:30, ~10:32. However, the employer was not present to challenge claimant's testimony at the remand hearing that he reasonably notified the employer of those absences on October 5, 2015 by his statement that he would return to work when he had completed the household projects, and he thought it would require two weeks to finish them. Audio 2 at ~4:01, ~5:17, ~5:55, ~7:12. While the parties' testimony was in apparent conflict, there is no reason in the record to doubt the credibility of either party. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party that carries the burden to

persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on this evidentiary principle, the employer did not demonstrate that claimant did not reasonably notify it of his absences on October 6 and 7, 2015 in advance of his shifts. There is insufficient evidence to conclude that claimant's behavior in this instance was misconduct.

While the employer did not explicitly raise it as a ground for discharge, it was implicit in the testimony of its witness that claimant's behavior in absolutely refusing to work on the day shift for two weeks violated the employer's standards. At a minimum, claimant's behavior was insubordinate since he knew or should have known as a matter of common sense that the employer expected him to comply with its instructions about shift assignments. Claimant's behavior on October 5, 2015 in refusing to work for two weeks, until he had completed his winter preparatory tasks, was at least wantonly negligent.

While claimant's behavior on October 5, 2015 was wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). To qualify as an isolated instance of poor judgment, the behavior at issue must have been a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). To be excusable, the behavior 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 471-030-0038(1)(d)(C). Here, there was no evidence that claimant had engaged in behavior in violation of the employer's standards before October 5, 2015. Audio 1 at ~14:02. Since claimant's wantonly negligent insubordination was confined to a single act, and there was no evidence of prior non-compliance with the employer's standards, claimant's behavior on October 5, 2015 meets the first test to be excused as an isolated instance of poor judgment.

Claimant's refusal to work until he completed his preparations for winter, while it might have been insubordinate, was understandable and did not fundamentally undercut his relationship with the employer. From claimant's perspective, completing the household tasks was essential to prepare for winter and he knew they could only be done in the time remaining before the fall rainy season started. Audio 1 at ~18:30, ~21:39. It was already October 5, 2015 and based on past experience claimant believed the rains would start at any time. Claimant had just learned without notice that he was required to change to day shift, a shift on which he would not have the daylight hours available to him to perform those outdoor tasks. Audio 1 at ~19:42, ~21:36; Audio 2 at ~5:55, ~6:47. The employer refused to permit claimant to take vacation time to finish those tasks, and gave him the rather uninformative explanation that it was a "business necessity" that he start working the day shift immediately. Audio 1 at ~19:29, ~27:40; Audio 2 at ~25:11. Given that context, an employer would reasonably be aware of claimant's feelings of anxiety about the status of his winter preparations and his frustrations when the employer rejected out-of-hand all of the compromises he proposed to allow him to finish his winter projects. On this record, a reasonable employer would not have concluded under these exigent circumstances that claimant's refusal to work until he could complete his winter preparations caused an irreparable breach of trust or otherwise made a continued employment relationship impossible. Since it meets all of the requirements, claimant's insubordinate behavior was excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, there was insufficient evidence to conclude that the discharge was for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-59080 is set aside, as outlined above.

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

**DATE of Service:** June 29, 2016

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.