

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0670**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120509). Claimant filed a timely request for hearing. On May 18, 2016, ALJ Frank conducted a hearing, and on May 26, 2016 issued Hearing Decision 16-UI-60539, concluding the employer discharged claimant, but not for misconduct. On June 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The Griffin House LLC employed claimant as an assistant administrator from May 5, 2015 to February 19, 2016.

(2) The employer expected claimant to act professionally and courteously toward her coworkers and the employer's administrator. The employer also expected claimant to report to work two days per week, on Wednesday, Thursday or Friday, or contact the employer if she was unable to work. Claimant understood the employer's expectations.

(3) On Wednesday, February 10, 2016, the claimant participated in a staff meeting with one of the two owners, who worked as the administrator, and other coworkers. Claimant was explaining a procedure to a staff member. The administrator interrupted claimant and told the staff person she would discuss the matter with the staff person later. Claimant was upset because the administrator interrupted and contradicted her in front of the staff. Claimant turned, walked out of the ongoing meeting and up some stairs to her office, collected her belongings and left the office without saying anything further to the administrator that day. The administrator told the other owner she planned to discharge claimant because of claimant's behavior on February 10.

(4) Claimant was unable to report to work from February 11 through February 18, 2016 because her mother, who was also her childcare provider, was in the hospital. The owner who was present at the February 10 meeting was in the hospital during the week claimant missed work.

(5) On February 19, 2016, claimant returned to work. An owner discharged claimant because of her behavior at the February 10, 2016 meeting.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, but 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 standards of behavior the 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 the 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 are not misconduct. OAR 471-030-0038(3)(b).

In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred when it did. Although the employer did not discharge claimant until after she allegedly failed to contact the employer or report to work during the week following the February 10 meeting, the employer also clarified that the incident that prompted the employer to discharge claimant was claimant's behavior at the February 10, 2016 staff meeting, and not claimant's lack of attendance from February 11 to 19, 2016. Audio Record at 13:23 to 31:34, 22:56 to 23:04. Accordingly, the February 10 incident was the proximate cause of claimant's discharge and is the proper initial focus of the initial misconduct analysis.

The parties agreed about what occurred at the February 10, 2016 staff meeting. Claimant testified that she left the meeting and work abruptly and without talking to the administrator because she felt "embarrassment and frustration" when the administrator interrupted her explanation to the staff member. Audio Record at 26:01 to 27:05. The employer reasonably expected claimant to act professionally and courteously toward the administrator and staff. Claimant understood this expectation as a matter of common sense. Despite claimant's emotions at the time of the incident, she was in control and conscious of her actions, which were a wantonly negligent violation of the employer's expectations.

However, claimant's behavior on February 10 was excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To constitute an isolated instance of poor judgment, claimant's behavior must have been 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). The record does not show claimant engaged in other incidents of misconduct before the February 10 meeting, but the employer alleged that claimant engaged in other willful or wantonly negligent behavior by failing to report to work or call in from February 11 through February 18. Audio Record at 10:13 to 10:37, 21:30 to 21:49. Claimant testified that she called a supervisor at work on February 11 and February 17 to report that she could not work until February 19 due to a lack of childcare, and asked the supervisor to "let [the administrator] know." Audio Record at 27:09 to 28:14. The owners testified that they did not receive a message regarding why claimant failed to report to work. Audio Record at 21:30 to 21:49, 31:30 to 31:42. In a

discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). There is no reasonable basis on this record to doubt the credibility of the witnesses at hearing. Because the evidence to support the employer's allegation that claimant was a "no show, no call" during her final week of employment was, at best, equally balanced with claimant's testimony that she had called in to report her absences, the employer failed to show by a preponderance of the evidence that claimant violated its attendance expectations, let alone that she did so willfully or with wanton negligence. Absent such a showing, we cannot find that claimant's conduct during the February 10 staff meeting was part of a pattern of other willful or wantonly negligent behavior.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-60539 is affirmed.

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

**DATE of Service:** July 7, 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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