

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0934**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75710). Claimant filed a timely request for hearing. On August 1, 2016, ALJ Seideman conducted a hearing, and on August 3, 2016 issued Hearing Decision 16-UI-64938, affirming the Department's decision. On August 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that he provided a copy of it to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, and he failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Industrial Systems, Inc. employed claimant as an electrical designer from October 27, 2005 until May 2, 2016.

(2) The employer expected claimant to follow the instructions of the employer's owners and not to engage in behavior for the principal purpose of showing resistance to those instructions. Claimant understood the employer's expectations as a matter of common sense.

(3) In December 2015, one the employer's clients called for assistance with some chemical control pumps in a system that the employer had installed. To allow the client's pumps to operate, the employer overrode some of the system's controls. A very few days later, claimant removed the overrides and restored the client's system to its previous operation because he thought the overrides had not been correctly done. Claimant was not asked to make the changes and did not inform the employer, any of the employer's staff or the client of the changes he had made. When the employer's owner learned what claimant had done, he asked claimant why he had made the changes without telling anyone. Claimant stated he was merely ensuring the correct operation of the system. The owner instructed claimant that,

regardless of his belief, he was never again to make any non-requested changes without informing the client and the employer's staff and coordinating any changes with them. Transcript at 40-41.

(4) Beginning sometime before March 21, 2016, claimant used the employer's computer and internet access to review his personal email account on AOL, as well as make personal purchases through AOL. One of the employer's owners repeatedly told claimant that he was prohibited from using the employer's computers and internet access for personal purposes. When claimant did not stop accessing AOL using the employer's computer, the employer blocked claimant from accessing AOL using its computers and information resources. Shortly before March 18, 2016, claimant learned he was blocked from accessing AOL when using the employer's computers and became angry. On March 18, 2016, when claimant arrived at work, he parked his personal vehicle on the sidewalk in front of the workplace, rather than in the parking lot. Claimant did so knowing the owner would see how he had parked and become upset, as a protest to the employer's actions in blocking his access to AOL, and to "bring it [his] disagreement with the owner's actions to a head." Transcript at 15. On March 21, 2016, the employer issued a written warning to claimant for his behavior and placed him on probation for 90 days

(5) On April 25, 2016, the same client that had called in December called again to report that it was having problems with the level transmitters for two sump pumps and, as a result, the pumps were not operational. The employer investigated the problem, determined its source and, while the problem was being repaired, agreed to override the low level alarms preventing the system from operating on the condition that the client had to be willing to take responsibility for operating the pumps manually. The client agreed. On that day, the employer's owner sent an email to claimant and other staff letting them know he had installed overrides in the client's system. Sometime after, claimant saw what he believed was a correctly functioning low level sensor and noticed that the system was operating in automatic mode with the safety alarms still overridden and disabled. Although he was not asked to do so, claimant removed the overrides in the system. Claimant consult with the owner about it, and did not tell the owner, any staff or the client that he had removed or eliminated the overrides. On April 28, 2016, the client called the employer because it had completed the repairs to its system but it could not make the sump pumps operate. The employer investigated and learned that claimant had removed the overrides that had been installed in the client's system and had not told anyone.

(6) On May 2, 2016, the employer discharged claimant for removing the overrides without notifying the employer's owner and staff and the client.

**CONCLUSIONS AND REASONS:** 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. 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).

Claimant did not dispute that after he had restored the client's system to its intended operation in December 2015, the owner had told him never again to change a client's system without informing the

employer, its staff and the client, even if claimant thought the change would enhance the system's operation. Only four months later, sometime on or before April 28, 2016, claimant again changed a client's system when he was not asked to do so and again did not notify the client or the employer's staff of the change. While claimant contended he changed the client's system for safety reasons, this does not explain or justify why he could not and did not consult with the employer or the client about the issue, or, at a minimum, inform the owner, staff and client about the change he had made. By not doing so, claimant willfully violated the employer's expectations as communicated to him by the owner in December 2015.

Although claimant's behavior around the end of April 2016 was a willful violation of the employer's standards, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior may be considered an "isolated instance of poor judgment" if, among other things, it was a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). In this case, claimant's behavior in response to the March 21, 2016 warning, intentionally parking his vehicle on a sidewalk outside of parking lines in the lot for the purposes of annoying or provoking the owner and protesting the warning, was a willful act of poor judgment that violated the standards of behavior the employer had the right to expect of him as a matter of common sense. As well, although claimant contended at hearing that when he accessed AOL using the employer's computers he was often checking his email account for business emails, he appeared to acknowledge that he also checked the personal emails at the same time. Transcript at 14. Claimant also did not dispute that the owner specifically informed him several times he was not to access his AOL account for personal purposes using the employer's computers before the owner blocked his ability to access AOL, and constituted an exercise of poor judgment that willfully violated the employer's standards. Based on those incidents, considered separately or together, claimant's exercise of poor judgment around the end of April 2016 did not meet the criteria for being excusable as an isolated instance of poor judgment.

Claimant's behavior around the end of April 2016 also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he misunderstood the employer's instruction to him in December 2015, and such a contention would be implausible given the clarity of that instruction. Since claimant could only have understood the employer's expectation, his willful violation of it cannot be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-64938 is affirmed

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

**DATE of Service:** September 19, 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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