

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0984**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81919). Claimant filed a timely request for hearing. On August 12, 2016, ALJ Vincent conducted a hearing, and on August 18, 2016 issued Hearing Decision 16-UI-65886, affirming the Department's decision. On August 26, 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 that argument to the employer as required by OAR 471-041-0080 (October 29, 2006). Claimant's written argument also contained information not offered during the hearing and he did not show that factors or circumstances beyond his reasonable control prevented him from offering that new information at the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument or the new information claimant sought to present when reaching this decision.

**FINDINGS OF FACT:** (1) Coos County School District # 9 employed claimant from May 16, 2015 until May 31, 2016, last as a full-time night custodian.

(2) The employer expected claimant not to work outside of, or more than, his scheduled work hours without permission.

(3) Several times after he was hired, the employer noticed claimant was working longer than his scheduled hours, and outside of them. The employer advised claimant several times not to work longer than his scheduled work hours or at any times other than those he was scheduled to work.

(4) On April 28, 2016, the facilities manager spoke to claimant about taking his lunch breaks as scheduled. The manager told claimant that he was required to stop working at the end of his shift and was prohibited from working after his shift ended. The manager also told claimant he should never

work more than forty hours in a week even if he did not seek compensation for that overtime unless the overtime was authorized. Exhibit 1 at 6.

(5) On May 3, 2016, the facilities manager observed claimant emptying trash cans at 6:00 a.m. when he was scheduled to work that day from 2:45 p.m. until 11:15 p.m. The facilities manager asked claimant when he had arrived to perform this task and claimant stated at 5:00 a.m. The facilities manager told claimant he should not be working outside of his scheduled hours unless he was authorized to do so. Exhibit 1 at 6. On May 3, 2016, the employer issued a letter of directive to claimant warning him not to work outside of his scheduled work hours unless authorized and advising him he was subject to discharge if he violated this instruction.

(6) On May 16, 2016, the facilities manager told claimant in a meeting that he was required to follow his work schedule of 2:45 p.m. until 11:15 p.m. On May 17, 2016, the employer issued a letter of directive to claimant instructing him, among other things, to comply with his work schedule and not to work longer hours than those for which he was scheduled. Exhibit 1 at 4.

(7) On May 25, 2016, claimant was scheduled to work from 2:45 p.m. until 11:15 p.m. Claimant reported for work at 2:45 p.m. At 7:17 p.m., claimant covered a workplace surveillance camera. Claimant removed the cover at 2:32 a.m. on May 26, 2016 and left the workplace.

(8) On May 31, 2016, the employer discharged claimant for working outside his scheduled hours without authorization on May 26, 2016.

**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 establish 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 at hearing that the facilities manager and other employer representatives had instructed him several times not to work outside of his scheduled hours or longer than those hours. Claimant also did not dispute that the employer had issued two letters of directive to him reinforcing this instruction. While claimant initially testified he went to the workplace outside of his scheduled hours on May 26, 2016 to remove a cap he had forgotten to take off a surveillance camera lens during his shift, as his testimony developed his explanation shifted from the lens cap to the allegations that many other employees worked outside of their scheduled hours, that the facilities manager knew he was working outside of his scheduled hours and did not take any action to stop him until the employer's management became aware of his work practices, and he should be praised rather than condemned for the work hours he volunteered to the employer without seeking compensation. Audio at ~12:55, ~14:10, ~15:08, ~31:38, ~32:12, ~32:49. In the course of his latter testimony, claimant appeared to concede that he often worked outside his scheduled hours even though he knew the employer had forbidden him from doing so. Even if claimant went to the workplace outside of his scheduled work hours at 2:32 a.m. on May 26,

2016 to remove a lens cap from the surveillance camera, he knew the employer had forbidden him from entering the workplace outside his scheduled hours. By doing so on May 26, 2016, absent exigent circumstances or an attempt to alert the facilities manager or another member of the employer's supervisory personnel of any need to remove the lens cap, claimant, with indifference to the consequences of his actions, consciously engaged in conduct he knew or should have known probably violated the employer's expectations. Claimant's conduct therefore was, at best, wantonly negligent.

Claimant's behavior on May 26, 2016 may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(d). To be considered as an "isolated instance of poor judgment," the behavior of claimant that is at issue must have been, among other things, 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)(C). Here, claimant did not dispute the testimony of the employer's witness that he was observed several times before May 26, 2016 working outside of his regularly scheduled hours and longer than those hours, most recently on May 3, 2016. Audio ~25:23. Nor did claimant contend that on many occasions when he worked outside of his scheduled hours he was unaware that the employer prohibited him from doing so. Claimant's exercise of poor judgment on May 26, 2016 therefore was not a single or infrequent willful or wantonly negligent violation of the employer's standards, and therefore is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on May 26, 2016 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(c). Given the number of times claimant was instructed not to work outside of his regular work hours and the two letters of directive he received reiterating this instruction, it is implausible that claimant sincerely believed the employer would permit him to enter or remain on the workplace premises on May 26, 2016, long after his shift was ended. Claimant's behavior is not 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-65886 is affirmed.

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

**DATE of Service:** September 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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