

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1106**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 93436). The employer filed a timely request for hearing. On August 16, 2016, the Office of Administrative Hearings issued notice of a hearing scheduled for August 31, 2016. On August 31, 2016, ALJ Frank conducted a hearing, and on September 8, 2016, issued Hearing Decision 16-UI-67130, concluding that the employer discharged claimant for misconduct. On September 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument included contact information for witnesses who, claimant asserted, could provide testimony regarding the circumstances that resulted in her discharge. Under OAR 471-041-0090 (October 29, 2006), EAB may consider information not part of the hearing record only if the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented the party from presenting the information at the hearing. In regard to claimant's apparent request that EAB contact witnesses, we note that the August 16, 2016 hearing notice claimant received advised her that if she had witnesses she wanted to testify at the hearing, she needed to tell the ALJ about the witnesses at the start of the hearing, give the ALJ their phone numbers, and tell her witnesses that the ALJ would be calling them for the hearing. The hearing notice also informed claimant about her rights to appeal the hearing decision to EAB, and told her that "[t]he EAB generally does not allow anybody to present new evidence, but instead reviews the testimony and any documents from the hearing." *Id.* It was well within claimant's reasonable control to carefully read the hearing notice and

understand the necessity of presenting witness testimony at the August 31 hearing. Her request to have EAB consider new information in the form of additional testimony is therefore denied.<sup>1</sup>

**FINDINGS OF FACT:** (1) From September 1, 2003 until May 31, 2016, Fred Meyer Stores employed claimant as a loss prevention manager. Claimant was assigned to a particular store, and was responsible for detecting external or internal threats to store security, such as vandalism and theft by employees or customers. To perform her job, claimant was expected to remain in her office and view closed circuit television recordings that provided video footage of areas in the store and the store parking lot. Transcript at 13. Claimant was a salaried employer who scheduled her own work hours and was not required to file time sheets to account for hours she had worked.

(2) On May 2, 2016, claimant scheduled herself to work from 12 p.m. to 10 p.m., but arrived at work at 12:18 p.m. and left at 3:11 p.m. She did not take approved leave for the hours of her scheduled shift that she did not work. Transcript at 10.

(3) On May 10, 2016, claimant scheduled herself to work from 1 p.m. to 11 p.m., but arrived at work at 12:42 p.m. and left at 3:42 p.m. She did not take approved leave for the hours of her scheduled shift that she did not work. Transcript at 10.

(4) On May 20, 2016, claimant scheduled herself to work from 1 p.m. to 11 p.m., but arrived at work at 1:41 p.m. and left at 6:22 p.m. She did not take approved leave for the hours of her scheduled shift that she did not work. Transcript at 8.

(5) On May 22, 2016, claimant's supervisor sent her an email asking her to complete a routine assigned task. When he did not receive a response from her, he checked her schedule and saw that she had been working at the time he sent the email. Claimant's supervisor then viewed a video recording of claimant's office and saw that the lights in her office were turned off and that no one had been in her office that day. Transcript at 8-9. Claimant had taken sick leave on May 22 because of a May 20 accident in which someone had hit her car. Transcript at 18.

(6) On May 23, 2016, claimant scheduled herself to work from 12 p.m. to 10 p.m., but arrived at work at 11:55 a.m. and left at 5:38 p.m. She did not take approved leave for the hours of her scheduled shift that she did not work. Transcript at 6.

(7) As a result of his inability to contact claimant on May 22, her supervisor reviewed claimant's scheduled work hours, closed circuit television recordings of activity in her office, and records of the times claimant "punched" in and out of the employee entrance at the store where she worked for the period from April 24 through May 23, 2016. Based on his review of this information, claimant's

---

<sup>1</sup> In its request for hearing, the employer stated that it would present testimony from two witnesses at the hearing, the loss prevention manager and store director. The store director, who did not appear at or the hearing, is one of the witnesses that claimant asked EAB to contact for information regarding her discharge. At the beginning of the hearing, however, the employer informed the ALJ that the store director would not be testifying. Audio recording at 5:35. At that time, claimant could have told the ALJ that she wanted to call the store director as a witness, and asked that he be contacted to testify on August 31, or, if the store manager was unavailable on August 31, asked that the hearing be postponed so she could call him as a witness. Because it was within claimant's reasonable control to do so, her request to have EAB consider the testimony of this individual is denied.

supervisor concluded that claimant had failed to work all scheduled work hours on eighteen days, including May 2, 10, 20 and 23, and had not requested or taken approved leave for any hours not worked on those dates. Transcript at 15.

(8) Effective May 31, 2016, the employer discharged claimant for theft of time from the employer by failing to work all scheduled work hours during the period from April 24 through May 23, 2016.

**CONCLUSION AND REASONS:** We agree with the employer 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 connected with work. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

As a salaried employee, claimant was not required to record hours she worked and was responsible for creating her own work schedule. The employer expected that claimant would work the hours she scheduled herself to work, and take approved leave for any scheduled time that she did not work. Claimant knew about and understood the employer's expectation. After the employer conducted an investigation, it discovered that during the period from April 24 through May 23, 2016, claimant failed to work all scheduled hours on May 3, 10, 20 and 23 and a number of other occasions. Effective May 31, 2016, the employer discharged claimant for theft of time from the employer. Claimant's failure to work the hours she scheduled herself to work on at least four occasions constituted a conscious violation of the standards of conduct with which the employer expected to comply. Claimant's conduct was, at least, wantonly negligent behavior.

Claimant, however, asserted that she worked all hours she was scheduled to work during the period in question and "put in sick leave" for any time not worked. Transcript at 19. Claimant disputed the accuracy of the employer's conclusions about her work hours, which were based on review of video footage of claimant's office, as well as a review of the times claimant "punched" in and out of the employee entrance in the store to which claimant was assigned. According to claimant, she was out of her office performing "live surveillance" of the store parking lot when she could not be observed in her office and regularly went in and out of store entrances other than the one used by employees. Transcript at 22, 25, and 28. Based on this record, however, we do not find claimant's testimony regarding her work hours to be credible.

Claimant insisted that a number of incidents required that she perform live surveillance of the store parking lot during the period from April 24 through May 23 – vandalism, a store employee who was

possibly smoking marijuana, and an issue involving an employee assigned stocking duties. Transcript at 25. Claimant's supervisor, however, testified that the employer maintained an internal reporting system that required claimant document the type of incidents to which she referred, and that there was no record that claimant had documented any of the incidents about which she testified. Transcript at 29-30. The record also shows that when claimant met her supervisor on May 31 to discuss absences from her office, she told him she had called in sick on May 22, but said nothing about parking lot surveillance she may have been performing during the period about which she was questioned. Transcript at 23.

We also note that claimant's response to a question about the specific details about her parking lot surveillance was not responsive. The ALJ asked the following question about claimant's May 2 work hours and received the following response:

Q Is it your testimony that [you performed parking lot surveillance] for seven hours that day?

A I worked for my full shift. And any day, like on my car accident day, and the days I was sick, I put in for sick days. Transcript at 19.

Nor was claimant able to provide a plausible explanation why, at the May 31 meeting with her supervisor, she provided no reasons why she had been absent for her office during the period from April 24 through May 23. When the ALJ asked claimant if, on May 31, her supervisor addressed the issue of days for which she claimed "time for time not worked," claimant responded:

A No. He asked me why. He informed me and this was his format of questioning, he said 'You know what, Julie, this is like a whiplander interrogation.' And he says, 'I want you to tell me why?' And I said, 'What do you mean why?' And he said, 'I want you to tell me why about your attendance?' And he says, 'Are your – have you been home painting?' He went off on this little side avenue in which the gist of the conversation I thought was still about the attendance for the days and vacation. Transcript at 24.

For the foregoing reasons, we find that claimant's assertion – that the employer erred in concluding that she had not worked a number of her full shifts because she frequently left her office to perform in person surveillance of the store parking lot – was not credible. We have therefore found facts in accordance with the employer's evidence. Based on that evidence, we conclude that claimant engaged in theft of time from the employer by failing to work all scheduled work hours on May 2, 10, 20 and 23, 2016, and by failing to take approved leave for hours not worked on those dates.<sup>2</sup>

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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)(A). The record

---

<sup>2</sup> Although the employer claimed that claimant failed to work all scheduled work hours on a total of 18 occasions during the period from April 24 through May 23, 2016, it presented specific evidence regarding claimant's work hours for only four of these occasions – May 2, 10, 20 and 23. We therefore conclude that the employer did not meet its burden to prove that claimant engaged in misconduct on any dates other than the four for which it offered evidence of claimant's work hours.

establishes that claimant failed to work all the hours she was scheduled to work on at four separate occasions within a few weeks. As a result, her actions were neither single nor infrequent.

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that the employer would excuse her failure to work the hours she was scheduled to work.

We therefore conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 16-UI-67130 is affirmed.

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

**DATE of Service:** October 18, 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.

**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.