

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1235**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 19, 2016, the Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct (decision # 75549). Claimant filed a timely request for hearing. On October 14, 2016, ALJ Hall conducted a hearing, and issued Hearing Decision 16-UI-69280, affirming the administrative decision. On November 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) F & R Manufacturing employed claimant as a sales executive from May 19, 2008 until August 18, 2016. Claimant's father was one of the employer's partners; claimant's supervisor was the other partner.

(2) Although the employer had no written attendance policies, and claimant's relationship with her supervisor was very informal, claimant knew that her supervisor expected her to contact him in advance of her scheduled shift if she was unable to report to work or was going to be late.

(3) On May 4, 2016, claimant failed to report for work, and on May 11, 2016, claimant did not work her entire shift. On May 13, 2016, claimant met with her father and supervisor; during the meeting, claimant expressed her unhappiness with her work environment, and also talked about personal matters that were affecting her work performance. On May 16, 2016, claimant met with her supervisor and they agreed to change her work schedule so that claimant would work four days a week, from 8:00 a.m. to 4:30 p.m. each day, with a one half hour lunch. Claimant's supervisor hoped that claimant would be better able to adhere to this schedule and that the schedule would give her time during the week to attend to her personal issues.

(4) On May 26, 2016, claimant texted her supervisor 39 minutes before her shift was scheduled to begin to tell him that she would not report for work. Claimant stated "I'm not in the right state of mind at all to be there." Exhibit 1, Additional Comments to Form 220.

(5) On May 27, 2016, claimant's supervisor told her that if she failed to report for a scheduled shift, he would consider that claimant had voluntarily quit her job. He also instructed her to call and not text him in advance of her shift if she was unable to report for work or was going to be late. Exhibit 1, Additional Comments to Form 220.

(6) On July 15, 27, and 28, claimant texted her supervisor in advance of her scheduled shift to notify him that she was ill and unable to report for work. On July 25, 2016, claimant texted her supervisor after her shift was scheduled to begin that she was unable to come to work because she had missed a July 24 flight from California to Oregon. On July 27, 2016, claimant did not report to work; she texted her supervisor at 1:07 p.m. to explain that she had gotten in home late from her California trip, had slept through her alarm, and would not be coming to work on that day. Exhibit 1, Additional Comments to Form 220.

(7) On July 29 and August 1, 2016, claimant texted her supervisor approximately two hours after her shift was scheduled to begin to notify him that she was ill and unable to work on that day.

(8) On August 2, 2016, claimant did not report for work and did not contact her supervisor in advance of her shift to tell him that she was unable to work on that day. On August 3, 2016, claimant's supervisor met with her and told her he was giving her the day off with pay so that claimant could decide whether she wanted to continue working for the employer. On August 4, 2016, claimant reported to work and told her supervisor she wanted to continue to work for the employer.

(9) On August 16, 2016, claimant texted her supervisor at 7:34 a.m. to tell him that would not be reporting to work on August 16 and 17 because she needed to meet with attorneys concerning her husband's legal matters. Also on August 16, claimant texted her supervisor at 11:29 a.m. to tell him that she was "[s]till waiting on them to give my statement," and then texted him again at 4:48 p.m. to state that her husband's trial had been postponed and that she "will be at work the rest of the week." Exhibit 1, September 16, 2016 email.

(10) On August 17, 2016, claimant did not report for work and did not contact her supervisor in advance of her shift to tell him she was unable to work on that day.

(11) On August 18, 2016, claimant reported for work. Her supervisor told her that because she had not shown up for work on the preceding day, he considered her to have voluntarily quit her job. Claimant's supervisor told claimant to leave the workplace, because she was no longer welcome.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant for misconduct.

**Work Separation.** The employer characterized claimant's August 18, 2016 work separation as a voluntary quit because he had previously warned claimant that if she failed to report for work and failed to tell him in advance of her shift that she was unable to work, he would consider that she had voluntarily left work. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-

0038(2)(b). The actions of claimant's supervisor on August 18, 2016, clearly indicated that he was no longer willing to allow claimant to continue working for the employer: he directed claimant to leave the workplace, and told her she was no longer welcome in the workplace. Claimant's work separation was therefore a discharge.

**Discharge.** 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has 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 understood, as a matter of common sense, that the employer expected her to report on time for her scheduled shifts, and contact her supervisor in advance of her scheduled shift if she was unable to work or was going to be late. In addition, claimant's supervisor had warned her in May 2016 and again in August 2016 that claimant needed to notify him in advance of her shift if she was going to be absent. Claimant had notified her supervisor that she would be absent from work on August 16 and 17, 2016 because she of her involvement in her husband's legal matters. Late in the day on August 16, at 4:48 p.m., however, claimant texted her supervisor, told him that her husband's trial had been postponed, and assured him that she would be at work for the rest of the week. On August 17, however, claimant did not report for work and did not contact her supervisor in advance of her shift to inform him that she would be absent. Claimant's failure to notify her supervisor about her absence constituted a deliberate disregard of the employer's expectations and was at least wantonly negligent.

Claimant asserted that her failure to notify her supervisor about her August 17 absence occurred because she had "a lot going on" in regard to her husband's legal matters, and that "personal issues" had created such a stressful situation for her that she forgot to tell her supervisor that she would not be reporting for work on August 17. In regard to the situation in which claimant was involved, she provided no explanation of what she was required or expected to do in regard to her husband's legal matters, and no explanation regarding the extent or nature of the stress this situation created for her. We also find it highly unlikely that, after she had been warned on August 1 that she would lose her job if she failed to inform her supervisor in advance about her absences, that claimant would forget to do so on August 17. Also unlikely is claimant's assertion that, after texting her supervisor three times on August 16 to update him about her situation, she then forgot to tell him about a change in circumstances that required her to be absent from work on August 17. For these reasons, we reject claimant's contention that her failure to notify her supervisor about her August 17 absence resulted from a lapse in memory. Claimant knew or should have known that the employer expected her to report her absence from work in advance of the time her shift was scheduled to begin. Her failure to do so on August 17 was a wantonly negligent violation of the standards of behavior the employer expected of her.

Claimant's failure to report her August 17 absence in advance of her shift cannot be excused as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(A) provides that, for conduct to qualify as an isolated instance of poor judgment, the conduct must be a "single or infrequent occurrence," and not a "repeated act or pattern" of other willful or wantonly negligent behavior. Prior to August 17, claimant violated the employer's expectations regarding attendance on at least two occasions. On July 25, 2016, after the time her shift was scheduled to begin, claimant notified her supervisor that she would not be able to work that day because she had missed a July 24 flight from California to Oregon. On August 2, she did not report for work and did not contact her supervisor in advance to tell him about her absence. Claimant presented no reason why she was unable to report her absences from work on July 25 and August 2 prior to the time her shifts were scheduled to begin, and we conclude that her failure to do so demonstrated willful and wantonly negligent disregard for the employer's expectations concerning attendance. Claimant's violation of the employer's standards of behavior in regard to attendance was therefore not a single or infrequent occurrence, and her August 17 conduct cannot be excused as an isolated instance of poor judgment.

Nor did claimant's behavior result from a good faith error. Although claimant testified that she and her supervisor had a "mutual understanding" regarding her absences from work (Audio Recording at 22:42), the record shows that her supervisor had warned claimant on August 3 that further violations of the employer's expectations concerning attendance would result in the loss of her job. Given this warning, claimant could not have reasonably believed that the employer would excuse her failure to notify her supervisor in advance that she would be absent on August 17.

The employer discharged claimant for misconduct. She is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-69280 is affirmed.

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

**DATE of Service:** November 14, 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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