

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0303**

*Modified*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 134747). Claimant filed a timely request for hearing. On February 15, 2017, ALJ Logan conducted a hearing, and on February 17, 2017 issued Hearing Decision 17-UI-77265, affirming the Department's decision.<sup>1</sup> On March 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Postal Express, Inc. employed claimant as a delivery driver from July 7, 2016 to October 9, 2016.

(2) The employer required employees to work their scheduled shifts, and, unless they were on an approved leave of absence, to notify the employer each time they were going to miss a scheduled shift. Claimant knew or should have known the employer's requirements as a matter of common sense.

(3) The location at which claimant worked was understaffed. Claimant regularly exerted himself by repeatedly lifting heavy boxes and regularly worked overtime. Claimant began to feel run down and ill. Claimant regularly told his acting manager that the employer needed to hire more people and that he was working too hard and too many hours. Claimant asked human resources to hire additional staff.

(4) During the days prior to September 29, 2016, claimant did not feel right. By September 29, 2016, he felt dizzy, weak, tired, felt unable to get out of bed, and when he took deep breaths he wheezed and coughed. Claimant worked a partial shift but eventually felt as though he could not go on; he felt so ill that he considered it unsafe to drive the employer's van because he might accidentally crash it.

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<sup>1</sup> Claimant disconnected from the telephone hearing after 27 minutes 07 seconds. Thereafter, the ALJ continued the hearing to take the employer's witness's testimony and ended the hearing after 33 minutes 51 seconds.

(5) Claimant felt ill and scared because he did not know what was wrong with him. He did not know how long he would need off work to recover from his symptoms. During the middle of his shift, claimant called the acting manager and left a voicemail message stating that he was taking a temporary leave of absence and going home. Claimant covered his shifts through Saturday, and then left work.

(6) Later that day, the acting manager called claimant. Claimant did not answer the phone and the acting manager did not leave a message for him. Claimant did not make any attempt to respond to the acting manager's call or to communicate with the employer. Claimant went to bed and did not get up until Saturday, October 3, 2016. He continued to feel ill. Claimant did not report to work or initiate any contact with the acting manager or anyone else during the following one and one-half weeks.

(7) On October 9, 2016, claimant sent a text message to the acting manager stating the he was still sick.<sup>2</sup> The acting manager replied by text message, "best of luck to you, you know we don't – I think we're done." Audio recording at 13:05. Claimant construed the acting manager's message to mean that the employer did not need him anymore and the employer had moved on or hired someone to replace him.

(8) After October 9, 2016, claimant did not initiate any further contact with the employer, and the employer did not initiate any further contact with claimant.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant is disqualified from benefits. However, we disagree that claimant voluntarily left work on September 29, 2016, and conclude instead that the employer discharged claimant for misconduct on October 9, 2016.

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 ALJ found as fact that claimant voluntarily left work, reasoning that although claimant testified that he had not quit, "claimant ceased contacting employer and ceased reporting for work" when he "could have continued to work for employer for an additional period of time by following employer's policies for calling in and requesting a leave of absence," making the work separation a quit. Hearing Decision 17-UI-77265 at 2, 4. The ALJ also found as fact that the date of the work separation was September 29<sup>th</sup> and that the effective date of claimant's disqualification from unemployment benefits was September 25, 2016. Hearing Decision 17-UI-77265 at 2, 5. We disagree.

Although claimant walked off the job on September 29<sup>th</sup> and had very minimal contact with the employer thereafter, circumstances suggest he did not walk off the job with the intent to sever his employment relationship with the employer. He covered his shifts through Saturday, left a voicemail message for the acting manager in which he characterized his leaving as a temporary leave of absence,

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<sup>2</sup> Claimant testified that he contacted the acting manager one and one-half weeks after September 29, 2016. Audio recording at ~ 12:55. We reasonably infer that one and one-half weeks is 10 days. We therefore infer that claimant contacted the acting manager on October 9<sup>th</sup>, which is 10 days after September 29<sup>th</sup>. That said, it is unfortunate that the ALJ did not ask either witness if they knew the date of the text message exchange or ask what was the date of claimant's final paycheck, either of which might have helped to pinpoint the discharge date with more accuracy.

and, later, sent a text message to the acting manager indicating that he was still sick and unable to work. Had claimant intended to permanently sever his employment relationship with the employer when he walked off the job on September 29<sup>th</sup>, it is more likely than not that he would not have taken any such steps to inform the acting manager about his condition and ability to work and instead would likely have just left and ceased all contact. The work separation was not, therefore, a voluntary leaving.

Claimant was willing to continue working for the employer, as demonstrated by his acts of covering his shifts, stating he was on a leave of absence, and checking in with the acting manager both when he left and again on October 9<sup>th</sup>. It is apparent from the acting manager's response to claimant's October 9<sup>th</sup> text message wishing claimant good luck but stating that "we're done" that the employer was, as of that point in time, unwilling to allow claimant to continue working.<sup>3</sup> The work separation was, therefore, a discharge, and the discharge occurred on October 9, 2016.

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) 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. Absences due to illness, isolated acts of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to report to work as scheduled, and, if he was unable to do so, to notify the employer that he was going to be absent from work. The expectation was reasonable, is common to most workplaces, and claimant should have known it as a matter of common sense. Claimant violated the expectation by walking off the job in the middle of a shift on September 29<sup>th</sup> to take an indefinite temporary leave of absence, leaving only a vague voicemail for his acting manager, and then being absent from work without another word to the employer for the next ten days. Claimant violated the employer's expectation that he communicate about his absences and availability for work under circumstances where he was conscious of his conduct and knew or should have known that it would violate the employer's expectations. His violation was, therefore, wantonly negligent.

Claimant's absences were due to illness, and are therefore excused from being considered misconduct, but his failures to contact the employer about his absences are not excusable. Claimant argued that he was too sick to communicate with anyone and, after leaving work on September 29<sup>th</sup> remained in bed until October 3<sup>rd</sup>. We find it unlikely that an individual who was so sick he was entirely unable to get out of bed and lacked the capacity to even send a text message would not seek medical attention, regardless of his medical insurance status. We are also unconvinced, based on claimant's description of his symptoms and condition, that he was physically incapable of communicating with the employer

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<sup>3</sup> See accord *Van Rijn v. Employment Department*, 237 Or. App. 39, 238 P.3d 419 (2010) (claimant's manager instructed claimant to leave under circumstances where there was nothing that reasonably suggested to claimant that he would be welcome to remain at or return to work).

about his absences or need for time off work. Claimant's failure to communicate with the employer about his absences was not excusable due to illness.

Claimant's conduct cannot be excused as a good faith error. Although he argued that he did not feel the need to contact the employer because he had covered some of his shifts and left the voicemail stating that he was taking a temporary leave of absence, it was both objectively and subjectively unreasonable for claimant to have held such a belief. Claimant did not cover all the shifts he missed, only those through Saturday, yet still did not communicate with the employer about his need for additional time off work. Claimant did not tell the employer in his voicemail to the acting manager how long he thought he would be off work, or why he was taking temporary leave. Claimant did not actually speak to the acting manager or anyone else about taking leave. Claimant was aware that no one expressly or impliedly authorized him to take a leave of absence. In fact, it was apparent from the acting manager's call to claimant later the same day – a call claimant was aware had occurred – that he wanted to discuss matters with claimant; claimant, however, chose not to answer the call and made no effort to return the call. Given those circumstances, claimant did not sincerely believe he had satisfied his obligation to communicate with the employer about his absences from work and did not have any basis for believing it was unnecessary to communicate with the employer about his absences from work. Rather, he was aware he was taking an extended but undefined period off work, that the employer was understaffed, and that the acting manager wanted to speak with him about his absences, and chose not to answer the phone or return the call. Claimant did not act in good faith with respect to communicating with the employer about his absences, and his failure to communicate was, therefore, not excusable as a good faith error.

Claimant's failure to communicate with the employer about his absences also was not excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior that does not exceed mere poor judgment; an act of poor judgment occurs each time claimant consciously decided to take action (or fail to act). OAR 471-030-0038(1)(d)(A), (B) and (D). This record does not contain any evidence suggesting how many times claimant made a conscious decision not to communicate with the employer about his absences from work after his decision not to answer the acting manager's call on September 29<sup>th</sup> and not to return that call. Accordingly, we must conclude that claimant's conduct was isolated for purposes of this analysis. Although isolated, however, claimant's conduct exceeded mere poor judgment by making a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d)(D). Employers hire and schedule employees to work shifts according to the employer's business needs. As such, employers generally need to be able to rely upon employees to either report to work when scheduled or communicate about their absences. Anything less would make it impossible for employers to hire and schedule employees as suits their business needs. No reasonable employer under any circumstances can be expected to tolerate an employee walking off the job mid-shift leaving only a vague voicemail message about needing a temporary leave of absence, ignoring and not returning the acting manager's call about the walk-off and absences, and then taking an indefinite leave of absence he knew he had not been authorized to take. Claimant's decision to act as he did made a continued employment relationship impossible, and therefore exceeded mere poor judgment and cannot be excused.

For the foregoing reasons, we conclude that the employer discharged claimant for misconduct on October 9, 2016. He is therefore disqualified from receiving unemployment insurance benefits effective

October 9, 2016, until he requalifies for benefits by earning four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 17-UI-77265 is modified as to the nature of the work separation and the date of the disqualification, as outlined above.

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

**DATE of Service:** April 3, 2017

**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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