

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0476**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 151817). Claimant filed a timely request for hearing. On March 30, 2017, ALJ Seideman conducted a hearing, and on April 7, 2017, issued Hearing Decision 17-UI-80578, affirming the administrative decision. On April 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0090(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090. We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Vector, Inc. employed claimant as a technical trainer from August 22 to December 16, 2016. The employer was a call center that provided customer service.

(2) Claimant was ill and was unable to work on December 14 and 15, 2016. The employer's executive directors became concerned because claimant had exceeded all of the time off the employer permitted him to take. The directors "wanted to have an administrative meeting with [claimant] to assess what the situation was and how we could move forward with both of our best interests at heart." Transcript at 13.

(3) On December 15, 2016, one of the employer's executive directors asked that claimant report to the employer's office for a face-to-face meeting with her and the other executive director at 9 a.m. on December 16. The executive director cancelled calls that claimant had scheduled with clients on December 16 so that claimant could participate in the meeting. Transcript at 17.

(4) After the director notified claimant about the December 16 meeting, claimant became concerned about the employer's treatment of his clients. On December 16, he sent one of the directors a text

message in which he questioned the employer's treatment of two of his students. The director responded to claimant with the following text message: "Are you on your way in?" Claimant then sent the director this text message: "No." Exhibit 4. Claimant and the director continued to exchange text messages in which the director insisted that claimant report for the meeting, and claimant told her that he needed answers to the questions he had about his students. Claimant was reluctant to meet with the directors because he wanted them to respond in writing or text messages to his questions. He believed that the directors might subsequently deny any oral statements they would make in a meeting with him. Transcript at 26, 32.

(5) After exchanging several texts with claimant on December 16, the directors concluded that he had abandoned his job by refusing to report for the scheduled meeting. One of the directors sent claimant a text message in which she denied that claimant had been discharged and told him "[y]ou refused to come in to work and have just left us high and dry so your job is gone ... but not because of us come in and bring the key thank you." Exhibit 4. Claimant wanted to continue his work for the employer, but wanted the employer to first answer the questions he had asked about his student. Transcript at 33.

**CONCLUSION AND REASONS:** We disagree with the ALJ, and conclude that the employer discharged claimant, but not for misconduct.

**Nature of the work separation:** If the employer 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

At hearing, the employer's witnesses asserted that claimant voluntarily left work, contending that he chose to abandon his job by refusing to report for a meeting he had been directed to attend on December 16. Claimant, however, argued that the employer discharged him because of his insistence that they answer his questions about his students. The employer's text message, in which it told claimant that his "job is gone" and instructed him to bring in his key, was a clear indication that the employer was no longer willing to allow claimant to continue working. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 knew, as a matter of common sense, that he was expected to comply with the directives of his supervisors. The director's order that he meet face-to-face with her and the other director to discuss his

concerns was not unreasonable. His refusal to participate in the December 16 meeting was insubordination, *i.e.*, an intentional refusal to comply with a supervisor's reasonable request. Claimant's conduct was therefore at least a wantonly negligent disregard of the employer's expectation that he comply with his supervisors' directives.

While claimant's refusal to attend the December 16 meeting may have been a wantonly negligent violation of the employer's standards, it is excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). A claimant's behavior may be excused as an isolated instance of poor judgment if it was single of infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To be excused, the behavior at issue must also not have been of a type that exceeded "mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, the record contains no evidence that claimant violated the employer's expectations prior to December 16. As a result, claimant's behavior meets the first part of the test to be excused as an isolated instance of poor judgment.

Considering the circumstances surrounding claimant's conduct, we conclude that it did not exceed mere poor judgment. Claimant's behavior did not create an irreparable breach of trust in the employment relationship. Claimant's refusal to attend the meeting was at least in part caused by his insistence that the directors answer his questions about service provided to claimant's clients. Prior to December 16, claimant's relationship with his employer had been "very friendly"; the employer had received compliments about claimant's work and the directors were sufficiently pleased with his work that they were considering making claimant a manager or partner. Exhibit 5 and Transcript at 31. Under these circumstances, a reasonable employer would conclude that a disagreement about attending a meeting could be resolved, particularly when the disagreement resulted at least partly from the employee's desire to make sure his clients were well served; such an employer would not conclude that it could no longer trust the employee to perform his job duties. We also find that claimant's conduct did not make a continued employment relationship impossible. There is no evidence in the record that claimant's refusal to attend the December 16 meeting adversely affected the employer's business or caused any damage to the employer's authority, business status or coworkers. Because claimant's behavior meets both parts of the test necessary to be excused as an isolated instance of poor judgment, it was not misconduct.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-80578 is affirmed.

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

**DATE of Service:** May 18, 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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