

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0625**

*Affirmed*  
*No Disqualification*  
*(No Descalificación)*

**PROCEDURAL HISTORY:** On March 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120148). Claimant filed a timely request for hearing. On May 4, 2017, ALJ Sgroi conducted a hearing at which the employer did not appear, and on May 12, 2017 issued Hearing Decision 17-UI-83278, reversing the Department's decision. On May 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) City Liquidators employed claimant to perform a variety of duties from November 2005 until February 22 or 23, 2017.

(2) The employer expected claimant to report for work as scheduled and to notify the employer if he was going to be absent. Claimant understood the employer's expectation as a matter of common sense.

(3) On February 14, 2017, a day that claimant was not scheduled to work, claimant became drunk and was arrested for driving under the influence of intoxicants. Claimant was released from custody sometime around or before his next work shift was scheduled to begin on February 15, 2017. At the time claimant was released, claimant's wife took him to a hospital for observation because she was concerned about claimant's condition. Claimant's wife did not call the employer to report his absence because she was not fluent in English. Claimant was discharged from the hospital at approximately 7:00 p.m. on February 15, 2017, after his scheduled shift had ended.

(4) On February 16, 2017 at 8:20 a.m., before the start of his shift, claimant called the employer and spoke to a manager, who was also the son of the employer's owner. The manager told claimant that claimant needed to speak to the owner before he could return to work. The manager told claimant that the owner was out of town at that time.

(5) After February 16, 2016, claimant tried more than once to reach the owner by phone but the owner was still away. On February 22 or 23, 2017, when claimant called the employer again trying to reach

the owner, claimant spoke to the manager. The manager told claimant the owner would be away from the workplace and out of state for three weeks. The manager told claimant that he did not work there anymore and he did not have a job.

(6) On February 22 or 23, 2017, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). Isolated instances of poor judgment are not misconduct. OAR 471-030-038(3)(b).

ORS 657.176(2)(g) requires a disqualification from unemployment insurance benefits if the claimant has been discharged for being absent or tardy in reporting to work and the absence or tardiness occurred as the result of the use of alcohol on a second or any subsequent occasion within a period of 12 months unless the claimant was participating in a recognized alcohol rehabilitation program at the time of the absence or tardiness, or is so participating within 10 days after the date of the discharge or suspension, and the person provides to the department documentation of program participation.

The employer carries the burden to by a preponderance of the evidence that claimant is disqualified from receiving benefits. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant was hospitalized when he missed work on February 15, 2017, his hospitalization was apparently the result of a voluntary choice to become highly intoxicated on February 14, 2017. Because claimant consciously chose to drink to excess, which set into motion the circumstances that prevented him from reporting to work on February 15, 2017, his behavior exhibited an indifference to the consequences of his over-consumption of alcohol since he knew or should have known of the deleterious effects of an excessive consumption of alcohol. Claimant's absence from work on February 15, 2017 was at least a wantonly negligent violation of the employer's standards.

Claimant's wantonly negligent behavior that caused his absence from work on February 15, 2017 may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior is excused on this ground if, first, it was a single or infrequent event rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In addition, to be excused as an isolated instance of poor judgment, the behavior at issue also must not have been of a type that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, the employer did not appear at the hearing and no evidence was presented on its behalf. The evidence in the record is insufficient to show that claimant's failure to notify the employer of his absence from work on February 15 was willful or wantonly negligent, or that the exercise of poor judgment the resulted in his absence that day was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence. As well,

claimant's violation of the employer's standards, which resulted in a single day's absence, appears to have been by its nature a relatively insignificant event in an employment relationship that had lasted for over twelve years. Absent additional evidence, of which there is none in this record, claimant's single day of absence did not cause an irreparable breach of trust and did not make a continued employment relationship impossible. Since it meets all the requisites, claimant's wantonly negligent behavior on February 15, 2017 is excused from constituting misconduct as an isolated instance of poor judgment.

With respect to ORS 657.176(2)(g), the record fails to show that claimant was absent or tardy in reporting to work due to the use of alcohol on a prior occasion within a period of 12 months. Claimant therefore is not disqualified from receiving benefits under that provision.

The employer discharged claimant but not for misconduct or disqualifying conduct under ORS 657.176(2)(g). Claimant therefore is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-83278 is affirmed. *Decisión de la Audiencia 17-UI-83278 queda confirmada.*

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

**DATE of Service: June 19, 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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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