

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0803**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101236). Claimant filed a timely request for hearing. On June 5, 2017, ALJ Amesbury conducted a hearing, and on June 16, 2017 issued Hearing Decision 17-UI-85927, affirming the Department's decision. On July 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The ALJ held the record open until June 9, 2017, to allow the employer to submit additional documents, which were marked as Exhibit 1. Claimant submitted a response to this exhibit, which was marked as Exhibit 2. Exhibits 1 and 2 were admitted into evidence without objection. Exhibits 1 and 2 contain the "Life Story" of a resident of the employer's facility. The "Life Story" contains identifying information about the resident, and neither the employer nor the ALJ redacted this identifying information. EAB has redacted all information from Exhibit 1 by which the resident could be identified, however.

**FINDINGS OF FACT:** (1) Heirloom Living Centers employed claimant as an activity director at a residential care facility from September 9, 2016 to April 7, 2017.

(2) The employer provided residential, community-based memory care services and was licensed through the Oregon Department of Human Services (DHS). DHS regulations required the employer to develop and maintain certain records, including a "Life Story" and activity plan for each resident. "Life Stories" and activity plans were created by an employee interviewing a resident and family regarding his or her personal history, desires and attributes and then completing a written form. The employer was subject to fines and other regulatory actions if it failed to maintain an up-to-date "Life Story" and activity plan for each of its residents. The employer expected claimant, as activity director, to create and maintain a "Life Story" and activity plan for each resident at the facility where claimant worked. Claimant understood the employer's expectations.

(3) On March 20, 2017, the care manager took over as the new administrator at the facility where claimant worked and became claimant's supervisor. The new administrator previously had trained claimant regarding how to complete a "Life story" and activity plan for each resident. However, in reviewing resident records on March 20, the administrator discovered that no life stories and activity plans existed for the facility's 26 current residents.

(4) On March 21, 2017, the administrator met with claimant to discuss the issue. Claimant admitted that it was his responsibility to complete the life stories and activity plan forms for residents but had not done so because the previous administrator had been lax with him regarding the forms. The new administrator went over the DHS regulations with claimant to review what had to be done and again showed claimant how to complete the forms. The administrator directed claimant to complete life stories and activity plans for all 26 residents within the next two weeks, at which time his work performance would be evaluated. Claimant signed a written acknowledgement of the meeting and the nature of the discussion that took place.

(5) On April 6, 2017, a DHS inspector came to the facility to conduct an inspection, including a review of the "Life Story" and activity plan for each resident. The inspector discovered that no such forms had been completed for any resident and concluded the employer was in violation of DHS regulations.

(6) On April 7, 2017, the administrator discharged claimant for failing to complete the forms as directed.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, we agree with the ALJ that claimant was not credible. Claimant's testimony that he did not meet with the administrator on March 21, 2017 or on any other day and was never assigned any duties with regard to preparation of life stories and personal activity forms was implausible given the nature of his position, testimony from an employee that she witnessed claimant go into a meeting with the administrator that day and claimant's signature on a contemporaneous record that memorialized the meeting. Because claimant was not a credible witness we found facts in dispute in accordance with the employer's evidence.

The employer had the right to expect claimant to complete a "Life Story" and activity plan for each of its 26 residents, particularly after the administrator met with him on March 21, gave him copies of the

relevant regulations, directed him to complete the forms within two weeks and had him acknowledge the meeting by signing a contemporaneously written description of their discussion. Claimant violated that expectation regarding each current resident and placed the employer at risk for a regulatory sanction. Claimant's failure to even begin completing the forms, more likely than not, was a willful act of insubordination, but at the very least, demonstrated conscious indifference to the consequences of his inaction for the employer.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's failure to prepare the required life history and activity plan applied to each of the employer's 26 current residents, with whom he interacted on a regular basis regarding activities and snacks. Audio Record ~ 39:00 to 41:30. His failures to act to obtain the relevant information from the resident, the resident's family or both, to prepare the activity plan for the resident in question, involved conscious exercises of poor judgment regarding each resident. Her conduct was, therefore, not isolated. Additionally, some conduct, even if isolated, may not be excused if it exceeded mere poor judgment by causing an irreparable breach of trust or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant's failure to even begin to comply with an express directive from a supervisor constituted a blatant act of insubordination. Moreover, that same failure placed the employer's business at risk for regulatory enforcement action. Under those circumstances, viewed objectively, claimant's failures to prepare life story and activity plans for each current resident made it impossible for the employer to trust claimant to perform essential work tasks any longer and created an irreparable breach of trust in the employment relationship. Claimant's conduct therefore cannot be excused because it exceeded mere poor judgment. Nor can claimant's conduct be excused as a good faith error. Claimant did not assert or show that he reasonably believed, or had a factual basis for believing the employer would condone his inaction, particularly after being warned that his progress would be evaluated two weeks from March 21, 2017.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 17-UI-85927 is affirmed.

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

**DATE of Service:** August 1, 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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