

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1317**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 81253). Claimant filed a timely request for hearing. On October 25, 2017, ALJ Griffin conducted a hearing, and on October 26, 2017 issued Hearing Decision 17-UI-72188, concluding the employer discharged claimant, but not for misconduct. On November 15, 2017, the Department filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Fred Meyer Stores, Inc. employed claimant as a produce clerk from May 21, 2006 to August 2, 2017.

(2) The employer expected claimant to report to work as scheduled, or notify the employer by calling a manager or person in charge prior to the start of her shift if she was going to be absent. The employer also expected claimant to check the work schedule and know when she was scheduled to report to work. Claimant understood those expectations.

(3) On June 8, 2017, the employer scheduled claimant to work. Claimant did not report to work or notify the employer she was going to be absent from work because she slept through her cell phone alarm and did not wake up until after her shift had already begun. Claimant called the employer after she awoke; the employer instructed her to report to work on June 9, 2017.

(4) On June 9, 2017, the employer suspended claimant, and reinstated her effective July 20, 2017. The employer warned claimant that the employer would discharge claimant if she failed to call in prior to missing a shift again in the future.

(5) The employer scheduled claimant to work on July 20<sup>th</sup>, July 21<sup>st</sup> and July 22<sup>nd</sup>, and claimant reported to work as scheduled. On July 22, 2017, claimant was injured in a car accident and was medically restricted from working until July 27<sup>th</sup>. Claimant was scheduled to work on July 23<sup>rd</sup> and July 24<sup>th</sup>, and notified the employer prior to her shifts that she was going to be absent from work. Claimant knew she was not scheduled to work on July 25<sup>th</sup> and July 26<sup>th</sup>, and did not go to work or notify the employer she was going to be absent. Claimant had not checked the work schedule for the following week prior to leaving work on July 22<sup>nd</sup> and did not contact the employer to ask when she was next scheduled to work.

(6) On July 26, 2017, a person in charge sent a text message to claimant asking how she was feeling. Claimant replied to the text message and indicated that she would bring a doctor's note to the employer the next day. Claimant did not ask about her work schedule.

(7) On July 27, 2017, the employer scheduled claimant to work at 4:00 a.m. Claimant did not report to work or notify the employer she would be absent from work. At 8:00 a.m., the person in charge called claimant and left a voicemail about claimant's missed shift. Claimant did not call or otherwise contact the person in charge or the employer. She did not bring the employer the doctor's note as she had promised the previous day.

(8) The employer scheduled claimant to work on July 28<sup>th</sup>, July 29<sup>th</sup> and July 30<sup>th</sup>. Claimant did not report to work for any of those shifts and did not contact the employer to report that she would be absent from work. On August 2, 2017, the employer discharged claimant for abandoning her job.

(9) On November 15, 2017, Hearing Decision 17-UI-95439, which concluded in part that claimant's suspension was not for "a willful or wantonly negligent violation of the standards of conduct an employer has a right to expect of its employees" and was therefore not for misconduct, became final without any party having filed an application for review of that decision.<sup>1</sup>

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, but conclude that the discharge was 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. 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.

The ALJ concluded that claimant's "successive absences can be attributed to her failure to check the schedule," and that "[n]to checking one's work schedule is a circumstance that a reasonable person

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<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

would know would be likely to result in missing work,” making claimant’s failure to check her work schedule wantonly negligent. Hearing Decision 17-UI-95442 at 3. We agree with the ALJ that claimant’s failure to check her work schedule was wantonly negligent for those reasons. The ALJ also concluded, however, that claimant’s conduct was excusable as an isolated instance of poor judgment because, although claimant had previously failed to notify the employer of her absence in June 2017, “in that case claimant slept through her alarm, and did not do so willfully or with wanton negligence,” making her conduct in July an isolated instance of poor judgment. Hearing Decision 17-UI-95442 at 4. We disagree that claimant’s conduct was excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d) defines an “isolated instance of poor judgment,” in pertinent part, as a single or infrequent exercise of willful or wantonly negligent poor judgment, as opposed to a repeated act or pattern of other willful or wantonly negligent conduct. Additionally, an isolated instance of poor judgment may not be excused if it exceeded mere poor judgment; conduct exceeds mere poor judgment if, among other things, it causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In its written argument, the Department argued that claimant’s conduct in July 2017 should not be considered isolated because claimant’s “suspension for failing to call in or show up to work on June 8, 2017” made the July 2017 conduct part of a “pattern of failing to call in or show up for scheduled shifts.” See Department’s written argument. We disagree. Claimant’s June 8, 2017 conduct and resultant suspension was, as a matter of law, not willful or wantonly negligent. See Hearing Decision 17-UI-95439 (final date November 15, 2017). We are therefore precluded from concluding in these proceedings that it was. See ORS 657.273. Therefore, claimant’s June 8, 2017 conduct cannot be considered a repeated act or part of a pattern of other willful or wantonly negligent conduct.

Nevertheless, we conclude that claimant’s July 2017 conduct cannot be considered isolated because it involved repeated wantonly negligent failures to act, each of which required formation of a separate poor judgment. In the context of claimant’s suspension, reinstatement for failing to notify the employer of her absence from work, and the warning she received that further instances of the same conduct would result in her discharge, claimant knew the importance the employer placed upon receiving notification of her absences. She knew she did not know her schedule for the week at issue. Transcript at 18. She testified that she believed the next time she needed to report to work after July 24<sup>th</sup> was “either after – or on the 27<sup>th</sup> when my doctor’s note ended,” but she did not report to work that day and failed to contact the employer to ask about her schedule prior to July 27<sup>th</sup>.<sup>2</sup> Transcript at 17. She communicated with a person in charge on July 26<sup>th</sup> but, despite knowing she did not know when she was next scheduled to work, failed to ask what her schedule was. She received a call from the person in charge about missing work on July 27<sup>th</sup> but chose not to return the call. She also chose not to contact the employer again after that date. Each of claimant’s failures to act – her failure to check the work schedule, failure to ask the person in charge when she was scheduled to work, failure to return the person in charge’s July 27<sup>th</sup> call, and failure to contact the employer about her work schedule or status

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<sup>2</sup> Claimant claimed she did not know her work schedule after July 22<sup>nd</sup> and only called in on July 23<sup>rd</sup> and July 24<sup>th</sup> “[t]o cover my rear and.” Transcript at 23. However, it is clear from claimant’s actions in calling in on July 23<sup>rd</sup> and July 24<sup>th</sup>, but not July 25<sup>th</sup> and July 26<sup>th</sup>, and her testimony that she believed she would be scheduled to work on or after July 27<sup>th</sup>, that claimant’s claim that she was ignorant of the schedule is not credible.

thereafter, amounted to a separate decision to act or not to act, and therefore amounted to repeated exercises of poor judgment with respect to her attendance at work. The July 2017 conduct therefore cannot be considered “isolated” or excused as an isolated instance of poor judgment.

Even if we had concluded that claimant’s July 2017 conduct was isolated, in the context of claimant’s suspension, reinstatement and warning, claimant failed to contact the employer again about her attendance or employment status. Although she said did not contact the employer because she assumed she would be fired, her failure to report to work for scheduled shifts, about which she either knew or should have known, respond to a person in charge’s call to her, or otherwise contact the employer about her return to work or employment status, amounted to job abandonment.<sup>3</sup> Her conduct created an irreparable breach of trust in the employment relationship, such that the employer could no longer trust claimant to report to work as scheduled or contact the employer about her attendance when requested. Additionally, her job abandonment and refusal to communicate with the employer when requested also made it, as a practical matter, impossible for the employer to continue to employ her. For those reasons, claimant’s conduct in July 2017 exceeded mere poor judgment and is, therefore, not excusable, either as an isolated instance of poor judgment or any other exception to misconduct.

For the reasons set forth herein, we conclude that the employer discharged claimant for misconduct. Claimant therefore is disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-95442 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: December 13, 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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<sup>3</sup> *See* Transcript at 25.