

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1468**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144345). The employer filed a timely request for hearing. On September 13, 2017 and October 5, 2017, ALJ Wyatt conducted a hearing at which claimant failed to appear, and on October 13, 2017 issued Hearing Decision 17-UI-94519, affirming the Department's decision. On October 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

On November 17, 2017, EAB issued Appeals Board Decision 2017-EAB-1208, reversing Hearing Decision 17-UI-94519 and remanding the case to the Office of Administrative Hearings for additional evidence. On December 12, 2017, ALJ Wyatt conducted the hearing on remand, and on December 15, 2017, issued Hearing Decision 17-UI-99150, concluding the employer discharged claimant for misconduct. On December 18, 2017, claimant filed an application for review of Hearing Decision 17-UI-99150 with EAB.

**EVIDENTIARY MATTER:** The ALJ admitted the employer's documents, which he identified as Exhibits 1 and 2, into evidence, but failed to mark them as such. As a clerical matter, we have identified those exhibits based on the ALJ's description of them and marked them as Exhibit 1 and Exhibit 2. Audio Record (October 5, 2017 hearing) ~ 8:00 to 11:00.

**FINDINGS OF FACT:** (1) CTL Management, Inc. employed claimant as a maintenance technician from December 1, 2014 to April 3, 2017. The employer considered claimant a "split" employee, in that he was assigned to work at one employer property on Saturday and Sunday, and another employer property on Monday, Tuesday and Wednesday. Audio Record ~ 20:10 to 20:30.

(2) The employer expected claimant to follow instructions received from supervisors and to avoid being careless. Claimant was aware of the employer's expectations.

(3) On November 29, 2016, the employer met with claimant to generally discuss work performance issues that had occurred on unspecified dates during the two prior months. The employer discussed claimant's occasional failures to follow instructions in work orders, substandard work, taking too much time to complete work orders, carelessness, the improper use of some equipment and his failures to immediately return apartment keys to a drop box after completing work. On that date, the employer gave claimant a written warning for carelessness, substandard work and failure to follow instructions. Exhibit 2.

(4) On December 6, 2016, the employer gave claimant his annual review. Claimant reviewed some listed deficiencies in his performance ratings and responded that he understood that "improvement is needed with my performance. Now that I have gotten pass a lot of stressful events in my personal life, I am hopeful to focus more on my work. Improvement will be forthcoming." Exhibit 2. Claimant had been experiencing medical issues that required medications at the time, and the medications he was prescribed caused claimant "dizzy spells" which affected his work performance. Transcript (December 12, 2017 hearing) at 21. Claimant had hoped, on December 6, "that that with the change in medications that things would be turning out much better. Transcript (December 12, 2017 hearing) at 30. However, that was not the case, as claimant's dizzy spells got "worse and worse." Transcript (December 12, 2017 hearing) at 21.

(5) On December 29, 2016, claimant did not fully complete a work order as directed for Unit #342 at one of the employer's properties. Part of the work order involved replacing some light bulbs on a chandelier. While doing so, the light fixture fell out of the ceiling due to improper installation and caused a short in the electrical system. Consequently claimant had to install new wiring to repair the electrical system, the result of which was that he did not get out of the unit until after his shift, resulting in his failure to fully complete his work order that day.

(6) On January 7, 2017, claimant left work early due to weather concerns without contacting the manager on duty. However, after freezing rain began falling, claimant attempted to contact the manager on duty several times to inform her that he intended to leave early for safety reasons. Claimant made some of his attempted calls in front of the leasing manager at one of the properties where he worked, but the manager on duty he was attempting to reach never answered the phone. Claimant then notified the leasing manager that he was with that he was leaving, and left when he did to avoid endangering himself and others on the road.

(7) On January 24, 2017, the employer gave claimant a second written warning for "substandard work." Exhibit 1. The warning cited instances of incomplete work orders by claimant, although claimant left notes explaining why he was not able to complete them, primarily involving the need for parts and supplies that had to be ordered. The warning also cited instances of claimant "calling out" from work for various reasons, including a bad back and the January 7 weather incident, without enough prior notice. Exhibit 1. The warning notified claimant that if similar instances of poor work performance occurred and "there are no extenuating circumstances," termination of his employment could result. Exhibit 1.

(8) On March 18, 2017, claimant's supervisor left him a "to do" list to complete that involved painting and maintenance tasks in Unit #325 that was to be completed by March 19, 2017. Audio Record (October 5, 2017 hearing) ~ 23:30 to 25:30. Although claimant reported that the work had been

completed, upon inspection, the manager concluded the work that had been done was of poor quality and was not fully complete. Claimant's supervisor discussed with him the manager's concerns and the need to satisfactorily complete all assigned work tasks.

(9) On or about March 25, 2017, claimant's supervisor left claimant a "to do" list for him to complete on March 26 and 27, a Sunday and Monday. Audio Record (October 5, 2017 hearing) ~ 15:00 to 23:30. On the list, claimant was instructed to complete a painting assignment and miscellaneous repairs in Unit #253, which was unoccupied but scheduled for occupancy on April 1, 2017. Claimant began the assigned work, but then chose to assist another employee with that employee's more extensive painting assignment in another unit, Unit #233. Although both assignments were equally urgent, claimant had not been assigned to work on Unit #233. As a consequence of claimant's failure to complete the work order regarding Unit #253, on Tuesday, March 28, the employer had to rapidly find another employee to complete the work in that unit. Because of claimant's status as a "split employee," claimant worked at another property from March 28 through 30, 2017, followed by his days off, and could not be assigned to complete the work order regarding Unit #253 by April 1, 2017.

(10) On April 3, 2017, the employer discharged claimant for "poor work" and "carelessness" following claimant's failure to complete the "to do" list regarding Unit #253 on March 26 and 27, 2018.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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. 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer discharged claimant for "poor work" and "carelessness" following his failure to satisfactorily complete the assigned work order for Unit #253 by March 28, 2017. Exhibit 1. The record shows that claimant was assigned to work only on Unit #253 and instead abandoned that work after beginning it to work with another employee on Unit #233. The record therefore established that claimant received a clear instruction to work in a particular unit and chose to disregard that instruction under circumstances where, after having received a final written warning on January 24 for failing to follow instructions, he knew or should have known that failing to do so again would probably violated the standards of behavior the employer had the right to expect of him. Claimant's conduct on March 26 and March 27 was, therefore, at least wantonly negligent.

In Hearing Decision 17-UI-99150, after concluding that claimant's conduct on March 26 and 27 was wantonly negligent, the ALJ concluded that his conduct could not be excused as an isolated instance of poor judgment, reasoning:

The evidence presented [at the two hearings] persuades me that the final violation cannot be excused as an isolated instance of poor judgment. Claimant had previously left work uncompleted in a manner unsatisfactory to the employer on December 29, 2016. Specifically, claimant did not complete a work order as directed for unit #342. Claimant did not clean up after his work in the unit, leaving the remainder of the work and cleanup for someone else to complete. That violation of the employer's expectations was presented to claimant in the form of a final coaching record on January 24, 2017. ... [C]laimant asserted that he had a medical condition that caused him to "struggle" to meet the employer's expectations. However, claimant never brought any medical condition to the employer's attention, nor did he request medical leave or any accommodation for a medical condition.

Hearing Decision 17-UI-99150 at 4. We disagree with the ALJ's conclusion that claimant's conduct on March 26 and 27 cannot be excused as an isolated instance of poor judgment.

An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent occurrence of willful or wantonly negligent conduct rather than a repeated act or pattern of other willfully or wantonly negligent behavior. OAR 471-030-0038(1)(d). Although claimant was coached or warned by the employer about incidents of incomplete or careless work on November 29, 2016, December 6, 2016, December 29, 2016, January 24, 2017 and March 19, 2017, the record shows, by a preponderance of credible evidence, that despite recurrent dizzy spells from his medical condition that got "worse and worse" up to the time of claimant's discharge and that eventually resulted in surgery and radiation therapy in December 2017, claimant attempted to complete his assigned tasks and otherwise follow the employer's expectations to the best of his ability. *See* Transcript (December 12, 2017 hearing) at 21. For example, although claimant occasionally failed to promptly return apartment keys to an employer drop box after completing work orders on apartment units, it was undisputed that those failures were due to his worsening memory and that he always returned the keys shortly after becoming aware of his mistakes in that regard. Although claimant failed to complete a work order on December 29, 2016 in Unit #342, claimant demonstrated that the primary reason for that failure was the need to install new wiring to repair an electrical system that shorted out after an improperly installed chandelier fell to the floor, which he did. Although on January 7, 2017, claimant failed to speak to the manager on duty about leaving early before doing so, claimant demonstrated that he was not indifferent to the employer's interests by attempting to contact the manager several times by phone first without success. Similarly, the employer explained that often when claimant failed to complete assigned work orders, he typically left notes explaining why he had not completed the assigned tasks, whether because he needed supplies or parts that needed to be ordered or for other reasons, again demonstrating that he was not indifferent to the employer's interests or concerns. Accordingly, on this record, the employer failed to meet its burden to show that claimant's violations of the employer's expectations prior to March 26 and 27, 2017 were at least wantonly negligent, i.e., the result of *conscious* indifference to the consequences of his actions for the employer. Claimant's wantonly negligent violation of the employer's expectations regarding Unit #253 on March 26 and 27, 2017 therefore was an isolated instance.

Under OAR 471-030-0038(1)(d)(D) some willful or wantonly negligent conduct, even if isolated, such as conduct that violates law, is tantamount to unlawful conduct, creates irreparable breaches of trust in the employment relationship or otherwise makes a continued employment relationship impossible exceeds mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). Here, claimant's failure to complete the work order for Unit #253 was not unlawful, tantamount to unlawful conduct, and viewed objectively on its own, did not create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-99150 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service: January 25, 2018**

**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>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.