

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0089**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162203). Claimant filed a timely request for hearing. On January 11, 2018, ALJ Amesbury conducted a hearing, and on January 12, 2018 issued Hearing Decision 18-UI-100820, affirming decision # 162203. On January 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB. Claimant's argument contained information that was not part of the hearing record and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered claimant's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Western Pneumatics, Inc. employed claimant from May 15, 2017 until October 13, 2017 as a field installer of equipment manufactured by the employer.

(2) The employer expected claimant to notify his supervisor or lead worker if he was unable to work due to illness or another reason. The employer's attendance policy further provided that it would consider an employee to have abandoned his position if he was absent for three consecutive days without notifying his supervisor or human resources of his absence, the reason for it, and the expected date of return. Claimant understood the employer's policy.

(3) On October 9, 2017, midway through his shift, claimant told his two lead workers that he did not feel well and needed to go to the doctor. Claimant left work early and went to the doctor. Later on October 9, claimant sent his supervisor a text message stating, "I don't know if I need to report this to you or not, but I got a prescription for Tylenol with codeine." Transcript at 8. Claimant did not provide additional detail. The supervisor responded that claimant should not operate heavy machinery at work while taking the prescription.

(4) Claimant worked his entire shifts on October 10 and 11, 2017. On October 11, 2017, claimant told a “job boss” at work that he was not feeling well and that he would need to take time off to get better and care for his father, who also was ill. The job boss told claimant to “get a hold of [his supervisor].” Transcript at 33. Claimant texted his supervisor asking to meet for lunch, but the supervisor was not available.

(5) After work, at 5:55 p.m. on October 11, claimant sent his supervisor a text message stating, “I’m sorry but I’m going to have to be gone for a couple weeks, maybe longer. I’ve got some ongoing issues and I need to get some of them resolved.” Transcript at 8. The supervisor tried to contact claimant by telephone but claimant did not return his calls. The supervisor did not leave telephone messages for claimant, or tell claimant that he needed additional information regarding claimant’s absence or that claimant’s job was in jeopardy if he did not contact the employer.

(6) Claimant was still sick and taking the prescription medication on Thursday, October 12 and Friday, October 13, 2017. The employer expected claimant to report to work on October 12 and 13, 2017. Claimant did not report to work or contact the employer on October 12 or 13. Claimant was willing to return to work once his illness subsided and he addressed his father’s health needs.

(7) On October 13, 2017, the employer discharged claimant because he did not report to work on October 12 and 13 and did not return the supervisor’s calls.

(8) On October 14, 2017, claimant noticed that his supervisor had called him. Claimant did not call the supervisor back. On October 16, 2017, claimant received a letter from the employer, dated October 13, stating that the employer had terminated his employment.

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

**Nature of the Work Separation.** If the employee 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 was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

In Hearing Decision 18-UI-100820, the ALJ concluded that the work separation was a quit, reasoning that the employer had work available for claimant, but that, because claimant stopped reporting for work and stated that he would be absent for an “indefinite period of time” without providing detail about his absence, claimant “signaled” that he was voluntarily quitting his job. Hearing Decision 18-UI-100820 at 3. We disagree with the ALJ’s characterization of the work separation. Claimant did, in fact, give the employer notice that he intended to return to work and claimant testified that he intended to return to work after his and his father’s conditions improved. The employer, however, clearly signaled it was no longer willing to allow claimant to work by sending claimant a termination letter on October 13 after he missed work on two consecutive days without returning the supervisor’s telephone calls. The work separation therefore was a discharge.

**Discharge.** 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Having found that claimant quit work, the ALJ addressed claimant's reasons for voluntarily leaving work rather than the employer's reasons for discharging claimant, and the ALJ's reasoning is thus inapplicable here, where we have found the employer discharged claimant for failing to provide adequate notice of his time off work and to respond to the supervisor's telephone calls on October 12 and 13.

Claimant knew, or should have known as a matter of common sense, that the employer expected him to provide more than a vague reason such as "personal issues" for a two-week absence from work. His text message to his head supervisor on October 11 was inadequate as to his reason for time off and his return to work date. Moreover, the supervisor had not responded to claimant's request before claimant missed work for two days. Claimant argued at hearing that his faulty notice was a good faith error because in the past he had merely asked for time off then taken time off, without doing more, and that he had "told enough people" before he missed work. Transcript at 30, 31. We reject that argument because claimant should have known, as a matter of common sense, that an absence of two weeks would require more communication with his supervisor than a vague text message regarding "personal issues." Although on October 9, claimant told two leads and his supervisor some details about his and his father's illnesses, when claimant told his job boss on October 11 that he needed to take time off work, the job boss told claimant to contact his supervisor. Claimant therefore knew or should have known that the employer expected him to tell his supervisor, and not just his job boss, when he began an absence from work that it was due to illness. Claimant's failure to provide sufficient detail for his absence to his supervisor constituted a wantonly negligent disregard of the employer's reasonable expectations.

Although claimant's faulty notice was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that is a single or 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 also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

There is no information that claimant had violated the employer's expectations regarding attendance before October 12. Nor do we find the two absences on October 12 and 13 to constitute a repeated act, because the employer did not show that it required a separate notice for each day of an absence, and

there was only one faulty notice. Claimant did, however, fail to respond to the supervisor's telephone calls on October 12 and 13. We conclude that, under the circumstances, claimant's failure to contact the supervisor before the employer discharged him on October 13 was not a separate willful or wantonly negligent disregard of the employer's expectations because claimant did not notice the supervisor had contacted him until October 14, which we find plausible considering claimant was "very sick," felt "horrible, like garbage," and was taking a narcotic prescription for his illness. Transcript at 25, 29. Moreover, claimant did not suspect the employer might contact him on those days because claimant had sent a text message, albeit a faulty one, to his supervisor, and the employer's own policy did not provide for discharge for failing to give adequate notice until an employee missed three consecutive days of work. Claimant had missed only two days of work. Claimant's violation of the employer's standards of behavior in regard to attendance was therefore a single or infrequent occurrence.

For these same reasons, we also conclude that claimant's faulty notice and failure to respond to the supervisor's calls did not exceed mere poor judgment. Under these circumstances, claimant's behavior likely was attributable more to his illness than a disregard for the employer's interests. An employer would not objectively conclude from claimant's behavior that it could not trust claimant to conform to its expectations in the future. Because it meets both prongs of the standard, claimant's behavior in failing to provide adequate notice for his absences on October 12 and 13, while it was wantonly negligent, is excused from being disqualifying misconduct as an isolated instance of poor judgment.

We thus conclude that the employer discharged claimant not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 18-UI-100820 is set aside, as outlined above.

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

**DATE of Service:** February 26, 2018

**NOTE:** 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.

**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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