

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0111**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 113919). The employer filed a timely request for hearing. On January 23, 2018, ALJ Clink conducted a hearing at which the claimant failed to appear, and on January 24, 2018 issued Hearing Decision 18-UI-101551, affirming the Department's decision. On January 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Portland Chiropractors Clinic, LLC employed claimant as a front desk receptionist in training. Claimant lived in Clackamas, Oregon, and the clinic was located in Northeast Portland.

(2) The employer expected claimant to report to its clinic when it scheduled her to do so.

(3) After completing interviews of claimant, the employer's owner scheduled her to "job shadow" from 9:00 a.m. to noon on November 1, 2017 for a receptionist position. Claimant completed the three hours of job shadowing on November 1, and the employer gave her employment eligibility documents at that time. The owner scheduled claimant to return for additional training and to return her employment eligibility documents on November 2, 2017.

(4) On November 2, 2017, claimant called the employer and reported to a staff person that she was having car problems. The owner rescheduled claimant to report to the clinic at 9:00 a.m. on November 4 to complete the additional training and bring her employment eligibility documents.

(5) On November 4, 2017, claimant left a voicemail message at the employer's clinic at 7:30 a.m. stating that she did not have transportation to go to work. The owner received the message when he arrived at the clinic at 8:45 a.m. He called the claimant and told her that "it's not going to work out," but the employer would pay her for the three hours she spent job shadowing on November 1. Audio Record at 16:27-16:35. The employer mailed claimant payment of \$39 for the three hours she spent at the clinic on November 1, and had no further contact from claimant.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, 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 of an employee. Isolated instances of poor judgment and good faith errors 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).

As a preliminary matter, we address the employer's assertion that claimant "was not, and never has been an employee of [the employer]." Exhibit 1 at 2. "Employment" means service for an employer performed for remuneration or under any contract of hire, written or oral, express or implied. ORS 657.030(1). ORS 653.010(2) provides that to "employ" includes to "suffer or permit to work." "Hours worked" means "all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." OAR 839-020-0004(19) (July 1, 2016). The employer's requirement that claimant report to work on its premises served the business purpose for the employer of training and otherwise preparing claimant for work and evaluating if she was suitable for further employment. The employer paid claimant for the service. Based on this record, the employer employed claimant from November 1 until it was no longer willing to allow her to work when she failed to report to work on November 4, 2017.

The employer had a reasonable right to expect that, absent exigent circumstances, claimant would report for work as scheduled. Claimant should have understood that expectation as a matter of common sense. The record does not show that claimant knew or should have known she would not have transportation to work, or time to arrange alternate transportation on November 2. However, on November 4, claimant left a voicemail for the employer an hour and a half before she was scheduled to begin her shift stating she did not have transportation to work. Claimant lived within a reasonable commuting distance from the employer's clinic, and likely could have arranged for alternate transportation to work. We therefore conclude that claimant's failure to report to work on November 4 was a wantonly negligent violation of the employer's attendance expectations.

We conclude, however, that claimant's failure to report to work on November 4 was an isolated instance of poor judgment. A claimant's behavior is an "isolated instance of poor judgment" if it is, among other things, 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 constitute an isolated act of poor judgment, in addition to being isolated, claimant's behavior also must not have "exceed[ed] mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Having found that claimant's behavior on November 2 was not a willful or wantonly violation, claimant had no other willful or wantonly negligent violations before November 4. Her conduct on November 4 was, therefore, isolated. Nor was claimant's failure to report to work due to lack of personal transportation was not the type of wantonly negligent behavior that exceeded mere poor judgment. Although the employer reasonably had concerns about claimant's dependability, a reasonable employer would not have concluded that it could no longer trust claimant or that a continued employment relationship with claimant was impossible. Because claimant's behavior on November 4 was isolated and did not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible, claimant's behavior was excused from constituting misconduct as an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 18-UI-101551 is affirmed.

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

**DATE of Service:** March 2, 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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