

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0635**

*Modified*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100153). Claimant filed a timely request for hearing. On June 8, 2018, ALJ Griffin conducted a hearing, and on June 11, 2018, issued Order No. 18-UI-111060, concluding the employer discharged claimant but not for misconduct. On June 13, 2018, ALJ Griffin issued Amended Order No. 18-UI-111226, “to correct erroneous provisions in the ORDER and CONCLUSIONS OF LAW sections of the previous order” concluding the employer discharged claimant for misconduct and her disqualification from benefits was effective beginning February 25, 2018.<sup>1</sup> On June 21, 2018, claimant filed an application for review of Amended Order No. 18-UI-111226 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Lane Community College employed claimant as a dishwasher from October 27, 2015 to March 9, 2018.

(2) The employer expected claimant to report for work as scheduled or notify a kitchen supervisor by phone or the executive chef by text message that she would be absent or late two hours prior to the start of a scheduled shift so her shift could be covered. Claimant was aware of and understood the employer’s expectations.

(3) The employer posted its weekly work schedules for dishwashers in both of its kitchens and online, and also left copies of the schedules in its kitchens for employees to take with them if necessary. Claimant typically took a written copy of her work schedule home with her but sometimes also checked her schedule online when she was able to do so.

(4) On February 12, 2018, claimant was scheduled to work from 12:00 p.m. to 6:00 p.m. but did not report for work or notify the employer that she would be absent. When claimant next worked on

<sup>1</sup> Amended Order No. 18-UI-111226 at 1.

February 16, 2018, the executive chef met with her and reminded her of the employer's expectation that she notify them in advance of her shift when she would be absent or late to allow them the opportunity to cover her shift. Claimant responded that she understood the employer's notification policy.

(5) On February 23, 2018, the executive chef contacted claimant and asked her if she would fill in for a dishwasher that was going to be absent. Claimant agreed to do so, but did not report for work later that day or notify the employer that she would be absent.

(6) On February 21 or 22, 2018, the employer scheduled claimant for work shifts on February 26, February 28 and March 2, 2018. Claimant failed to report for work or notify the employer that she would be absent on each of those dates.

(7) On or about March 9, 2018, after claimant failed to communicate with the employer about any of her recent absences from work, the employer discharged claimant for failing to report for work as scheduled on February 23, 26, 28 and March 2 or notify the employer that she would be absent.

**CONCLUSIONS AND REASONS:** We agree that the employer discharged claimant for misconduct. However, claimant's disqualification from receiving unemployment insurance benefits should begin on March 4, 2018, not on February 25, 2018 as the ALJ concluded.

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) (January 11, 2018) 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 the employer's evidence was more credible than claimant's. Claimant's testimony that she was "off" on February 12 and was not scheduled to work on February 26, February 28 and March 2, 2018 was not persuasive because her testimony was based largely on her memory, whereas the executive chef's contrary testimony was based on the written work schedules that had been posted, which he had before him as he testified. Audio Record ~ 17:00 to 19:30. Because the employer's evidence was more probative than claimant's, we found facts in dispute in accordance with the employer's evidence.

The employer had the right to expect claimant to report for work as scheduled or notify the employer in advance if she would be absent or late, particularly after the executive chef met with her on February 16, 2018, and reminded her of the employer's attendance policy. Claimant violated those expectations on February 23, 26, 28 and March 2, 2018. Claimant's failure to notify either the kitchen supervisor, where she was scheduled to work, by phone, or the executive chef by text, that she would be absent at the very least demonstrated her indifference to the consequences of her inaction for the employer. Although

claimant asserted that on February 20, 2018, she left messages on each of the kitchen phones that she would be unable to report for work due to transportation problems for the remainder of the week, she did not dispute the executive chef's testimony that he spoke with claimant personally on February 23<sup>rd</sup> by phone, when she agreed to report for work that day "to fill in for a dishwasher" before failing to either show up for work or notify the employer that she could not. Moreover, if claimant truly had been prevented from reporting for work due to transportation problems, she could have advised the chef at that time of that problem and there was no evidence that she did. Audio Record ~ 5:30 to 6:15. More likely than not, claimant's failure to notify the employer that she would be absent on February 23, 26, 28 and March 2 demonstrated conscious indifference to the consequences of her inaction for the employer, when she knew or should have known that her conduct would probably violate the employer's attendance expectations.

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 failures to notify the employer that she would be absent was repeated, and more likely than not, involved conscious exercises of poor judgment regarding each absence. Her conduct was, therefore, not isolated. Nor can claimant's conduct be excused as a good faith error. Claimant did not assert or show that she reasonably believed, or had a factual basis for believing either that she had provided adequate notice to the employer about her absences, or that the employer would condone her failures to notify it she would be absent, particularly after being warned on February 16<sup>th</sup> about a similar failure that occurred on February 12, 2018.

The employer discharged claimant for misconduct. Claimant is disqualified, beginning March 4, 2018, from receiving unemployment insurance benefits based on her work separation until she has earned at least four times her weekly benefit amount from work in subject employment.

**DECISION:** Order No. 18-UI-111226 is modified, as outlined above.

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

**DATE of Service:** July 26, 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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