

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0877

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90342). Claimant filed a timely request for hearing. On August 27, 2018, ALJ S. Lee conducted a hearing, and on August 31, 2018 issued Order No. 18-UI-115917, affirming the Department's decision. On September 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant filed a written argument with EAB in which he asserted that the ALJ erred by not concluding that he was discharged for an isolated instance of poor judgment. However, we agree with the ALJ that claimant's conduct, failing to report to work on May 22 and 24, 2018, may not be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act. OAR 471-030-0038(1)(d)(A) (January 11, 2018). Moreover, acts that create irreparable breaches of trust in the employment relationship exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant failed to report to work on May 22 and May 24 in apparent protest to his supervisor having asked him to allow a tenant to ride with him in his work vehicle on May 21, 2018. Claimant considered that to be a violation of the employer's policy regarding allowing non-employees to ride in the employer's vehicles. There is no evidence in the record to show that claimant was asked to engage in the same or other activities that he disagreed with or that posed a risk to his health or safety on May 22 or May 24, 2018. Claimant's failure to report to work on May 22 and 24 demonstrated indifference to the employer's attendance expectations, and was a willful violation of those expectations. His conduct was not isolated because it was a repeated act that occurred on May 22 and May 24. The record does not show that claimant's absences were due to illness, disability or other exigent circumstances on May 22 or May 24. Moreover, claimant's refusal to work as scheduled violated a fundamental requirement of any employment relationship, and was sufficient to create an irreparable breach of trust that made a continued relationship

impossible. Claimant's conduct therefore exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment for that reason.

EAB reviewed the entire record and claimant's written argument. On *de novo* review and pursuant to ORS 657.275(2), Order No. 18-UI-115917 is **adopted**.

DECISION: Order No. 18-UI-115917 is affirmed.

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

DATE of Service: October 12, 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. 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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