

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0881**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 92720). The employer filed a timely request for hearing. On August 10, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing on August 24, 2018 to the parties at their addresses of record. On August 24, 2018, ALJ Snyder conducted a hearing at which the claimant failed to appear, and on August 31, 2018, issued Order No. 18-UI-115923, concluding the employer discharged claimant for misconduct. On September 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted new information with his written argument and stated on his application for review, "I was never notified of the employer's appeal nor the appeal hearing on August 24, 2018." Claimant's statement is construed as a request for EAB to consider new information under OAR 471-041-0090(2) (October 29, 2006). Under that rule, claimant is required to establish that factors or circumstances beyond his reasonable control prevented him from appearing at the hearing and offering the new information into evidence at that time.

With respect to claimant's assertion that he did not receive the August 10, 2018 notice of hearing, we note that the notice was mailed to claimant's address in Oregon City, Oregon, which was his address of record with the Department, and the same address to which the Department mailed decision # 92720 and OAH mailed Order No. 18-UI-115923, both of which claimant apparently received. We also note that documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012); ORS 40.135(1)(q). Absent more information, claimant's bare assertion that he did not receive the notice fails to overcome the presumption that he did. Claimant therefore failed to establish that factors or circumstances beyond his reasonable control prevented him from appearing at the hearing and offering the new information into evidence at that time. Claimant's request for EAB to consider new information under OAR 471-041-0090(2) therefore is denied.

EAB considered claimant's written argument only to the extent it was based on information in the record.

**FINDINGS OF FACT:** (1) Cascadia Behavioral employed claimant from November 12, 2012 until June 22, 2018 as a residential counselor at a respite facility for clients with behavioral health issues receiving temporary care.

(2) The employer expected residential counselors to remain awake and on site during their shifts in case there was an emergency with one of the clients. Claimant was relieved of his duties only during two fifteen-minute breaks and a thirty-minute meal break during his shift. Claimant understood as a matter of common sense that the employer expected him to be working during his shift unless he was on a break or meal period. The employer informed counselors at hire that sleeping on the job would result in immediate discharge.

(3) Claimant was scheduled to work the night shift from 11:00 p.m. June 18, 2018 until 7:30 a.m. on June 19, 2018. During his shift, claimant left work to go to the store for personal reasons from 11:30 p.m. until 2:25 a.m. Claimant returned to the work site, but remained in his car while conducting a personal telephone call until 3:00 a.m. Claimant returned to work for an hour. At 4:00 a.m., claimant told a coworker he was going to take a nap, and took a nap until 5:00 a.m. Claimant remained "clocked in" for his entire shift. Audio Record at 16:14 to 16:28.

(4) After June 19, 2018, claimant's manager spoke to claimant about the time he spent not working during his shift on June 18 and 19, 2018. Claimant told the manager that he thought he could put his breaks together and use them for personal tasks. Claimant did not explain why he was clocked in for his entire shift although he spent 4.5 hours not working.

(5) Before June 19, 2018, claimant had received no warnings or other discipline at work.

(6) On June 22, 2018, the employer discharged claimant because during his night shift on June 18, 2018, he spent more than four hours running a personal errand, making a personal telephone call and taking a nap while on duty.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant for misconduct.

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. 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).

The employer had a right to expect claimant to be working during his shift unless claimant was on one of his two fifteen-minute breaks or his meal period. It was therefore reasonable for the employer to

expect claimant to refrain from leaving work, engaging in personal telephone calls and taking naps unless he was on a rest or meal break. On claimant's shift that began on June 18, 2018, claimant intentionally left work to go to a store for personal items, sat in his car engaged in a personal telephone call, and took a nap while he was "on the clock." By doing so, claimant willfully violated the employer's expectations. When claimant's manager asked claimant about his conduct, claimant did not offer a persuasive reason for why he spent more than four hours of his shift engaged in personal business when, even if he had grouped his breaks together, only 45 minutes of the more than four hours of personal time could have been attributed to breaks or a meal period. The record therefore does not show that claimant's conduct was based on a good faith error.

An isolated incident of poor judgment is excluded from the scope of what qualifies as misconduct. OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d) (January 11, 2018) provides that to be considered an isolated instance of poor judgment, "the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." Here, claimant engaged in three separate acts in willful disregard of the employer's policies. Although all three acts occurred during the same shift, they were separate acts that required a separate awareness and willful disregard of the circumstances and employer's interest present at the time of each act. Claimant knew he was not permitted to leave the work site, but did so for almost three hours during his shift. Three hours later, when he returned to the work site, claimant made a separate decision to sit in his car for thirty minutes rather than enter the work facility. Later during his shift, claimant made a third choice to take a nap during his shift. Those three separate acts were not a single or infrequent occurrence, but instead were repeated willful violations of the employer's policies to remain on the work site, and to refrain from sleeping or conducting personal business while "on the clock." For those reasons, his conduct was not an isolated instance of poor judgment, and it therefore cannot be excused.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-115923 is affirmed.

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

**DATE of Service:** October 9, 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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