

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1317

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On July 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140344). Claimant filed a timely request for hearing. On July 30, 2014, ALJ Seideman conducted a hearing, and on July 31, 2014, issued Hearing Decision 14-UI-22602, affirming the Department's decision. On August 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Furniture Warehouse employed claimant as a delivery laborer from September 5, 2013 to June 17, 2014.

(2) The employer expected claimant to refrain from taking unauthorized breaks to smoke cigarettes and from smoking in its delivery trucks. Claimant was aware of the employer's expectations.

(3) On March 25, 2014, the employer's owner gave claimant a written warning for taking unauthorized smoke breaks. Claimant agreed to comply with the owner's expectation regarding smoke breaks. A few weeks later, the owner gave claimant a verbal warning for additional violations of the owner's prohibition against unauthorized smoke breaks.

(4) On June 12, 2014, the owner drove by the employer's business site and saw claimant smoking taking an unauthorized smoke break. Claimant was off work from June 13 through 16, during which the owner received information from customers and others that claimant had smoked in front of a customer residence during the course of a delivery, had reeked of cigarettes during a separate customer delivery and had smoked in a delivery truck.

(5) On June 17, 2014, when claimant reported for work the owner discharged claimant for taking unauthorized smoke breaks and for smoking in a delivery truck. When confronted by the owner about the reasons for his discharge, claimant did not deny, explain or offer any excuses for his conduct.

**CONCLUSIONS AND REASONS:** We agree with the Department and ALJ. 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) (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's owner discharged claimant, in part, for taking unauthorized smoke breaks and for smoking in a delivery truck after giving claimant warnings against taking unauthorized smoke breaks in March and April of 2014. Although claimant denied he was aware he was prohibited from smoking in a delivery truck and that he possessed any cigarettes on June 12, he did not dispute the owner's assertion that he did not offer any denial, explanation or excuse for his reported conduct when informed of the reasons for his discharge on June 17. Audio Record ~ 8:30 to 9:00; 13:45 to 14:00. Moreover, claimant admitted that he had smoked in front of a customer's residence as alleged and did not assert or show that he had obtained prior authorization to do so after being repeatedly warned against taking unauthorized smoke breaks. Audio Record ~ 12:45 to 13:30. More likely than not, claimant consciously violated the owner's expectations regarding smoking on the job as alleged.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Claimant's conduct was not isolated and occurred under circumstances that demonstrated conscious indifference to the employer's prohibitions. Moreover, his conduct was not the result of a good faith error in his understanding of the employer's expectations. Claimant acknowledged at hearing that on March 25, 2014, he agreed with the owner that he would obtain prior authorization before taking smoke breaks and did not assert or show that he disputed the owner's allegations when informed of the reasons for his discharge on June 17. Audio Record ~ 8:30 to 9:00; 11:15 to 11:30.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 14-UI-22602 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** September 9, 2014

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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