

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1883

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85850). On October 8, 2014, decision # 85850 became final without a request for hearing having been filed. On October 18, 2014, claimant filed a late request for hearing. On November 26, 2014, ALJ Triana conducted a hearing and issued Hearing Decision 14-UI-29472, allowing claimant's late request for hearing, and affirming decision # 85850. On December 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No party applied for review of that portion of Hearing Decision 14-UI-29472 allowing claimant's late request for hearing. EAB therefore limited its review to whether claimant's discharge was for misconduct.

**FINDINGS OF FACT:** (1) Washman LLC employed claimant as a cashier from December 13, 2011 to August 22, 2014.

(2) The employer expected its cashiers to refrain from taking the employer's money for their personal use. Claimant understood that expectation.

(3) On August 14, 2014, claimant's supervisor counted claimant's "bank" of the employer's money and confirmed that no money was missing. Transcript at 35. On August 21, 2014, claimant's supervisor again counted claimant's bank and discovered that \$30 was missing. On August 22, 2014, the employer's human resources manager asked claimant what happened to the \$30. Claimant admitted that he sometimes took \$5 to \$10 of the employer's money to pay for his lunch.

(4) The employer discharged claimant for taking its money for his personal use.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from taking its money for his personal use. In sometimes taking \$5 to \$10 of the employer's money to pay for his lunch, claimant consciously engaged he knew violated the employer's expectations, and therefore willfully violated those expectations. Claimant's conduct cannot be excused as an isolated instance of poor judgment because it was a repeated act, and not a single or infrequent occurrence. *See* OAR 471-030-0038(1)(d). Nor can claimant's conduct be excused as a good faith error. Claimant understood the employer expected him to refrain from taking its money for his personal use. His conduct was not the result of an error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 14-UI-29472 is affirmed.

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

**DATE of Service:** January 26, 2015

**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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