

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0087**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105052). Claimant filed a timely request for hearing. On December 29, 2014, ALJ Vincent conducted a hearing, and on January 12, 2015 issued Hearing Decision 15-UI-31663, affirming the Department's decision. On February 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Pacificorp employed claimant from March 29, 1993 to July 15, 2014 as a serviceperson.

(2) The employer expected claimant to accurately and honestly report the time he worked. The employer permitted claimant to take fifteen-minute morning and afternoon breaks, and an hour for lunch. The employer did not consider time claimant spent engaging in personal business to be work time. Claimant understood the employer's expectations. If a serviceperson's lunch break was interrupted by a service call, the employer permitted the serviceperson to take the break when the service call was completed.

(3) On June 16, 2014, claimant took a morning break at his home for 36 minutes. Claimant did not record that his break exceeded fifteen minutes. Claimant returned home for a lunch break at 12:06 p.m., but was interrupted by a service call at 12:50 p.m. Claimant left for the service call at 1:05 p.m. Claimant spent a portion of his lunch break cleaning his work truck and checking a map for the service call. Claimant took a second lunch break at 3:32 p.m. for one hour. Exhibit 1.

(3) On June 18, 2014, claimant took a morning break at his home for 28 minutes. Claimant was home again from 11:54 p.m. to 1:15 p.m., and again for 51 minutes beginning at 2:58 p.m. Claimant did not report that his breaks exceeded fifteen minutes, or that his lunch was more than one hour long. Exhibit 1.

(4) On June 19, 2014, claimant took a morning break at his home for 27 minutes. He also spent 44 minutes assisting his wife with personal business at their storage unit location, and recorded that he was working during that time. Claimant took an additional 23 minutes for lunch, and took a break for one hour and 9 minutes at approximately 2:30 p.m. Claimant did not report that his breaks exceeded fifteen minutes, or that his lunch was more than one hour long. Exhibit 1.

(5) On July 15, 2014, the employer discharged claimant for falsifying his time records.

**CONCLUSIONS 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) (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 discharged claimant for failing to accurately and honestly report the time he worked. Claimant provided a plausible explanation for the two lunch breaks he took on June 16, 2014, testifying that he understood his lunch break "reverted back" to the beginning if it was interrupted by a service call, and he was entitled to begin the lunch hour again when he completed the call. Transcript at 51-53. The employer disagreed but failed to show that claimant's understanding of the interrupted lunch policy was not a good faith error. However, claimant understood lunch breaks that were not interrupted by service calls were one hour long, and breaks, fifteen minutes. In taking breaks and lunches that exceeded those limits and time off work to assist his wife with personal business, and failing to report that he had done so, claimant consciously engaged in conduct he knew violated the employer's expectations regarding timekeeping, and therefore willfully violated its expectations in that regard.

Claimant's conduct cannot 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 or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In addition, acts that create irreparable breaches of trust in the employment relationship make a continued relationship impossible, exceed mere poor judgment, and do not fall within the exculpatory provisions of

OAR 471-030-0038(3). In the present case, claimant exercised poor judgment by taking breaks that exceeded fifteen minutes on June 16, 18 and 19, and by failing to report that he was not working when he was assisting his wife for 44 minutes on June 18. Claimant's exercise of poor judgment therefore was a repeated act and pattern of willful behavior, and not a single or infrequent occurrence. In addition, claimant's willful failure to truthfully record his time, viewed objectively, was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's acts therefore exceeded mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant's conduct be excused as a good faith error. Claimant consciously engaged in conduct he knew violated the employer's expectations. His failure to report his long breaks and lunches as time off work was not the result of errors in his understanding of those expectations.

**DECISION:** Hearing Decision 15-UI-31663 is affirmed.

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

**DATE of Service:** March 17, 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 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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