

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0599**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 161143). The employer filed a timely request for hearing. On May 5, 2015, ALJ Frank conducted a hearing, and on May 13, 2015 issued Hearing Decision 15-UI-38428, concluding the employer discharged claimant for misconduct. On May 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) OnTrack Inc. employed claimant from December 9, 2013 to February 27, 2015 as a cook at the employer's residential facility for clients.

(2) The employer expected claimant to adhere to its healthy kitchen rules to maintain a clean and sanitary working environment. The employer's rules included requiring that claimant to wear gloves when handling raw meat, refrain from stacking food on top of other food in the refrigerator, and serve meals through a window, rather than placing food out where clients would serve themselves. The employer also expected claimant to work with the clients to ensure that they cleaned up spilled food immediately, and left no trash was on the kitchen floor. The employer also expected claimant to ensure the sink drain traps and stove grease traps were cleaned at least once per week, and the kitchen trash was taken out after each of the three daily meals. Claimant understood the employer's expectations.

(3) After a health inspection during the summer of 2014 that listed items that needed to be corrected, the employer's program manager reviewed the health code and the employer's kitchen sanitation rules with claimant, including the requirement to wear gloves when handling raw meat.

(4) On December 30, 2014, the employer gave claimant a written warning when she stacked food on top of other food in the refrigerator, and handled raw meat without using gloves.

(5) On February 10, 2015, a state official conducted a health inspection of the employer's kitchen. The health inspection found claimant allowed clients to serve themselves lunch food on February 10, rather than serving the food through a window or otherwise guarding the food from contamination. Claimant disregarded the rule prohibiting clients to serve themselves food that day because claimant was at a training, and not at the facility that day, she did not expect the health inspector to arrive during lunch that day.

(6) The night of February 19, 2015, claimant observed food spilled in the dry storage pantry, and did not ensure the spilled food was cleaned up.

(7) On February 20, 2015, the human resources director and operations director noticed a foul odor coming from the kitchen, and conducted an inspection of the kitchen while claimant was preparing lunch for the clients. The employer observed claimant handling raw chicken without gloves, an overflowing trash can, uncleaned drain and grease traps that were causing the foul odor, food stacked on top of other food in the refrigerator, and the same spilled food claimant had noticed the prior night.

(8) On February 27, 2015, the employer discharged claimant for failing to maintain sanitary conditions in the kitchen.

**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.

The final incident that led to claimant's discharge was claimant's failure to maintain sanitary conditions in the kitchen before the employer's inspection on February 20, 2015. The employer had the right to expect claimant to follow the employer's rules to ensure the kitchen area remained clean and sanitary. Claimant did not contest the employer's testimony about the conditions it encountered, but, rather, alleged that she was unaware of the rules or not responsible for the violations. Regarding her handling of the raw meat, claimant testified that she did not recall the employer instructing her to wear gloves when handling raw meat. Transcript at 28. However, one employer witness testified firsthand that she discussed this rule with claimant after a state health inspection in 2014, and another gave claimant a written warning for the same conduct in December 2014. The preponderance of the evidence shows claimant understood through training, experience, prior warnings, and common sense all the rules she violated on February 20, including that the employer expected her to use gloves when handling raw meat. Claimant also asserted that the clients, and not her, were responsible for the spilled food, unclean traps, and overflowing garbage. Transcript at 32, 33. Claimant's testimony regarding the spilled food was inconsistent throughout the hearing, and therefore, unpersuasive. Claimant testified first that she

cleaned the spill when the employer showed it to her during the inspection. Transcript at 32. She later testified that she cleaned the spill when she saw it the morning of February 20, before the inspection. Transcript at 38-39. However, the record shows claimant knew there was food spilled in the pantry, but did not ensure it was immediately cleaned up. Claimant acknowledged she was responsible to ensure the food and grease traps were cleaned, but said she was unaware they were not clean on February 20. Transcript 34. Her testimony is unpersuasive because the odor and unclean condition of the traps on February 20 show it is more likely than not that the traps were in that condition because claimant did not clean them or ensure the clients had cleaned them. Moreover, the record shows claimant, as cook, was responsible for the condition of the kitchen, and for ensuring clients completed their chores by following claimant's own example when she performed the chores and by assigning those duties to the clients. Regarding the food stacked in the refrigerator, claimant testified that the food was in grocery bags and she had not had a chance to put it away correctly yet. Transcript at 37. However, the record does not show the employer made any exceptions to its rule to avoid cross contamination of food. The preponderance of the evidence shows claimant's failure to maintain sanitary conditions in the kitchen constituted, at best, a wantonly negligent violation of the employer's reasonable expectations.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record does not show claimant sincerely believed or had a factual basis for believing the employer would condone claimant's failure to follow its sanitation rules. Nor may claimant's conduct be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant's conduct was a repeated act of violating the kitchen sanitation rules. Claimant had knowingly violated the employer's expectations on repeated occasions by stacking food and mishandling meat prior to the warning she received in December 2014, and on February 10, 2015, claimant had knowingly allowed clients to serve themselves food because claimant did not believe the health inspector would arrive that day. Claimant's conduct then was wantonly negligent, as each decision claimant made to ignore the employer's sanitation rules showed her conscious indifference to the standards of behavior the employer expected of her. Thus, her wantonly negligent conduct in the final incident was a repeated act of wantonly negligent conduct.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 15-UI-38428 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;  
J. S. Cromwell, not participating.

**DATE of Service:** July 13, 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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