

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0814**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 131154). Claimant filed a timely request for hearing. On June 15, 2015, ALJ Triana conducted a hearing, and on June 23, 2015, issued Hearing Decision 15-UI-40529, affirming the Department's decision. On July 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Southern Oregon Elmer's LLC employed claimant as a crew member from September 2, 2012 to April 25, 2015.

(2) The employer expected its crew members to perform and then record inventory counts of cigarettes, beer and other inventory items at the beginning and end of each shift. The employer's expectation was set forth in writing and discussed by the regional manager with crew members, including claimant, in a meeting the first week of April, 2015. During that meeting, the regional manager required all crew members to sign a copy of the policy as a reminder of the employer's expectation. Claimant understood the employer's expectation regarding inventory counts.

(3) At the regional manager's meeting with crew members, claimant reported that the prior store manager did not require crew members to perform physical counts of inventory at the end of their shifts if the incoming crew member's inventory count matched the outgoing crew member's original count minus shift sales. The regional manager informed all crew members that the new store manager, who began April 1, would enforce the employer's policy as written.

(4) Between the regional manager's meeting with crew members and April 20, 2015, claimant did not perform inventory counts of cigarettes and beer at the end of her shifts. On Monday, April 20, 2015, the regional manager learned that claimant had not turned in end-of-shift inventory counts during the prior weekend and that ten beers were unaccounted for. On April 20, 2015, the regional manager gave claimant a written warning for failing to perform an end-of-shift inventory count of beer. Transcript at 21-22.

(5) On April 21, 2015, the regional manager had another meeting with all crew members at which she reminded everyone that "Everything had to be counted before and after every shift." Transcript at 23.

(6) On or about April 22, 2015, the store manager reported to the regional manager that claimant had not turned in end-of-shift inventory counts after her shift on April 21, 2015, which occurred after the regional manager's meeting with crew members that day. On April 25, 2015, the employer discharged claimant for that reason.

**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 is conscious of his conduct and knew or should have known that his 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 show misconduct by a preponderance of the 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)

After the regional manager's meeting with crew members the first week of April, the employer had the right to expect claimant to perform end-of-shift inventory counts of beer and cigarettes and turn those counts in to her store manager. Claimant admitted she violated that expectation with regard her shifts between that meeting through April 21 because she "was old and stubborn" and thought the counts "were coming out right" using the method used under the previous store manager. Transcript at 25-26. Claimant's explanation demonstrated her conscious indifference to the employer's inventory count policy and expectations during that entire period, and that she was at least wantonly negligent during each of those shifts.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent

conduct.<sup>1</sup> Claimant's conduct in ignoring the employer's end-of-shift inventory count policy was not isolated, having repeatedly occurred between the regional manager's crew member meeting at the beginning of April 2015 and her last shift on April 21, 2015.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record fails to show claimant sincerely believed, and had a factual basis for believing, that the employer would tolerate her continual violation of its inventory count policy after being warned and reminded about the policy several times during the month she was discharged.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 15-UI-40529 is affirmed.

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

**DATE of Service:** August 21, 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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<sup>1</sup> OAR 471-030-0038(1)(d)(A).