

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0991**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 94832). The employer filed a timely request for hearing. On August 10, 2015, ALJ M. Davis conducted a hearing, and on August 11, 2015, issued Hearing Decision 15-UI-42814, affirming the administrative decision. On August 20, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0090(2)(a) (October 29, 2006). We therefore did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Woof's Dog Bakery and General Store employed claimant as a customer service employee from March 23, to April 18, 2015.

(2) The employer's store included a 6,000 square foot retail sale area, where products were displayed for customers. The owner required that at least one employee be present in the retail sale area at all times. In addition, the employer required that an employee notify another employee if the employee was going to leave the building to take a break. Claimant knew about and understood the employer's expectations. On a number of occasions, the employer's manager orally reprimanded claimant for leaving the retail sale area unattended.

(3) One of the employer's owners and its manager were dissatisfied with claimant's inability to learn and understand the employer's procedure for stocking the store and pricing products. Audio Recording at 15:20 and 15:32. In addition, the employer was unhappy with claimant's failure to comply with its dress code, which required claimant to wear a black polo shirt and clean, dark jeans. On April 14, 2015, the employer's owner gave claimant money to purchase two black polo shirts.

(4) On April 18, 2015, one of the employer's owners discharged claimant because she believed that claimant had left the retail sale area unattended on that date.

**CONCLUSION AND REASONS:** We agree with the ALJ. We conclude that the employer discharged claimant, but not 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).

At the hearing, the employer's witnesses testified that claimant's discharge resulted from a number of concerns, including difficulties learning the employer's stocking and pricing procedures and inability to comply with the employer's dress code, as well as numerous occasions when she left the retail sales area unattended. The employer did not decide to discharge claimant until claimant allegedly left the retail sales area unattended on April 18, 2015. That incident was the proximate cause of the work separation and will be the initial focus of our misconduct analysis. Only if the employer meets its burden to demonstrate that claimant's conduct on April 18 was willful or wantonly negligent will we analyze the prior incidents the employer described. Claimant understood the employer's reasonable expectations that the retail sales area would never be left unattended, and that she needed to notify another employee if she wanted to leave the employer's store to take a break.

In regard to the April 18 incident, the employer's witnesses provided conflicting testimony about claimant's conduct. The employer's manager testified that claimant "left the building completely" on that date. Audio Recording at 12:34. One of the employer's owners, however, gave a different account of claimant's actions. The owner testified that she was in the back stockroom, talking with another employee, when claimant came to the stockroom to talk with them. Claimant's owner determined that there were no employees in the retail sales area and left the stock room to attend to customers in the sales area. Audio Recording at 24:23. Claimant, however, testified that she never left the sales area unattended when she worked for the employer, and did not do so on April 18. Audio Recording at 30:53. Given the inconsistency in the employer's evidence, we give greater weight to claimant's account of her actions on April 18, and have found facts in accordance with her testimony. We conclude that claimant did not engage in willful or wantonly negligent behavior by leaving the retail sales area unattended on April 18, 2015.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 15-UI-42814 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service: September 22, 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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