

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1104**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 152021). The employer filed a timely request for hearing. On September 1, 2015, ALJ M. Davis conducted a hearing, and on September 2, 2015 issued Hearing Decision 15-UI-43817, affirming the Department's decision. On September 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

**FINDINGS OF FACT:** (1) Great Earth Café & Market employed claimant as a clerk and deli worker from February 2 to June 15, 2015.

(2) The employer expected employees to refrain from leaving open food containers at their workstations, and to clean their workstations before leaving work at the end of their shifts. Claimant understood the employer's expectations.

(3) On June 12, 2015, the employer required claimant to continuing working after the end of her scheduled shift to cover for an employee who had called in sick. After claimant worked an additional three hours, the employer's president instructed claimant to leave work. Claimant believed the president wanted her to leave work immediately, and therefore did not clean her workstation before leaving.

(4) On June 15, 2015, claimant left an open food container at her workstation.

(5) The employer discharged claimant for her conduct on June 12 and 15, 2015.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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. 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, for failing to clean her workstation before leaving work on June 12, 2015. However, claimant believed the employer's president wanted her to leave work immediately without cleaning her work station, given that claimant already had worked three hours after her scheduled shift had ended. Claimant arguably should have known she was expected to clean her workstation before leaving work. However, the record shows that claimant sincerely believed, and had a rational basis for believing, that she was complying with the employer's expectations. Claimant's conduct therefore was, at worst, a good faith error, and not misconduct.

The employer also discharged claimant for leaving an open food container at her workstation on June 15, 2015. However, the record fails to show claimant consciously left the open food container at her workstation, or that she consciously engaged in other conduct she knew or should have known would probably result in her doing so. Claimant was careless, arguably negligent, but the record fails to show her conduct was willful, or that it rose to the level of wanton negligence as defined under OAR 471-030-0038(1)(c).

The employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-43817 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** October 7, 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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