

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1305**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 134415). The employer filed a timely request for hearing. On October 12, 2015, ALJ Murdock conducted a hearing, and on October 19, 2015, issued Hearing Decision 15-UI-46116, concluding the employer discharged claimant for misconduct. On November 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The employer offered Exhibit 1 into evidence at the beginning of the hearing but the ALJ did not admit it because the employer failed to provide a copy to claimant and could testify to its contents. The employer testified only about portions of the exhibit at hearing. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. A document submitted by the employer, the "Notice and Reminder to All Hourly Employees," is relevant, and its admission into evidence is necessary to complete the record in this case. Accordingly, that document, marked as EAB Exhibit 1, is admitted into the record. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

Claimant's written argument contained information that was not part of the hearing record. In accordance with ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent it was based on information received into evidence at the hearing.

**FINDINGS OF FACT:** (1) Safeway Stores Inc. employed claimant as a warehouse worker from September 23, 1992 to July 31, 2015.

(2) The employer expected its warehouse workers, when "on the clock," to perform work "unless authorized by [a] supervisor to do otherwise," and considered unauthorized breaks or

“wandering” to warehouse locations away from their work to be misappropriation of company time and a terminable offense. Exhibit 1. Claimant acknowledged and was aware of the employer’s expectations.

(3) The employer also had a point-based attendance policy under which an employee could be terminated for accumulating too many points for absences, authorized or otherwise. Beginning in 2013, claimant accumulated a large number of attendance points for authorized absences from work primarily to care for his injured daughter. By July 2015, claimant had accumulated so many attendance points that he was warned that additional absences from work could result in his termination.

(4) On July 22, 2015, claimant was working as a forklift driver and became seriously ill during the course of his work shift. He became dizzy, vomited, had “stomach issues” and began “pooping blood.” Audio Record ~ 12:30 to 13:00. He went in and out of the restroom until he decided he could no longer drive a forklift without risking injury to coworkers. He also believed that if he missed any more work time due to illness he would be terminated under the employer’s attendance policy. He approached his working foreman, told him how sick he was and asked to be allowed to go home due to not being needed during the shift. His foreman told him he could not authorize an early release for that reason and suggested he go home due to illness. Claimant explained that he believed he would be terminated under the attendance policy if he went home sick. Claimant then told the foreman he was “going to be in the bathroom,” to which the foreman replied, “then go in the bathroom.” Audio Record ~ 26:00 to 27:10. Claimant then stayed mostly in the employer’s locker rooms and bathrooms for the next three hours and performed only “limited work.” Audio Record ~ 13:40 to 14:35.

(5) After July 22, the employer received complaints from claimant’s coworkers that claimant had been in the employer’s bathrooms that day for an excessive amount of time without performing work. After investigating, the employer agreed and concluded claimant had violated its policy against misappropriating company time by not working for approximately three hours during a shift. On July 31, 2015, the employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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.

In Hearing Decision 15-UI-46116, after finding that claimant spent “three consecutive hours in the employer’s break room and locker rooms not performing work” due to illness, and then failed to notify the employer of his absence from production time for that reason, the ALJ concluded claimant had been dishonest and the employer discharged claimant for misconduct, reasoning as follows:

Claimant was discharged for spending three hours of his paid work time in the break room or restroom. While the employer could not reasonably expect claimant to work when he was ill, the employer could reasonably expect claimant to immediately report to the employer that his illness required him to miss three full hours of work during his shift, so that the employer could adjust his time and attendance records as necessary. Claimant knew or should have known to do so and his failure to do so showed an indifference to the employer's business interests.

Hearing Decision 15-UI-46116 at 1-3.

However, claimant asserted that he told his foreman he was "going to be in the bathroom" due to his condition and that his foreman responded, "then go in the bathroom," without telling claimant his conduct was not allowed. Audio Record ~ 33:00 to 34:00. Although the employer's policy required warehouse workers, when "on the clock," to perform work "unless authorized by [a] supervisor to do otherwise," the employer failed to show that the foreman's statement to claimant did not give claimant the necessary authorization under the employer's policy to stay in the employer's locker rooms and bathrooms rather than work while ill. Moreover, the foreman's statement supported claimant's assertion that claimant did not even consider misappropriation of time to be an issue under the circumstances. Audio Record at 23:00 to 28:00.

Even assuming, *arguendo*, that claimant's conduct was wantonly negligent, it was no more than an isolated instance of poor judgment, which is not misconduct. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is defined as 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). Although the employer testified that claimant had been warned about misappropriation of time for an incident in May 2015, the employer presented no evidence, and the record fails to show, why claimant was away from his work station and talking to maintenance worker for a period of 30 to 40 minutes in that instance. Audio Record ~ 17:00 to 18:00. Given that lack of evidence, the record lacks sufficient detail to establish that claimant's conduct in that instance was either willful or wantonly negligent. Therefore, on this record, claimant's July 22 conduct was no more than an isolated instance of willful or wantonly negligent conduct.

Although some conduct, even if isolated, exceeds mere poor judgment, including "[a]cts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible," claimant's did not. OAR 471-030-0038(1)(d)(D). The ALJ concluded that claimant's July 22 conduct exceeded mere poor judgment, summarily stating that it was "dishonest and rendered a continued employment relationship impossible." Hearing Decision 15-UI-46116 at 3. However, as previously discussed, the record fails to show that it occurred to claimant that his conduct might be considered misappropriation of time, particularly in light of the fact that his absence from the work area was due to illness, it appears on this record that he was physically incapacitated during the time at issue, he was forthright with his foreman about his physical condition and where he planned to be, and his foreman's statement to him before he left his work area gave him reason to believe that his absence from his work area was condoned. Consequently, the employer failed to prove by a preponderance of the evidence that there was a component of dishonesty involved in claimant's July 22 conduct.

Claimant was discharged, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

**DECISION:** Hearing Decision 15-UI-46116 is set aside, as outlined above.<sup>1</sup>

Susan Rossiter and J. S. Cromwell.

**DATE of Service: December 23, 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> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.