

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0071**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131127). Claimant filed a timely request for hearing. On January 7, 2016, ALJ S. Lee conducted a hearing, and on January 11, 2016 issued Hearing Decision 16-UI-50803, reversing the Department's decision. On January 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Starv'n Marv'n Family Restaurant employed claimant from November 13, 2014 until November 15, 2015, last as a prep cook.

(2) The employer was small restaurant with a small staff. The employer had an informal timekeeping system. Employees filled out handwritten timecards reporting only the times they arrived for work and when they left for the day. The employer expected employees to limit lunch breaks to thirty minutes. Employees were not required to show the time they left work for lunch or other breaks and when they reported back. Each shift worked, the employer automatically deducted a half hour unpaid lunch break from the total time shown on the employee's timecard, even on days when the restaurant was busy and employees were unable to take rest or lunch breaks. Claimant did not understand that the employer had a formal break policy or expected employees to strictly adhere to a thirty minute break period.

(3) Aside from the owner, the employer had no formal supervisory employees for its staff other than the restaurant manager. The restaurant manager and the owner were not on the restaurant premises during all business hours, and in their absences the head cook and another employee made managerial decisions as necessary. The owner and the manager often had the head cook convey instructions to other staff members, and the head cook often mentored newly hired employees.

(4) In approximately August 2015, claimant told the head cook he might need longer than thirty minutes for his lunch breaks on Mondays and Saturdays so he could attend to a personal matter. The head cook approved claimant to take extended breaks on those days when necessary.

(5) Sometime around November 9, 2015, the employer received a complaint that claimant was taking longer than thirty minutes for his lunch breaks. The employer reviewed its surveillance tapes for November 8 through November 10, 2015 and determined that claimant's lunch breaks on those days were longer than thirty minutes.

(6) On Wednesday, November 11, 2015, the restaurant manager returned to claimant the timecards he had submitted for the days of November 8 through November 10, 2015 with corrections showing the actual length of the lunch breaks he had taken on those days. The manager wrapped a copy of Oregon laws about the length of rest and meal breaks was around claimant's returned timecards. The manager, the owner and other employer representatives did not tell claimant he was taking longer than allowed for his lunch breaks or explain the reason that the manager had corrected his timecards and had given him the copy of some Oregon laws. Claimant did not understand what the manager intended to communicate to him by returning his time cards and did not read the laws wrapped around his time cards. Claimant wrote on the corrected timecards that he was entitled to take two ten minute breaks during his shift which he had not taken on those particular days, apparently to suggest that it was appropriate for him to take the time for those rest breaks and add it to the time allowed for his lunch break, and, sometime later, claimant re-submitted the time cards to the employer.

(7) On November 14 and 15, 2015, the employer determined that claimant had taken longer than thirty minutes for his lunch breaks on both days. On November 15, 2015, the employer discharged claimant for exceeding the thirty minute time allotted for his lunch breaks on November 14 and 15, 2015 without permission.

**CONCLUSIONS AND REASONS:** 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The testimony of both the employer and claimant was in agreement that until claimant's final week the employer did not usually review the times its employees spent on breaks and did not strictly enforce prohibitions against taking breaks that were a few minutes longer than the allotted time. Transcript at 11, 15, 19, 22. While the employer's witness testified that the restaurant manager had spoken to claimant sometime during the week of November 8 through 14, 2015 warning him about taking any longer than thirty minute lunch breaks, claimant denied that conversation happened. Transcript at 7, 17, 18. The witness did not observe that alleged conversation, and her testimony about it relied on a hearsay account she received from the manager. Transcript at 7. Claimant's first-hand evidence that the alleged conversation did not occur has more weight than the employer's hearsay evidence that it did.

Accordingly, more likely than not, the restaurant manager never verbally warned claimant that he was taking excessively long lunch breaks or that he needed to strictly limit them to thirty minutes. The employer's communication of its prohibitions against taking longer than thirty minutes for lunch breaks to claimant rests on the restaurant manager's corrections to claimant's timecards for November 8 through 10, 2015 and enclosing, without comment, a copy of the Oregon laws on rest and meal breaks.

Claimant testified persuasively that he did not understand the reason that the Oregon laws on breaks were included with his returned time card, and he did not carefully review them believing that, at some future time, he would be informed of their relevance to him. Transcript at 19, 23, 25. Claimant did not understand the laws to be the employer's way of informing him that he could not add the time of rest breaks he was unable to take on a particular day to the thirty minutes allotted to him for his lunch break, as he thought he could. Transcript at 19, 25-26. That claimant failed to infer from the timecard corrections and the insert to his timecard the particular significance the employer attached to them was not unreasonable, nor, given claimant's authorization to take extended breaks two days a week and the employer's informal timekeeping practices, was it unreasonable for claimant to continue to believe that he could add his rest breaks onto his lunch breaks and thereby legitimately extend the amount of time he had for his lunch breaks. Since the employer did not demonstrate either that claimant was aware it intended to rigorously enforce the permitted length of his lunch breaks, or that the length of the lunch breaks claimant took on November 14 and 15, 2015 substantially exceeded the sum of thirty minutes plus the rest breaks he had not taken on those days, the employer did not demonstrate that claimant intentionally or consciously violated its expectations.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-50803 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** February 5, 2016

**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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