

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0610**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 93823). The employer filed a timely request for hearing. On May 3, 2016, ALJ Wyatt conducted a hearing, and on May 6, 2016 issued Hearing Decision 16-UI-59059, affirming the Department's decision. On May 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Ambridge Employee Service Corporation employed claimant from June 8, 2015 to January 25, 2016, last as a server for its hotel breakfast buffet.

(2) The employer expected employees to refrain from taking food from the employer's buffet without paying for it. The employer made an exception for leftover hot food items, which it allowed employees to take without charge after the buffet ended each day. Claimant understood that employees were permitted to take certain leftover food without paying for it, and observed employees take burritos and sandwiches made from the hot food items left after the buffet ended.

(3) On January 15, 2016, after the buffet ended, claimant placed some blueberries from the buffet into a plastic clamshell, and made a burrito and sandwich with a tortilla, bread and leftover hot items from the buffet. Claimant believed she was permitted to take the leftover food and use a tortilla and bread with it. The food and beverage manager saw claimant packing the food to take home. The manager believed that the sandwich and burrito were from the employer's frozen ready-made supply of those items, and that the blueberries were unopened packages from the refrigerator. The manager told claimant she was not permitted to take the blueberries, burrito or sandwich without paying for them. The manager said

she needed to talk to the other managers to see what claimant had to do to pay for the food. The food and beverage manager reported the matter to the general manager.

(4) Several days later, claimant offered to pay for the food items, but the food and beverage manager told claimant she could only pay for the items the day she took them.

(5) On January 25, 2016, the employer discharged claimant for taking food without permission or paying for it.

**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. 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to refrain from taking food without permission or paying for it. Claimant generally understood she was expected to refrain from taking food, but understood she could take some food items. She did not understand that she was expected to pay for leftover berries or bread and tortillas used to make sandwiches and burritos from leftover hot food, because she had observed other employees taking those items without consequences.

The employer's food and beverage manager alleged that claimant took a ready-made burrito and sandwich from its freezer on January 15, 2016, in addition to unopened blueberries from the refrigerator. Audio Record at 17:09 to 17:24; 17:39 to 18:03; 21:37 to 21:51. However, the manager did not see where the food came from because she entered the kitchen as claimant was packaging the food to take home. Claimant asserted that the berries were left over from the buffet and that the contents of the burrito and sandwich were leftover hot food, and not from the freezer. Audio Record at 31:41 to 32:28. Absent any reason to doubt claimant's credibility as to where the food came from, we give greater weight to claimant's first hand testimony about the food than to the testimony of the manager who did not see where the food originated.

On January 15, 2016, claimant violated the employer's expectations by taking blueberries, and bread and a tortilla to use with the hot food leftovers. However, claimant believed she was permitted to take the items, and the record fails to show that claimant knew otherwise through prior training, experience or warnings.<sup>1</sup> Nor do we find the employer's expectation so obvious that claimant knew or should have known the expectation as a matter of common sense. Because claimant acted on the basis of her good

---

<sup>1</sup> Claimant denied having been warned before January 15 that she was not permitted to use a tortilla or bread with hot leftovers, or to take leftover berries. Audio Record at 32:36 to 32:51.

faith belief that the employer would condone or excuse her conduct, based on her understanding of the employer's expectations and her observations of other employees, regardless of the fact that the employer did not, in fact, condone or excuse the conduct, claimant's good faith error on January 15, 2016 was not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 16-UI-59059 is affirmed.

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

**DATE of Service:** June 28, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.