

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0937**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 133147). The employer filed a timely request for hearing. On July 15, 2016, ALJ Shoemake conducted a hearing, and on July 22, 2016 issued Hearing Decision 16-UI-64323, concluding the employer discharged claimant for misconduct. On August 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) FedEx Ground Package System, Inc. employed claimant from February 11, 2014 to May 13, 2016 as a part time package handler.

(2) The employer had a “zero tolerance” policy prohibiting employees from intentionally mishandling packages, including throwing, kicking or stepping on packages. Exhibit 1, Standards of Conduct at 14-15. The employer also expected employees to maintain work habits and attitudes that protected other employees and themselves. *Id.* at 14. The employer reviewed its package handling policies with claimant every three months and the policies were posted near the employees’ time clock. Claimant understood the employer’s expectations.

(3) Claimant’s primary job duty was to safely load and unload packages with care. On May 5, 2016, claimant was working unloading packages from a band line. Claimant took a large package off the line, then lifted it from the floor and threw it to a lower section. Claimant later removed another package from the band line and threw it down to the other section. Claimant then walked on top of another oversized package that was on the floor.

(4) Claimant’s supervisor discussed the May 5, 2016 incident with claimant. Claimant agreed with the supervisor that he had intentionally mishandled the packages.

(5) On May 13, 2016, the employer discharged claimant for intentionally mishandling customers’ packages and creating an unsafe work environment.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has 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 employer had a right to expect claimant to refrain from intentionally mishandling packages. On May 5, 2016, claimant mishandled three packages. Claimant's supervisor who viewed video of claimant's conduct on May 5 testified that the packages were secure and he could see no reason other than frustration for why claimant threw or walked on the packages. Audio Record at 18:26 to 18:37. By doing so, claimant willfully violated the employer's package handling expectations.

Claimant's failure to follow the employer's package handling policies cannot be excused as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(A) provides that, for conduct to qualify as an isolated instance of poor judgment, the conduct must be a "single or infrequent occurrence," and not a "repeated act or pattern" of other willful or wantonly negligent behavior. Claimant engaged in three separate acts of intentionally mishandling customers' packages on May 5, 2016. Claimant took a package off the line and threw it to an area below him. Claimant then made two further choices to disregard the employer's reasonable expectations by throwing a second package off the line and walking across a third. Thus, claimant engaged in repeated acts in willful violation of the employer's package handling policy. Because claimant's conduct on May 5 was not isolated, it cannot be excused as an isolated instance of poor judgment.

Moreover, OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant's primary duty was to safely handle packages. Claimant's supervisor testified that the employer discharged claimant rather than pursuing other discipline because claimant created an unsafe environment for the package handlers working near claimant, and intentionally mistreated the customers' property. Audio Record at 18:40 to 18:48. Viewed objectively, it was reasonable that the employer no longer trusted claimant to perform his job when he intentionally mishandled packages, knowing that to do so was contrary to the employer's interests. Because claimant's conduct on May 5 created an irreparable breach of trust in the employment relationship, it cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record contains no evidence that claimant sincerely believed, or had a factual basis for believing, that the employer condoned his behavior. Claimant's conduct therefore was not the result of an error in his understanding of the employer's package handling policies.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-64323 is affirmed.

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

**DATE of Service:** September 9, 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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