

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1296**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 85410). The employer filed a timely request for hearing. On October 25, 2016, ALJ J. Mann conducted a hearing, and on November 1, 2016 issued Hearing Decision 16-UI-70311, affirming the Department's decision. On November 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer 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 did not consider the argument. We considered only information that was part of the hearing record when reaching this decision.

**FINDINGS OF FACT:** (1) O'Reilly Auto Parts employed claimant as a delivery driver from November 21, 2013 to July 8, 2016.

(2) The employer's driving policy required drivers to back their vehicles into parking spaces or park in spots that allowed drivers to drive forward when leaving the parking spot. Claimant understood the employer's policy and, prior to July 6, 2016, always backed into her parking spots or found parking spots from which she could drive forward when leaving.

(3) In January 2015, claimant failed to write her deliveries down on a board at the employer's business before leaving to make them, in violation of the employer's procedures. The employer issued claimant a written warning for the incident. In July 2015, claimant had an e-cigarette in her work truck in violation of the employer's policies. Claimant did not use the e-cigarette in the work truck and did not realize that it was against policy to have an unused e-cigarette in the truck. The employer issued claimant a written warning for the incident.

(4) On July 6, 2016, claimant delivered parts to a customer. She parked by driving forward into a parking spot. Ordinarily claimant could leave that parking spot by pulling forward without having to

reverse out of the spot. When claimant completed her delivery a car had pulled into the area in front of her vehicle. Claimant decided to back out of her parking spot instead of waiting for the vehicle to leave. Claimant checked her mirrors, thought the area behind her vehicle was clear, but collided with a vehicle parked in her blind spot, damaging both vehicles.

(5) On July 8, 2016, the employer discharged claimant for violating its driving policy and causing the July 6<sup>th</sup> collision.

**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 connected with work. 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant not to park in a manner that required her to back out from her parking space. Claimant understood the expectation. On July 6<sup>th</sup>, claimant pulled forward into a parking spot from which she could ordinarily drive forward when exiting, but backed out from when leaving, colliding with a parked vehicle as a result. Claimant testified that she would not have backed out of the spot "if the car wouldn't have pulled in" front of her or if she waited for that vehicle to move before leaving so she could have driven forward out of her spot. *See* Audio recording at ~ 25:00; ~ 25:45. Claimant did not, however, explain why she did not back into the parking spot in the first place to avoid putting herself in a situation where her forward exit was blocked and she was required to back out of the spot. Claimant's testimony indicated that she was conscious of the employer's expectation that she not back out of parking spots at the time of the events that occurred on July 6<sup>th</sup> and, more likely than not, conscious that she was violating the expectation by doing so, and did so anyway. Her conduct was, therefore, wantonly negligent.

Wantonly negligent conduct is not misconduct if it is excusable, for example, as an isolated instance of poor judgment. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent instance of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior, and it must not exceed mere poor judgment. OAR 471-030-0038(1)(d). Although claimant had, previously, violated two other policies, the employer did not show that those instances were repeated acts or formed a pattern of other willful or wantonly negligent conduct. Claimant's January 2015 failure to write her deliveries down on a board was too different in nature and distant in time from the final instance to be considered part of a pattern of conduct. Claimant's July 2015 conduct was not wantonly negligent because she was not conscious that merely having an e-cigarette with her in the employer's vehicle would violate the employer's policy, and, even if the conduct had been wantonly negligent, it occurred a year prior to the final incident and, like the January 2015 conduct was too

different and distant from her conduct in the final instance to be considered “repeated” or part of a “pattern.” For those reasons, we conclude claimant’s July 6<sup>th</sup> conduct was isolated.

Although even isolated instances can be considered misconduct if the instance exceeds mere poor judgment, claimant’s conduct did not. Conduct only exceeds mere poor judgment if it is unlawful, tantamount to unlawful conduct, causes an irreparable breach of trust in the employment relationship, or makes a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d)(D). Backing out of a parking spot is not unlawful conduct, or tantamount to it, even if doing so results in a preventable collision. The record fails to show that every reasonable employer would have chosen to discharge claimant over any other lesser form of discipline because of one preventable collision in the course of almost three years of employment, and the employer did not establish what it was about the incident on July 6<sup>th</sup> that could reasonably be seen to have caused an irreparable breach of trust or made a continued employment relationship impossible. We therefore conclude that claimant’s conduct did not exceed mere poor judgment, and was excusable as an isolated instance of poor judgment.

The employer discharged claimant because of an isolated instance of poor judgment. Isolated instances of poor judgment are not misconduct. Claimant’s discharge was, therefore, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-70311 is affirmed.

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

**DATE of Service: December 12, 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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