

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1439**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84644). Claimant filed a timely request for hearing. On December 12, 2016, ALJ Triana conducted a hearing, and on December 13, 2016 issued Hearing Decision 16-UI-72812, concluding claimant's discharge was not for misconduct and allowing benefits. On December 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Corbett Fish House LLC employed claimant as a manager from April 13, 2012 to September 21, 2016.

(2) The employer required that its managers store all cash either in the safe or in the bank. The employer required its managers to make bank deposits every weekday. If unable to make the daily deposit, the employer required its managers to contact the district manager or an owner to make the deposit instead. Claimant understood the employer's expectations.

(3) In June 2016, claimant failed to make weekday bank deposits several times because she was busy. On June 21, 2016, claimant made six deposits on the same day. The employer instructed her that the situation could not happen again, and that she had to make deposits every day or contact her manager or an owner if she needed help making a weekday deposit.

(4) In August 2016, claimant failed to make bank deposits every weekday because she was busy. Instead, she made bank deposits every few days. She had asked one of the owners to make deposits for her when she was too busy to do them herself, and it had never been a problem. Instead of asking the owner to help her again, however, she decided to wait until she could make the deposit herself.

(5) On September 19, 2016, the employer expected claimant to deposit cash collected over the weekend of September 17<sup>th</sup> and September 18<sup>th</sup> first thing in the morning. Claimant did not make the bank deposit that morning. The employer expected her to deposit cash from September 19<sup>th</sup> on September 19<sup>th</sup>, but she did not. On September 20, 2016, claimant gathered cash from the weekend of September

17<sup>th</sup> and September 18<sup>th</sup>, as well as from September 19<sup>th</sup> and September 20<sup>th</sup>, with the intent of making a deposit on her way home from work. She drove to her home instead of driving to the bank to deposit the cash. She realized when she arrived home that she had forgotten to deposit the employer's cash. Claimant knew that she could still deposit the money by using an ATM, regardless whether the bank was closed. Instead of driving to the bank to make the deposit, she took the deposit bag into her home.

(6) Later on September 20<sup>th</sup>, one of the owners contacted the district manager and notified him that it had been several days since claimant made a bank deposit. The district manager sent claimant a text message asking her why the deposits had not yet been made. Claimant apologized and said she planned to make a deposit the following day. The district manager subsequently reviewed the employer's records and discovered the incidents that had occurred in August 2016. The district manager reported the situation to the owner.

(7) On September 21, 2016, claimant deposited the cash from September 17<sup>th</sup> through September 20<sup>th</sup>. On September 21, 2016, the employer discharged her for taking cash into her home instead of depositing it.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that 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 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

We agree with the ALJ that claimant's decision to take the bank deposit home on September 20<sup>th</sup>, rather than taking it to the bank as the employer required, was a conscious violation of the employer's expectation, and demonstrated her indifference to the consequences of her conduct, making her conduct on that occasion wantonly negligent. However, we disagree with the ALJ that her conduct was excusable as an isolated instance of poor judgment because she "had not taken a deposit bag home with her in the past." An isolated instance of poor judgment is not confined to a single or infrequent occurrence of the *same* conduct that resulted in claimant's discharge, but is defined, in pertinent part, as a "single or infrequent" exercise of poor judgment "rather than a repeated act *or pattern of other . . . wantonly negligent conduct.*" OAR 471-030-0038(1)(d). Therefore, while the ALJ was correct in her finding that claimant never repeated the act of taking a deposit home with her, given the evidence in this record that claimant had engaged in other acts of misconduct during her employment, the isolated instance of poor judgment analysis cannot stop there. *See* Hearing Decision 16-UI-72812 at 4.

The record in this case shows that claimant repeatedly exercised other wantonly negligent poor judgment with regard to making bank deposits in August and September 2016. Claimant knew, at least as of June 2016 if not before, that she was required to make bank deposits every weekday, and if she could not, that she was required to ask the district manager or an owner to make the deposit for her. She had, on more than one occasion, asked an owner to make deposits for her and it had never been a problem. Despite claimant's understanding of the expectation and history of compliance with it, claimant decided on multiple occasions in August 2016 to violate it by not making deposits every weekday. She then decided again, first thing in the morning on September 19<sup>th</sup>, later on September 19<sup>th</sup>, and again on September 20<sup>th</sup>, not to make required weekday deposits. Under the circumstances, claimant's failures to make bank deposits on at least five occasions in August and September 2016 involved repeated instances of wantonly negligent conduct, making her wantonly negligent act of taking the bank deposit into her home on September 20<sup>th</sup> part of a pattern of other wantonly negligent behavior. Because her discharge was for conduct that was part of a pattern of other wantonly negligent behavior, the conduct was not isolated, and cannot be excused as an isolated instance of poor judgment.

Nor is claimant's conduct on September 20<sup>th</sup> excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not take the deposit home with her out of a sincere belief that she had already made the deposit, that she was not required to make the deposit, or that the employer would condone taking its money into her home, nor did she assert that she was operating under any such beliefs. Although claimant might have thought her conduct would result in a lesser form of discipline, such as a warning, she knew at the time she did it that her conduct violated the employer's expectations, and was not acting in good faith.

The employer discharged claimant for misconduct. Claimant is, therefore, disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 16-UI-72812 is set aside, as outlined above.

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

**DATE of Service: January 19, 2017**

**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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