

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0001**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133001). Claimant filed a timely request for hearing. On December 9, 2016, ALJ Wymer conducted a hearing, and on December 12, 2016 issued Hearing Decision 16-UI-72735, affirming the Department's decision. On December 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant and the employer submitted written arguments to EAB that contained information that was not part of the hearing record. Both parties failed to show that factors or circumstances beyond the parties' reasonable control prevented the parties from offering the information during the hearing. When reaching this decision, we considered only information received into evidence at the hearing and the portions of the arguments from the claimant and employer that did not refer to new information that was not provided at hearing. ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Hovercraft Studio, LLC, a graphic design agency, employed claimant from July 20, 2015 until September 12, 2016 as a project manager.

(2) The employer issued claimant a company credit card in her name for claimant to use for business purposes only. The employer permitted employees the occasional use of the employer's credit card for taxis to travel to meet with clients, but did not permit employees to use the employer's credit card to pay cab fare to commute between home and work. Claimant understood the employer prohibited her from using the company credit card to make purchases for personal use. Claimant also understood, as a matter of common sense, that the employer prohibited her from writing checks from the employer without authorization.

(3) On June 19, 2016, the employer's owner was out of town on a business trip and expected to return on June 22, 2016. Claimant knew the owner had a partner who was not at work and had been on sabbatical since May 2016. On June 19, claimant sent a text message to the owner's business partner, who was also out of town, asking how to reimburse herself for recent alleged work-related purchases. The partner

sent claimant a text message stating that claimant should have the owner handle the reimbursement. Nobody authorized claimant to write herself a check or to sign the partner's name on the check.

(4) On June 20, 2016, claimant wrote a check to herself for \$347.60 from the employer's business account and signed the partner's name on the check.

(5) During June 2016, claimant used the company credit card to purchase a Bluetooth speaker and cover, a travel bag, and a pair of shoes. The items were delivered to claimant's hotel when claimant was on a work assignment for the employer. The items were not purchased for work or were not provided to the employer.

(6) Claimant did not own a vehicle, and usually used a bicycle to commute to work. During June and July 2016, claimant had a personal account through the taxi application Uber. Claimant used the company credit card to pay for multiple Uber rides between the vicinity of her residence and her work location through her personal Uber account. The company credit card was also used during that time period for food deliveries that were not made to the employer's business location. One of the food deliveries was on Sunday, June 25, 2016, when claimant used the employer's credit card to purchase tacos that were delivered to her home at 9:15 p.m.

(7) In June and July 2016, claimant used the company credit card "a few times" to pay for hair extensions, hair extension accessories, and shampoo. Transcript at 20.

(8) At the end of June 2016, claimant used the company credit card to purchase 49 items, totaling \$240, through her personal "Amazon Prime Now" account that were delivered to her home between 8:00 p.m. and 10:00 p.m. on a Sunday night when the employer's business was closed.

(9) From July 21 through July 26, 2016, claimant used the company credit card to pay for a hat, a dog bed and toy, two Uber rides and purchases at a coffee shop and fast food restaurant.

(10) In August 2016, the owner told the employer's staff that he would be purchasing the partner's share of the business and, in preparation for that sale, would audit and reconcile the employer's financial records. The audit revealed numerous purchases made with claimant's company credit card that appeared unrelated to the business. The owner asked claimant to provide receipts for those purchases. There were no questionable purchases made after the employer told its employees that it was planning to conduct an audit.

(11) On September 3 and September 7, 2016, claimant provided receipts for all but two of the suspect purchases made with the employer's credit card. Some of the receipts claimant provided were for her Amazon purchases. However, claimant failed to provide receipts for the \$240 Amazon Prime Now purchase from her personal Amazon Prime Now account in July 2016.

(12) On September 10, 2016, the owner saw the \$347.60 check written to claimant on June 20, 2016. The owner's partner told the owner that he did not write or sign the check or authorize claimant to do so.

(13) On September 12, 2016, the owner met with claimant and asked claimant about some of the purchases the employer considered questionable. Claimant told the owner that she realized over the

weekend that she had used the company credit card for some personal purchases, and was willing to repay the employer for those purchases. The owner asked claimant to repay the check she wrote herself from the employer's account on June 20, 2016. Claimant did not respond to the owner's request about the check, or provide an explanation for the check. At the end of the meeting, the owner discharged claimant for misusing a company credit card and writing a check from the employer to herself without authorization.

**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. 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). 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 employer discharged claimant, in part, for writing and signing a check from the employer to herself without authorization. Claimant understood the employer's expectation that she would refrain from forging checks to herself from the employer's account as a matter of common sense. Claimant did not dispute having written herself a check for \$347.60 from the employer's account, and having signed the absent business partner's name on the check. Claimant asserted that the business partner gave her permission to do so in a telephone conversation on June 19, 2016, despite the partner having sent claimant a text message earlier on June 19 stating that she should have the owner handle the reimbursement. Transcript at 39-40. Claimant's allegation that the owner's business partner, while already having been on a sabbatical from the business for at least three weeks, gave claimant permission to write a check to herself from the employer's account and to sign the partner's name to the check is not plausible. Nor did claimant provide a plausible explanation for why the business partner would have changed his mind and allowed her to write herself a check, having already told her earlier on June 19 that she should seek reimbursement from the owner. Even if claimant told the partner that the owner was out of town for three days, it is implausible that the partner would have authorized claimant's actions knowing the owner would return to work and be available to write a valid check within a short time. Nor does the record show factors that might make claimant's allegation more likely, such as showing that the employer had authorized claimant to forge checks on other occasions, or that there was some emergent need for claimant to be reimbursed immediately, rather than within four days. Given the implausibility of claimant's assertions, and weighed against the owner's clear, logical testimony that neither he nor the partner gave claimant permission to write or sign the check, the preponderance of the evidence shows claimant wrote and signed the check without the employer's permission. Claimant was conscious of her conduct and knew or should have known that writing the check and signing the partner's name on the check would violate the employer's expectations. Her conduct was, therefore, a

willful or wantonly negligent violation of the standards of behavior the employer had a right to expect of her.

The employer also discharged claimant for using her employer-issued credit card for personal purchases. Claimant asserted that the employer had authorized all the purchases she made using the employer's credit card. Transcript at 63. The employer did not meet its burden to show that all the credit card charges were unrelated to work. Regarding the Uber fares, the employer showed the rides were between claimant's home and the employer's office, but claimant asserted that she used Uber to commute only when she had other work-related stops to make or items to deliver that she could not carry on her bicycle, her normal means of transportation to work. Transcript at 40. The record does not show by a preponderance of the evidence that claimant's Uber rides were not work-related as the claimant asserted. Nor did the employer show by a preponderance of the evidence that the restaurant deliveries that were not to claimant's home were unrelated to work, or that she did not use a hat she purchased for a work project, as claimant asserted at hearing. Transcript at 43-44.

Claimant did not deny making the purchases identified by the employer's owner at hearing. However, claimant implicitly argued that two other employees might have made some of the purchases because she allowed them to keep and use a copy of the employer's credit card bearing claimant's name. Transcript at 34-36, 41. A number of the purchases during June and July were for restaurant food deliveries. The record does not show that claimant made all of the questionable restaurant delivery purchases. However, the preponderance of the evidence shows tacos paid for with the employer's credit card were delivered to claimant's home on a Sunday at 9:15 p.m. It is unlikely claimant's coworkers would order food delivered to claimant's home, and claimant did not assert that she was working at home, or that the employer would authorize a food delivery to her home even if she were working at home. It is also unlikely that another employee would have ordered a Bluetooth speaker and cover, a travel bag, and shoes delivered to claimant's hotel room or made a \$240 purchase for 49 items using claimant's personal Amazon Prime Now account.

Claimant also asserted that she could have mistakenly used the employer's credit card to purchase items, including the hair extension and pet items, but that those purchases were not "purposeful." Transcript at 38, 42-43. It is not feasible that claimant would have mistakenly used the employer's credit card to make so many personal purchases, and claimant offered no plausible explanation for how she authorized the purchases using the employer's credit card number multiple times without her knowledge. We are also persuaded by the employer's argument that, because claimant stopped making questionable purchases after the owner announced he would be auditing the employer's financial records, it tends to suggest her purchases were not made by mistake. Employer's Argument at 3. It is more likely than not that claimant was conscious of her conduct while using the employer's credit card to purchase a Bluetooth speaker and cover, a travel bag, shoes, hair extension and pet items, 49 items using her personal Amazon Prime Now account, and tacos delivered to her home. Claimant knew such conduct would violate the employer's expectations and willfully violated the employer's policy prohibiting the use of its credit card for personal purchases.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant's conduct in forging a check to herself cannot be excused as mere poor judgment. Acts that create irreparable breaches of trust in the employment relationship make a continued relationship impossible, exceed mere poor judgment, and do not fall within the

exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's act of issuing herself a check from the employer without permission was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Moreover, conduct is excusable as an isolated instance of poor judgment only if it is a single or infrequent occurrence of poor judgment, and not if the act is repeated or part of a pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(a). Because claimant willfully violated the employer's policy against using its credit card for personal purchases on at least six occasions, the conduct was not isolated. Because the record does not show that claimant sincerely believed, or had a factual basis for believing, that she was not misusing the company credit card by making the described purchase, or that the employer would condone misuse of the company credit card, her conduct was not the result of a good faith error.

The employer discharged claimant for misconduct. She is disqualified from the receipt of unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-72735 is affirmed.

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

**DATE of Service:** January 27, 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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