

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0479**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140810). Claimant filed a timely request for hearing. On April 18, 2017, ALJ Janzen conducted a hearing, and on April 19, 2017 issued Hearing Decision 17-UI-81339, affirming the Department's decision. On April 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Luke-Dorf Behavioral employed claimant as a residential counselor from November 7, 2005 to February 23, 2017.

(2) In November 2016 a new manager began to supervise claimant, and in January 2017, the employer changed claimant's job duties to add additional cleaning tasks. Claimant tried but "just couldn't adjust to the change" and lacked the physical capacity to do all of her newly assigned tasks as expected. Transcript at 26. Between December 2016 and February 2017, the employer issued claimant several warnings for failing to complete various duties, for example, for failing to clean waste off the floor despite her attempts to satisfactorily clean that location two times and being unaware that it needed to be cleaned further, and failing to promptly complete her job duties on a "hectic" shift. Transcript at 25.

(3) The employer expected employees to immediately discard expired food items and listed the task on a daily checklist. Claimant did not understand the expectation. She was told and read somewhere that she was to wait three or four days after an item expired before discarding it. She also did not know whether or not she was supposed to discard items that were labeled as belonging to members of staff.

(4) Claimant worked the graveyard shift from February 15, 2017 through February 20, 2017. Each shift, she checked the fridge for expired food items, left some expired items in the fridge because they were labeled with staffs' names or because they were fewer than four days outdated, and marked a checklist stating that she had completed the task. On February 20, 2017, the house manager found an item in the fridge that was three days past its expiration date. She checked the rest of the fridge and found

approximately eight other items that were expired and one she felt was “clearly molded.” Transcript at 8. The house manager and facility administrator looked at the checklists claimant had completed indicating that she had checked for expired items in the fridge, and concluded that claimant had failed to complete the task each day, and falsified the checklists by reporting she had.

(5) On February 23, 2017, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that the employer discharged claimant for misconduct, finding that claimant “at least[] should have understood” the employer’s expectations with regard to removing expired items from the refrigerator, and “falsely indicated on her daily checklist” that she had completed that task despite having left expired items in the fridge. Hearing Decision 17-UI-81339 at 3-4. The ALJ reasoned that the understanding of the employer’s expectations claimant claimed to have held “was not reasonable” and that she “should have known” she was violating the employer’s expectations, again referring to claimant’s report as having been done “falsely.” *Id.* at 4. We disagree.

Claimant testified that she was both told and “saw it written down somewhere” that she was not supposed to discard expired food items until three or four days after they expired. Transcript at 21-22. The employer did not rebut her assertion. She testified that a lot of the expired items also belonged to staff and “had their name on it,” and she did not know whether or not she was allowed to discard items that belonged to staff. Transcript at 20. The employer did not rebut her assertion or claim that the employer’s policy specified that she was, in fact, to discard items labeled as belonging to staff if the items were expired. Claimant also testified that some other items, although perhaps expired when the house manager saw them on February 20<sup>th</sup>, had not been expired at the time claimant had checked for expired food items the night before. Transcript at 21. Although the employer’s witness testified that one of the items the house manager saw was three days old or more, the employer did not assert or show that all the items in question were over four days old, were not labeled as belonging to staff, or that none of the items expired on February 20<sup>th</sup> and therefore would not have been expired if claimant had checked the items during the portion of her graveyard shift that fell on February 19<sup>th</sup>. Nor did the employer show that, to any extent claimant left items more than four days expired and not belonging to staff in the fridge, claimant did so intentionally or consciously rather than inadvertently or by mistake.

In the absence of such showings, the record fails to support the ALJ's assertion that claimant's failure to understand the employer's expectations was "not reasonable" under the circumstances, that she knew or should have known that she was "falsely" completing a checklist when she said she had checked the fridge for expired items without discarding all of them, or that she acted willfully or with wanton negligence when she left some expired items in the fridge between February 15<sup>th</sup> and February 20<sup>th</sup> but completed the checklist suggesting otherwise. Rather, it appears that claimant's conduct was the result of either a sincere but mistaken belief that she was supposed to wait a few days before discarding expired items, or due to her failure to understand how to complete her job duties to the employer's satisfaction despite her efforts to do so. Either way, the preponderance of the evidence suggests that claimant did not act willfully or with wanton negligence, her discharge was not for misconduct, and she is not subject to disqualification from receiving benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-81339 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** May 16, 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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<sup>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.