

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0484**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133059). Claimant filed a timely request for hearing. On April 13, 2017, ALJ Wyatt conducted a hearing, and on April 20, 2017 issued Hearing Decision 17-UI-81400, concluding the employer discharged claimant, but not for misconduct. On April 25, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Wenoregon LLC employed claimant from July 13, 2015 until February 17, 2017 as a shift manager at a Wendy's restaurant.

(2) The employer prohibited employees from bringing non-employees behind the service counter and into the kitchen area of its restaurant. The employer also expected employees to refrain from giving away food.

(3) On February 8, 2017, during a busy period at the restaurant, claimant removed \$35 from the safe to provide an employee with change for her register, put the \$35 she received from the employee in the manager's desk drawer until she had time to replace it in the safe, but later forgot to replace the money into the safe. Claimant had no cash handling violations before February 8.

(4) During her shift on February 10, 2017, claimant found the \$35 in the manager's desk drawer and recalled having put it there two days earlier. Claimant informed her district manager by text message of the time and date that she had found the \$35, and put it in the register.

(5) Later on February 10, 2017, claimant was preparing to take her thirty-minute break at work. It was near closing time. The employer allowed claimant, as a manager, to have a free meal during each shift. Claimant allowed her son, who was visiting the restaurant, to order food he preferred, and claimant rang up the meal as her free meal. Claimant ordered only one free meal. Claimant ate the food with her son during her 30-minute break.

(6) Also on February 10, 2017, claimant brought her son and his wife behind the counter in the employer's restaurant after she closed the dining room. Claimant's son was a manager and employee at another Wendy's restaurant in Oregon. His wife was a non-employee. Claimant had not taken non-employees behind the counter before February 10.

(7) On February 17, 2017, the employer discharged claimant for the February 8 cash handling violation, and for giving away food and taking two guests behind the service counter on February 10, 2017.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant, but 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The final incidents that prompted the employer to discharge claimant occurred when claimant failed to replace \$35 into the safe on February 8, allowed family members behind the counter in the employer's restaurant and shared her free meal with her son on February 10, 2017. Audio Record at 7:18 to 8:04. We consider each of these reasons in turn to determine if any constitute misconduct.

At hearing, the employer's witness, who was the employer's payroll and benefits administrator, testified that another manager viewed a surveillance tape from claimant's restaurant, and told him that she saw claimant put \$35 of her own money into the register to correct a shortage of \$35 that occurred on February 10, 2017. Audio Record at 11:04 to 11:29. However, we give greater weight to claimant's first hand testimony that she found the \$35 she had left in the manager's desk drawer and forgotten about, and put it in the register. Claimant forgot to return the \$35 to the safe immediately because she was busy and forgot. Her conduct was, therefore, inadvertent and not intentional. Although claimant may have been negligent in failing to put the money into the safe immediately, to disqualify claimant from unemployment benefits, the employer must show more than carelessness or mere negligence in claimant's conduct. The record does not show that claimant's failure to replace the money in the safe immediately occurred because of claimant's conscious indifference to following the employer's procedures regarding how to obtain change from the safe, or because she was indifferent to the consequences of her conduct. As a result, the employer did not demonstrate that the cash handling incident constituted misconduct on the part of claimant.

In regard to claimant sharing her free meal with her son, the employer did not dispute that claimant had permission to have a free meal, and that she shared only her free meal, and no other food, with her son. Claimant testified that she did not consider her actions to be a violation of the employer's expectation that she refrain from giving away food. Audio Record at 22:08 to 22:27. The employer did not show that its policy clearly prohibited claimant from sharing her free meal with another. Moreover, because claimant was permitted to have a free meal, and did not receive more than that free meal on February 10, it cannot be concluded as a matter of common sense that claimant should have been reasonably aware that she was prohibited from sharing the meal with another person. The employer thus did not meet its burden to show that claimant's sharing her free meal with her son was a willful or wantonly negligent violation of the employer's standards.

With respect to claimant allowing her son and his wife to enter the kitchen area of the employer's restaurant, claimant testified that she did not realize she was violating the employer's policy by giving her son a tour of the back of the restaurant because her son was a Wendy's employee at another restaurant, and employees of other Wendy's restaurants often work in the restaurant where claimant worked. Audio Record at 19:14 to 19:53. Claimant's conduct in taking her son behind the service counter was, at worst, a good faith error, and good faith errors are not misconduct. OAR 471-030-0038(3)(b). And although claimant's act of taking her son's wife, a non-employee, behind the counter was wantonly negligent, it was an isolated instance of poor judgment,<sup>1</sup> and not misconduct. Claimant's act of taking a non-employee behind the counter was a single occurrence, and not a repeated act or part of a pattern of other willful or wantonly negligent behavior. The conduct did not violate the law, and was not tantamount to a law violation, however. Therefore, unless claimant's conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible, claimant's conduct is excusable as an isolated instance of poor judgment. The record does not suggest that an irreparable breach of trust occurred or that claimant's act rendered a continued employment relationship impossible.

Having so concluded, claimant's conduct in taking her son's daughter behind the restaurant counter was excusable as an isolated instance of poor judgment. Because isolated instances of poor judgment are not

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<sup>1</sup> OAR 471-030-0038(1)(d) (August 3, 2011) provides:

As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, 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).

misconduct, we conclude that claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 17-UI-81400 is affirmed.

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

**DATE of Service:** May 12, 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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