

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1149**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 72715). The employer filed a timely request for hearing. On September 20, 2017, ALJ Amesbury conducted a hearing, and on September 21, 2017 issued Hearing Decision 17-UI-92992, affirming the Department's decision. On September 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) CJ's Eateries, LLC employed claimant as a server and cashier from January 21, 2013 until July 24, 2017. The employer sold alcoholic beverages to customers and the employer's servers served those beverages.

(2) As an alcoholic beverages server, the employer expected claimant to have and maintain a valid server's permit issued by the Oregon Liquor Control Commission (OLCC) authorizing him to serve alcoholic beverages on behalf of the employer. Claimant understood the employer's expectation.

(3) On or before July 19, 2017, the employer's manager and claimant discussed that claimant's OLCC server's permit was going to expire sometime soon. On July 19, 2017, the manager called claimant and asked him to examine a binder that the employer maintained to determine when his OLCC permit would expire. The binder showed claimant's permit had lapsed on July 17, 2017. Claimant immediately called the manager and told her that his permit had expired. The manager told claimant to cease serving alcohol immediately, arrange for another employee to cover his shift and to clock out. After claimant had left the workplace, claimant spoke again that evening with the manager. During the second call, the manager agreed to allow claimant to come to the workplace on July 21, 2017, his day off, to take an online test required to renew his OLCC server's permit since claimant did not have his own internet access. Claimant was off work on July 20 and 21, 2017. Claimant's next scheduled workday was July 22, 2017.

(4) On July 21, 2017, claimant went to the workplace to take the online test to renew his OLCC permit. While registering for the test, claimant learned that his OLCC permit had not expired on July 17, 2017,

but was due to expire that day. Claimant took the online test and paid a fee online for the issuance of a new OLCC permit, by using his bank debit card. After, the manager approached claimant and gave him an application for a server's permit that she had signed. The manager told claimant, "You're good now." Audio at ~31:35. By her comment, claimant assumed he had taken all of the necessary steps to renew his OLCC server's permit and that the signed document the manager had given to him was intended to operate as a temporary OLCC server's permit until he received a permanent one from the OLCC. Claimant thought he was authorized to resume serving alcoholic beverages for the employer.

(5) On July 22 and 23, 2017, claimant reported for work and served alcohol to customers. On July 24, 2017, the employer discharged claimant for working and serving alcohol on those days without having a valid OLCC server's permit. Although claimant had taken the online test, the employer believed he needed to deliver a hard copy of the signed application form to the OLCC and pay a renewal fee before his OLCC server's permit was actually renewed and again valid.

**CONCLUSIONS AND REASONS:** 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. 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. 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).

At hearing, the employer's witness, a representative from the employer's human resources department contended that after claimant took the online test to renew his OLCC server's permit on July 21, 2017, the manager did not give claimant a signed document or an application for renewal of his OLCC permit, but pinned it to a message board for claimant to retrieve. The employer's witness further contended that the employer's manager specifically told claimant that he needed to take the application form that she had signed to the OLCC's offices along with a renewal fee before the renewal of his OLCC server's permit would be effective. Audio at ~10:54. Claimant disputed that this occurred, and claimant's account of the interaction between himself and the manager on July 21, 2017 appears in our findings of fact. Audio at ~27:10, ~31:12. Accepting the account of the employer's witness as accurate, the reason why the manager would have told claimant about the necessity of taking the application to the OLCC's offices and then proceeded to pin it up on the message board rather than simply giving it to claimant is not obvious to us. In addition, claimant's credible first-hand account of what transpired during his interaction with the manager has greater evidentiary weight than the second-hand account of the employer's witness, which appears to be entirely based on hearsay from manager. For this reason, claimant's account of this interaction is accepted based on the preponderance of the evidence.

Claimant's belief that he had completed all of the steps needed to renew his OLCC license by taking the online test and paying the renewal fee, and that the signed document given to him that evening by the manager was his temporary authorization to serve alcohol was plausible, particularly since claimant's manager accompanied the delivery of the document with reassuring statement of "you're good now." Audio at ~31:25. While claimant's belief about the process by which a renewal of an OLCC server's permit was effectuated may not have been inaccurate, it appears that it was sincere, not groundless and held in good faith. *See Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006) (behavior in violation of the employer's standards may be excused as a good faith error if, although it was based on a mistaken belief, the belief was honest, not based on fraud or deceit and the circumstances as they were known to claimant did not require further investigation into the accuracy of the belief). Here, on the facts in this record, the standards set out in *Goin* are met and, based on the actions and statements of the manager after claimant completed the online test, claimant had no reason to think his OLCC permit was not renewed or to investigate further whether or not it was. Accordingly, claimant's behavior in connection with the renewal of his OLCC server's permit was excused from being considered misconduct since it constituted a good faith error within the meaning of OAR 471-030-0038(3)(b). The employer did not meet its burden to show claimant engaged in misconduct.

Although the employer discharged claimant, it did not show that it did so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-92992 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 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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