

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1162**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121200). Claimant filed a timely request for hearing. On September 7, 2017, ALJ Amesbury conducted a hearing, and on September 11, 2017 issued Hearing Decision 17-UI-92247, affirming the Department's decision. On September 30, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Truck N Travel employed as a cashier from April 27, 2016 until June 4, 2017.

(2) The employer expected claimant to arrive to work on time or to notify the employer if she was going to be late. The employer also expected claimant to limit the time she took for her lunch break to a half-hour. The employer further expected claimant to take a half-hour lunch break during any shift in which she worked six hours or more and not to skip taking that break. Claimant understood the employer's expectations.

(3) On January 25, 2017, the employer issued a written warning to claimant for taking lunch breaks that were longer than thirty minutes and for arriving late to work without notifying the employer.

(4) In early 2017, claimant's manager told claimant that she could take lunch breaks that were longer than the thirty minutes usually allowed to enable her to attend her children's sporting events. The manager told claimant that, before taking an extended lunch break, she should make sure the other cashier on duty was aware that she would be gone for an extended period and agreed to it. Claimant's manager did not require notice each time claimant took an extended lunch break for purposes of attending a sporting event.

(5) After March 2017, claimant was tardy arriving to work only very infrequently. On May 21, 2017, claimant reported two hours late for work after having arranged to trade shifts with another employee. Claimant was not tardy again.

(6) Sometime before May 27, 2017, claimant's manager noticed from time records that claimant had failed to take lunch breaks on May 25 and 26, 2017, although the shifts she had worked those days were over six hours. On May 27, 2017, claimant's manager gave claimant a verbal warning for not taking a thirty minute lunch break when she worked shifts longer than six hours. The manager told claimant that if she failed to take the required lunch breaks in the future she would be subject to further disciplinary action up to and including discharge.

(7) On June 1, 2017, claimant took a lunch break of one hour and 12 minutes rather than the thirty minutes allowed. On June 2, 3 and 4, 2017, claimant worked shifts that were six hours or longer, but failed to take a lunch break.

(8) On June 6, 2017, the employer discharged claimant for tardiness, failing to take thirty minute lunch breaks when the shifts she worked were at least six hours in duration, and, on occasion, taking extended lunch breaks that were longer than thirty minutes.

**CONCLUSIONS AND REASONS:** 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. 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 employer's witness testified at hearing that the employer discharged claimant for tardiness and for failing to take thirty minute lunch breaks. Transcript at 5. The witness also testified about claimant's alleged practice of taking "extended" lunch breaks, or breaks longer than thirty minutes, presumably as additional alleged misconduct on claimant's part. Transcript at 15, 16, 31. However, the employer's witness testified that claimant was only very rarely tardy after March 2017 - apparently only on May 21, 2017 - and there was no indication that claimant was tardy in the days immediately preceding the discharge. Transcript at 32. It therefore does not appear that claimant's alleged tardiness was a proximate cause of the discharge. As to the "extended" lunch breaks, claimant and her manager appeared to have had a very loose understanding about when and under what circumstances claimant could take breaks longer than thirty minutes, and it does not appear that the manager gave claimant clear instructions on what the employer prohibited, and what it did not, with respect to the extended breaks. Without clear instructions or standards having been communicated to claimant about when taking extended lunches was allowed and when it was not, the employer was unable to show that claimant's behavior in taking particular extended lunches was a willful or wantonly negligent violation of the employer's standards. For these reasons, the focus of the misconduct analysis is on claimant's failure to take the required thirty minute lunch breaks on June 2, 3 and 4, 2017.

The employer was correct that Oregon law requires that employees who work shifts of at least six hours are required to have one thirty minute meal break. *See* OAR 839-020-0050(2)(a) (January 1, 2014). Claimant testified at hearing that she was aware of that the employer required her to take such breaks and acknowledged that she was warned about failing to take such breaks on May 27, 2017, only a week before she was discharged. Transcript at 21-22, 23. Claimant did not dispute that she failed to take the required lunch breaks on June 2, 3 and 4, 2017. While claimant speculated she might have failed to take the breaks because she was trying to make up work time due to having had medical appointments on those days, it does not appear likely that claimant would have done so without consulting with her manager so soon in time after having received a warning for skipping lunch breaks. Transcript at 22. It is also does not appear likely that claimant would not have been able to recall whether she had medical appointments on those days, as she testified, since they were immediately before the discharge, and the reason she skipped her lunch breaks on them should have become fixed in her mind as a result of being discharged. We therefore find it likely that in failing to take the required lunch breaks on June 2, 3 and 4, 2017, claimant, with indifference to the consequences of her actions, consciously engaged in conduct she knew or should have known probably violated the employer's expectations. Claimant's conduct therefore was, at best, wantonly negligent.

Although claimant's conduct on June 2, 3 and 4, 2017 may have been wantonly negligent, it will not constitute misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). To be excused as an isolated instance of poor judgment, claimant's conduct must, among other things, have been a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). Here, claimant's wantonly negligent behavior took place on three separate days, and involved three separate decisions to violation the employer's standards. As such, claimant's behavior was not isolated therefore falls outside the type that may be excused from constituting misconduct.

Nor is claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Here, claimant did not contend that she was unaware of the employer's requirement that thirty minute lunch breaks needed to be taken during all shifts that were at least six hours in duration. And, for the reasons discussed above, we find it unlikely that claimant failed to take the breaks on June 2, 3 and 4, 2017 because she was trying to make up work time due to having had medical appointments on those days. Absent such a reason for taking the breaks, we find it unlikely that claimant sincerely believed, and had a rational basis for believing, the employer would condone her failure to take them.

We therefore conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-92247 is affirmed.

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

**DATE of Service:** November 1, 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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