

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1293**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81822). Claimant filed a timely request for hearing. On October 20, 2017, ALJ Janzen conducted a hearing, and on October 23, 2017 issued Hearing Decision 17-UI-95136, concluding the employer discharged claimant, but not for misconduct. On November 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Sykes Enterprises employed claimant as a customer service agent from January 16, 2017 until August 30, 2017. Claimant was assigned to answer phone inquiries from the customers of one of the employer's clients. The client was a bank.

(2) The employer allowed its customer service agents to "talk" a customer through the process of setting up an online account, which include creating a user name, a password and answering security questions. Transcript at 6. However, the employer expected its customer service agents to refrain from inquiries and activities that would give them knowledge of the customer's user name, password or answers to security questions. The employer also expected claimant to ask one or more predetermined questions to verify the identity of a customer before proceeding to respond to the customer's phone inquiries. The employer further expected claimant to report for work as scheduled. Claimant understood the employer's expectations.

(3) On June 1, 2017, the employer issued a warning to claimant for having missed 14 work hours in six months. On July 19, 2017, the employer issued a written warning to claimant for having missed 173 work hours in six months.

(4) On August 17, 2017, the employer issued a verbal warning to claimant for failing to ask a customer the necessary questions to verify the customer's identity before responding to the customer's phone inquiry. On August 24, 2017, the employer issued a final written warning to claimant for having missed 175 work hours in six months.

(5) On August 25, 2017, claimant received a call from a bank customer who was having difficulty setting up an online account. Although the customer provided claimant with an identifying credit card number, claimant did not ask the customer to provide his or her name to further verify the customer's identity before proceeding to assist the customer. After listening to the customer's difficulties, claimant offered to set up the online account for the customer. In the process of doing so, claimant asked the customer what user name and password the customer wanted to use for purposes of accessing the account, as well as asking what the customer's answers were to certain account security questions. Claimant entered the information that the customer provided as part of creating the online account.

(6) On August 30, 2017, the employer discharged claimant for setting up the online account for the customer on August 25, 2017 and, in the process, learning the user name, password and answers to the security questions that would allow claimant access to the customer's account if he so chose.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer failed to establish that claimant's discharge was 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. Isolated instances of poor judgment 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 employer contended that it discharged claimant both for failing to ask the customer a second identity verification question on August 25, 2017 before proceeding to set up the customer's online account, and for obtaining knowledge of the user name, password and answers to the account security questions when he set up the account. Transcript at 6, 13, 14. With respect to failing to ask the customer a second question to verify identity, claimant thought that if he failed to do so, it was not deliberate and likely would have been because "I was just tired and skipped a step." Transcript at 24. That claimant might have inadvertently skipped a step in the verification process due to fatigue is not behavior that is associated with the consciously aware mental state required to find willful or wantonly negligent behavior or, in other words, misconduct. *See* OAR 471-030-0038(1)(c). On this record, the employer did not meet its burden to show that claimant's failure to ask a second verification question on August 25, 2017 was willful or wantonly negligent.

With respect to obtaining knowledge of the user name, password and answers to the security questions needed to access the customer's account, claimant did not dispute that the employer generally prohibited him from asking a customer for such information due to concerns over the potential for having unauthorized access to customers' accounts. Transcript at 22, 23. Although claimant contended that he only helped the customer set up the account on August 25, 2017, it is difficult to see how claimant could have reasonably or plausibly thought that this justification allowed him to permissibly learn the very information that would allow him to later access the customer's account without authorization, if he so chose. Transcript at 22, 23. By obtaining the information needed to access the account he set up for the customer independent of the customer, even if he was assisting the customer, claimant violated the employer's expectations with at least wanton negligence.

Even if claimant violated the employer's standards on August 25, 2017 with wanton negligence, however, that violation does not constitute misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To be excusable as an isolated instance of poor judgment, the behavior of claimant that is at issue also must not have "exceeded mere poor judgment" by, among other things, causing a irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, the employer identified claimant's failure to properly verify a customer's identity on August 17, 2017 and claimant's absences between June 1 and August 24, 2017 as constituting acts of misconduct on claimant's part prior to August 25, 2017. In connection with the failure to verify identity that the employer cited, neither of the employer's witnesses at hearing was able to describe how claimant allegedly violated the employer's standards in this regard. Transcript at 9, 19. Claimant also could not recall what the employer contended he had done or failed to do on August 17, 2017 or what, in fact, he actually had done or failed to do. Transcript at 25. Accordingly, there is insufficient evidence in this record to show that claimant willfully or with wanton negligence violated the employer's standards on August 17, 2017. With respect to claimant's absences between June 1 and August 24, 2017, claimant contended that his absences were due his brother having had a car accident and him needing to tend to the brother in another city, the harsh weather during the winter months, his apartment having been flooded, needing to move in with his mother, and his mother living one and a half hours away from the workplace. At hearing, the employer's witness was unable to provide information about the reason(s) for claimant's absences. Transcript at 10. In light of claimant's rebuttal and absent evidence showing or tending to show that claimant's absences between June 1 and August 24, 2017 were the result of willful or wantonly negligent behavior, there is insufficient evidence in this record to show the claimant's wantonly negligent behavior on August 25, 2017 was not isolated.

Claimant's wantonly negligent behavior on August 25, 2017 also did not exceed mere poor judgment. Claimant's testimony that he only wanted to assist the customer, and he obtained the prohibited information in the context of trying to most efficiently help the customer by setting up the online account for the customer was sincere. While claimant should have realized that obtaining information that would allow him to have unauthorized access to the customer's online account was prohibited, it does not appear that claimant had any ulterior motive in obtaining the information. Claimant's violation of the employer's standards on August 25, 2017 appears, most likely, to have been the result of an overzealous attempt to provide responsive customer assistance. On these facts, given claimant's likely

state of mind, an employer would not have objectively concluded that it could not trust claimant to comply with its standards in the future based on what he had done on August 25, 2017, or that claimant's behavior made it impossible to continue an employment relationship with him. Having met all the requisites, claimant's wantonly negligent behavior on August 25, 2017 is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-95136 is affirmed.

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

**DATE of Service: December 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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