

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1352**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 80538). The employer filed a timely request for hearing. On November 2, 2017, ALJ Griffin conducted a hearing and issued Hearing Decision 17-UI-96081, affirming the Department's decision. On November 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, 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). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) O'Reilly Auto Parts employed claimant from June 29, 2017 until August 22, 2017 as a retail service specialist.

(2) The employer expected each employee to notify his or her manager a minimum of 30 minutes before his or her scheduled shift if the employee was unable to report to work. If an employee did not report to work and failed to speak with his or her manager within the first two hours of the shift, the employer considered the absence a no call, no show. Any schedule change had to be reviewed by the store manager. The employer did not permit employees to switch shifts without manager approval. Claimant understood that the employer expected him to report for his scheduled shifts unless he received permission from his manager to change his schedule.

(3) The employer allowed employees to purchase merchandise on the employee's account for members of their own household. The employee was required to make the purchases himself.

(4) During the week of August 13, 2017, claimant used a bank card with his fiancé's name on it to purchase auto parts for an auto he and his fiancé shared. Claimant made the purchases under his

employee account. Claimant and his fiancé comingled their funds, and claimant was an authorized user of the bank card. Claimant's paychecks from the employer were automatically deposited into the account claimant used to make the purchases from the employer. Claimant did not have a separate bank account.

(5) In advance of August 22, 2017, claimant had asked for August 22, 2017 off from work to visit his mother in Portland who had recently had a stroke. On August 21, 2017, the schedule was posted and claimant was scheduled to work on August 22. Claimant reminded his supervisor that he had requested August 22 off from work. A coworker who held the same position as claimant stated that he could work claimant's shift. The supervisor told claimant to arrange that between the two of them and left. The other employee agreed to work for claimant on August 22.

(6) On August 22, 2017, claimant did not report to work for his scheduled shift. The other employee did report to work claimant's shift. Claimant called the store to confirm the coworker had reported to work.

(7) Claimant had not violated the employer's attendance policy before August 22, 2017.

(8) On August 22, 2017, the employer discharged claimant because he was a no call no show for his scheduled shift that day and because claimant made purchases with his team member account with a bank card that did not have claimant's name on it.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer discharged claimant in part because he failed to report to work on August 22, 2017, and failed to contact his manager that day to report his absence, in violation of the employer's attendance expectations. However, because claimant's manager expressly told him to arrange coverage for his shift with his coworker, claimant believed that that the employer had approved his time off work on August 22. Claimant's absence and failure to contact his manager on August 22 resulted from his good faith belief that the manager had allowed him to arrange for his coworker to cover claimant's shift on August 22. Claimant's violation of the employer's attendance policy therefore resulted from a good faith error

in his understanding of what the employer expected of him. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).<sup>1</sup>

The employer also discharged claimant, in part, after concluding he violated its policy regarding employee purchases, a policy that permitted employees to make employee purchases only for members of the employee's household. In regard to the alleged violation of the employee discount policy, the employer asserted that claimant's purchases using a bank card bearing his fiancé's name violated this policy. However, the record does not show that employer's policy stated or required that the manner of payment must bear the employee's name. To the extent the employer's policy may have contained that prohibition, claimant was unaware of it. Claimant's purchases were made by claimant, using a bank card he was authorized to use, drawing on his funds he had deposited into the account, for a vehicle he used. The record therefore does not establish that claimant made purchases in violation of the employer policy. At worst, claimant may have unknowingly violated a policy that was never communicated to him, which is not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-96081 is affirmed.

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

**DATE of Service:** December 21, 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> In concluding that claimant's violation was a good faith error, we disagree with the ALJ that claimant's conduct was an isolated instance of poor judgment. *See* Hearing Decision 17-UI-96081 at 3.