

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1362**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85052). Claimant filed a timely request for hearing. On November 17, 2017, ALJ Murdock conducted a hearing, and on November 20, 2017, issued Hearing Decision 17-UI-97290, affirming the Department's decision. On November 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB containing new information not offered at hearing. EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Because claimant did not explain the relevance of the new information or how circumstances beyond her reasonable control prevented her from offering the new information at hearing, we did not consider it in reaching our decision. We considered the hearing record and claimant's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Winco Foods, Inc. employed claimant as a cashier from May 29, 2015 until it discharged her on August 2, 2017.

(2) The employer expected claimant, as the graveyard shift cashier from 11:30 p.m. to 8:00 a.m., to check ("sweep") the floor in the front end of the store every 30 minutes for spills or other hazards, and to then initial a "sweep log" documenting that she had completed the sweep each time claimant checked the floor. Before doing the sweep, the employer expected claimant to call out on the intercom a reminder to other employees that were in charge of their own areas to check the floors in their areas and sign their own sweep logs after they checked the floors. No other employees were assigned to check the floor in claimant's area. The employer considered dishonesty such as falsifying company records to be gross misconduct. The employer used the sweeps and sweep logs to limit injuries and liability for

injuries to customers, employees and vendors that worked in the employer's store. Claimant understood that the employer prohibited her from falsifying the employer's records.

(3) On November 21, 2015, claimant received a verbal warning because she failed to initial the sweep log immediately after she conducted a sweep of a bathroom. She later backfilled the sweep log after rechecking the bathroom. The employer reminded claimant that the employer expected her to inspect the floors then immediately record having done so in the sweep log.

(4) Claimant was the only cashier during graveyard shift, so the employer expected her to conduct sweeps when she had no customers in her checkout line, or to contact other staff on duty to act as cashier while she conducted her sweeps. Every night there was at least one person working with claimant on the graveyard shift who was also qualified to perform cashier duties.

(5) The sweep logs that claimant initialed stated, "Employees performing inspection should place his or her three initials in the proper box to verify that no products or liquids are on the floor. Remain at spills until maintenance arrives." Exhibit 1, Customer Service/Front End Department Sweep & Mop Logs for July 2-July 8, 2017 and July 9-15, 2017.

(6) During July 2 through July 9, 2017, claimant sometimes checked the front end of the store as the employer required by walking up and down the length of the front end of the store. The length of the area was about 100 feet. Claimant would then note having done so on the sweep log. However, on July 3, twice on July 6, twice on July 8, and on July 9, claimant noted on the sweep log that she had checked the front end of the store when she had not done so. Exhibit 1 at 15. At times, claimant called out the reminder on the intercom that employees should conduct their sweep checks, and did not leave her register, but still signed the sweep log stating she had conducted a sweep. Claimant consistently went to the bathrooms every four hours and checked them, and signed the bathroom check log that she had done so.

(7) In July 2017, the employer's loss prevention viewed ten days of video showing that claimant did not check the floor for her assigned area before she signed the sweep log on multiple occasions during July 2 through 9, 2017.

(8) On August 2, 2017, the employer discharged claimant for repeatedly falsifying the sweep log.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that 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. 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 her conduct and knew or should have known that her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a

discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer prohibited employees from falsifying sweep logs by initialing the sweep logs without first conducting a sweep of the designated area. Claimant asserted at hearing that she was not trained regarding sweep log procedures. Transcript at 27. However, claimant was trained regarding the sweep log procedures in conjunction with a warning for violating the sweep log policy in November 2015. It is undisputed that on multiple occasions between July 2 and July 9, 2017, claimant initialed the employer's sweep log without having first checked the floor in her area, the front of the store. There is no evidence to show that claimant did so by inadvertence or mistake. Thus, by doing so, claimant falsified the employer's sweep logs. Claimant's repeated falsifications of the employer's sweep logs were willful violations of standards of behavior which the employer had the right to expect of claimant.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be excused as an isolated instance of poor judgment it must be a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). Claimant's conduct involved repeated willful falsifications of the employer's sweep logs. Her conduct was therefore a repeated act of willful conduct that cannot be excused as isolated.

Claimant also asserted that she believed she was only required to call out a sweep reminder on the intercom, and not actually check her area, before she initialed the sweep log every 30 minutes. Transcript at 24-26. We are not persuaded by claimant's assertion that she had a good faith belief that merely calling out the reminder satisfied the employer's expectations before she initialed the sweep log. First, when claimant received the warning in November 2015, claimant had forgotten to initial the sweep log after checking the floors, and went back and rechecked the floors again before she corrected her mistake by initialing the sweep log. Transcript at 29-30. Claimant's testimony regarding that incident shows that she understood she was required to check the floor before she initialed the sweep log. Moreover, during July 2017, claimant often did check her area before she initialed the sweep log, and she consistently checked the bathrooms before initialing the bathroom sweep log. This shows she understood the sweep log policy. Finally, claimant understood that the purpose of the sweeps was to maintain safe, hazard-free floors in all areas of the store, including claimant's area, the front of the store. It is not plausible that claimant believed in good faith that calling out a floor check, but not checking her own area when nobody else was assigned to check her area, satisfied the employer's goal of ensuring the floor in her area was free of hazards. On this record, claimant did not hold a good faith belief that the employer expected or would condone her initialing the sweep log when she had not actually performed sweeps. Claimant's conduct therefore cannot be excused as a good faith error.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 17-UI-97290 is affirmed.

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

**DATE of Service: December 29, 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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