

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0502**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93234). Claimant filed a timely request for hearing. On April 17 and May 7, 2018, ALJ Scott conducted a hearing, and on May 10, 2018 issued Order No. 18-UI-109085, concluding that claimant's discharge was not for misconduct. On May 16, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) McMenamain's Inc. employed claimant as brewer from August 28, 2002 until March 5, 2018.

(2) The employer expected claimant to perform his job duties adequately and to its satisfaction. Claimant understood the employer's expectations as a matter of common sense.

(3) Beginning in approximately 2015, claimant received several warnings for deficient work performance. On September 7, 2017, the employer gave claimant a final written warning for unsatisfactory performance. After claimant received the final written warning, claimant thought his work performance significantly improved.

(4) Beginning several years before 2018, the employer customarily offered a seasonal Irish Stout in its pubs during March. Sometime before January 2018, the employer notified claimant that he needed to brew the 2018 Irish Stout in sufficient time to have it available to be served in the Corvallis, Oregon pubs to which he provided beer by the time the pubs opened for business on March 1, 2018. The employer advertised to the public that its 2018 seasonal Irish Stout would be released to its pubs and available for consumption on March 1, 2018.

(5) Sometime in January 2018, claimant contacted another of the employer's breweries in Roseburg, Oregon and arranged for that brewery to supply the Irish Stout for the Corvallis pubs. The employer allowed claimant to meet some his brewing requirements though such arrangements with other

breweries. However, claimant inadvertently neglected to specify in the beer order from the Roseburg brewery that the Irish Stout needed to be delivered to the Corvallis pubs in sufficient time to have it available for service at the 11:00 a.m. time the pubs opened on March 1, 2018.

(6) On the morning of March 1, 2018, claimant learned that the general manager of one of the Corvallis pubs was going to arrive at a pub to sample the Irish Stout that was supposed to be released that day. At that time, claimant realized that he had not arranged for the Roseburg brewery to deliver the Irish Stout he had ordered to the Corvallis pubs on March 1, 2018. Claimant called another of the employer's breweries, in Eugene, Oregon, and determined that he could obtain Irish Stout from that brewery. On March 1, 2018, claimant spoke with the employer's regional brewing manager, told him that the March 1, 2018 release date for Irish Stout had "slipped his mind," but that he intended to drive to Eugene to pick up some Irish Stout. Transcript of April 17, 2018 Hearing (Transcript 1) at 8. The regional manager told claimant not to drive to Eugene to pick up the Irish Stout using his personal vehicle, and that other arrangements would be made. Had claimant driven to Eugene for the beer, he would have arrived in Corvallis with the Irish Stout by approximately 3:00 p.m. on March 1, 2018. However, the Irish Stout that claimant would have delivered would have required several hours of refrigeration before it was at an acceptable serving temperature and would not have been ready to serve on March 1, 2018. Irish Stout was not served in the employer's Corvallis pubs until March 3 or 4, 2018.

(7) On March 5, 2018, the employer discharged claimant for poor work performance.

**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) (January 11, 2018) 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 incidents of poor judgment or mere inefficiency resulting from lack of job skills or experience 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 the outset, the employer's witness testified that the employer discharged claimant not only for his failure to have Irish Stout available in the Corvallis pubs by the time they opened on March 1, 2018, but also for his ongoing poor work performance as indicated by several warnings issued to him in and after 2015. Transcript 1 at 18. However, EAB first focuses the final incident of a claimant's alleged misconduct in order to determine if claimant is disqualified from benefits. This is so because, as here, when the employer was aware of claimant's past defaults and did not discharge claimant at the time they occurred, it can be assumed that the employer did not consider them to merit discharge. Accordingly, claimant's behavior in failing to have Irish Stout available in the Corvallis pubs on March 1, 2018 is the focus of the misconduct analysis.

The employer's witness did not suggest that claimant's failure to have the Irish Stout delivered on time to the Corvallis pubs was due to anything other than an inadvertent oversight, and accepted claimant's explanation that making such arrangements had "slipped his mind." Transcript 1 at 8. By definition, violations of an employer's standards that are due to mistakes, errors, accidents, inadvertent oversights, lapses of attention or judgment and the like are generally not accompanied by the consciously aware mental state necessary to establish the type of willful or wantonly negligent behavior that disqualifies a claimant from unemployment benefits. *See* OAR 471-030-0038(1)(c). Absent additional evidence, which was not present in this record, the employer did not show that claimant's behavior in failing to have the Irish Stout available in the Corvallis pubs on March 1, 2018 was the result of willful or wantonly negligent behavior and that is constituted disqualifying misconduct.

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

**DECISION:** Order No. 18-UI-109085 is affirmed.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service:** June 15, 2018

**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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