

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0540**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84724). Claimant filed a timely request for hearing. On May 1, 2018, ALJ Micheletti conducted a hearing, and on May 9, 2018 issued Order No. 18-UI-108944, affirming the Department's decision. On May 24, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Coos Bay Toyota/101 Budget Auto Sales employed claimant as a café worker from August 14, 2015 until March 23, 2018. The employer operated a café in its auto dealership.

(2) Although the employer allowed café workers to consume café food without paying for it while on duty, it prohibited them from taking café food home without paying for it. The employer also expected claimant to complete all assigned duties before leaving for the day. Claimant understood the employer's expectations.

(3) On many occasions throughout claimant's employment, the cafe manager warned claimant about failing to complete her assigned closing duties before leaving work. The café manager made arrangements for claimant's minor child to be picked up from her after-school care and brought to the workplace by someone other than claimant to allow claimant to complete her closing work.

(4) On April 17, 2017, the employer issued a written warning to claimant for tardiness in reporting for work on several occasions. On February 26, 2018, the employer gave claimant a written warning for taking café food home without paying for it. While claimant had "totally spaced" and did not realize that she had taken the cookie from the café home in the incident that gave rise to the warning, claimant had on many other occasions knowingly taken café food home without paying for it.

(5) On March 22, 2018, claimant left work to pick up her daughter and then proceeded home without having completed all of her closing duties, including mopping the floor and washing dishes. Claimant

had discovered that her daughter had an event to attend at her after-school care. Had claimant stayed at work to complete all of her duties, she would have been late in picking up her daughter, but no harm would have resulted to her or her daughter from her lateness.

(6) On March 23, 2018, the employer discharged claimant for failing to complete her closing duties on March 22, 2018.

**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) (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. Isolated instances of poor judgment and good faith errors 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).

Claimant ultimately appeared to agree that she failed to complete all assigned closing duties on March 22, 2018, and did not contend that any harm would have resulted to her or her daughter if her daughter remained at after-school care for the time required for claimant to complete all of the closing duties, or that any other exigent circumstances prevented claimant from completing those closing duties. Audio at ~16:34, ~20:34, ~20:57. Given the multitude of times the café manager had warned claimant about completing her closing duties before leaving work, and claimant's awareness that she had not completed those closing tasks before she leaving on March 22, 2018, claimant's failure to finish all of her closing duties that day was at least a wantonly negligent violation of the employer's standards.

While the behavior for which claimant was discharged might have been wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if it was, among other things, a single or infrequent occurrence on claimant's part 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 agreed that she violated the employer's standards on many prior occasions when she took food and drinks home from the café without paying for them. Audio at ~19:04. Because claimant's behavior in violation of the employer's standards on March 22, 2018 was not a single or infrequent willful or wantonly negligent violation of the employer's expectations, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant's behavior on March 22, 2018 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she failed to finish all of her closing duties because she misunderstood the employer's requirements or that she thought the employer would permit her not to perform those duties on March 22, 2018. There is insufficient evidence in the record to support a conclusion that claimant's behavior on March 22, 2018 resulted from a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-108944 is affirmed.

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

**DATE of Service: June 22, 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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