

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0866**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 81833). The employer filed a timely request for hearing. On August 13, 2018, ALJ Snyder conducted a hearing, and on August 21, 2018 issued Order No. 18-UI-115318, affirming the Department's decision. On August 30, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY ISSUE:** Claimant submitted a letter from his doctor regarding symptoms of his medical treatment to the Office of Administrative Hearings before the August 13, 2018 hearing, presumably to offer at hearing. The ALJ marked the letter as Exhibit 1 and admitted it into the record in Order No. 18-UI-115318 without having addressed the document at hearing or asked the parties if they objected to the document. A copy of Exhibit 1 is therefore being mailed to the parties with this decision. Any party that objects to the admission of Exhibit 1 into evidence must submit such objection to EAB in writing, setting forth the basis of the objection, within ten days of our mailing of this order. Unless such objection is received and sustained, the document will remain in the record as Exhibit 1.

**WRITTEN ARGUMENT:** 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 did not consider its written argument in reaching this decision. The employer also asked for a new hearing to provide "additional information" that was not provided at the time of hearing. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Because the employer did not explain what information it wished to provide or how it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing, the employer's request to have EAB consider additional evidence is denied. We reached this decision based only upon our review of the hearing record. ORS 657.275(2).

**FINDINGS OF FACT:** (1) Cinemark USA, Inc. employed claimant from 1999 until June 14, 2018 as a booth engineer. The employer reimbursed claimant for meals, mileage and lodging expenses he incurred while traveling within his work area between Bellevue, Washington and Medford, Oregon. Claimant resided in Eugene, Oregon.

(2) The employer expected claimant to complete his online timecards accurately each day and to review and submit them to the employer for approval at the end of each week. Claimant understood that his timecards should accurately represent the total hours he worked.

(3) Claimant typically kept track mentally of the total hours he worked, but did not record exactly when he took breaks or worked each day. The work he completed was administrative work at home or while in a hotel while traveling, or repair and testing work on-site in the employer's theaters. Claimant recorded the actual number of hours that he worked each day and week, but sometimes did not record the schedule he worked accurately because he found it took more time to log his time to match the schedule he worked.

(4) During April and May 2018, claimant experienced short-term memory loss and mild cognitive deficits as side effects of having recently completed chemotherapy for cancer at the end of March. Exhibit 1.

(5) In April 2018, claimant's manager began a leave of absence, and claimant had a new manager. The first week the new manager reviewed claimant's timecard, he instructed claimant to separate his travel time from his work time on his timecards, because claimant had previously been combining them on his timecards. Claimant complied with the manager's request. The manager told claimant that the employer expected him to work five days per week. Claimant had been working four ten-hour days per week, and switched his schedule to working four nine-hour days and a half-day on Fridays.

(6) At the end of May 2018, claimant's manager asked claimant to submit all his outstanding travel and expense receipts to him. The manager reviewed the receipts from the previous six weeks because he noticed the expense receipts did not always match claimant's schedule on his timecards. The manager found an inconsistency between claimant's timecard and expense receipts for April 16, 2018. Claimant's timecard for April 16 showed that claimant traveled from his home area of Eugene to work in Medford from 6:00 a.m. until 8:30 a.m. One of claimant's receipts for April 16 showed that claimant had breakfast at 9:38 a.m. about one hour's driving distance from Eugene. The manager found a similar discrepancy during each of the six weeks he reviewed.

(7) On June 14, 2018, claimant's manager presented the inconsistencies that he had found on claimant's timecards to claimant. Claimant told the manager that the total time on his timecards was accurate, but that he sometimes did not put the accurate schedule on his timecards. Claimant received no warnings about how he completed his timecards or other issue during his employment.

(8) On June 14, 2018, the employer discharged claimant because claimant submitted time cards to the employer that contained inaccurate schedule information.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude 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. Good faith errors are not misconduct. OAR 471030-0038(3)(b). The employer carries the burden to prove by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It is undisputed that claimant failed to accurately record his schedule on his timecards during April and May 2018. The employer's witness asserted that claimant violated the employer's timekeeping expectations and reported working more hours than he actually worked. However, although claimant technically violated the employer's expectations by failing to record his hours to match the schedule he worked, claimant asserted that he did not believe his manner of reporting his time violated the employer's expectations. A "good faith error," which is not misconduct, usually involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case without reason to further investigate what the expectation was. *Accord, Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006). As a basis for his good faith belief, claimant testified that he accurately reported the number of hours that he worked, and had been reporting his hours the same way for years without being told or warned to report his hours differently. Moreover, the record does not show that the employer was dissatisfied with claimant's work performance or other evidence that would tend to show that claimant worked fewer hours than he reported. On the contrary, claimant had worked for the employer for many years without receiving any warnings. Although claimant's timekeeping violated the employer's expectation that he accurately report the schedule that he worked, his conduct was excused from constituting misconduct as a good faith error.

Even assuming, *arguendo*, that claimant made errors in reporting the number of hours he worked, the record does not show by a preponderance of the evidence that any errors claimant made in reporting his hours worked during April and May 2018 were not attributable to memory loss or cognitive deficits caused by his medical treatment. Behavior caused by inadvertent lapses, oversights, errors, accidents, or forgetfulness is generally not accompanied by the consciously aware state of mind needed to establish a willful or wantonly negligent violation of the employer's standards. Absent additional evidence showing that claimant knew or should have known his timekeeping violated the employer's expectations, or that he consciously misreported the total number of hours that he worked, the record does not show claimant engaged in misconduct.

The employer did not establish that it discharged claimant for misconduct. Claimant is not disqualified from unemployment insurance benefits.

**DECISION:** Order No. 18-UI-115318 is affirmed.

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

**DATE of Service: October 2, 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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