

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0417**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision #74759). The employer filed a timely request for hearing. On March 6, 2014, ALJ Shoemake conducted a hearing, and on March 12, 2014 issued Hearing Decision 14-UI-12105, affirming the Department's decision. On March 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Letica Corporation employed claimant from October 25, 2012 to December 19, 2013 as a forklift operator.

(2) The employer expected claimant to maintain the proper level of productivity and workmanship.

(3) Claimant had prior work experience as a fork lift operator moving finished goods. He did not have prior work experience selecting pallets and putting product on pallets before moving it.

(4) The employer did not expect claimant to meet its production requirements during his first ninety days of employment.

(5) From April 2013 to October 22, 2013, the employer warned claimant about multiple errors in packaging and loading pallets, and failure to meet the employer's production expectations. On October 22, 2013, the employer put claimant on probation because he failed to meet the employer's performance standards. Claimant completed additional training offered by the employer.

(5) On November 2, 2013, claimant omitted one container from a shipment when he loaded the shipment in a trailer.

(6) On November 8, 2013, the employer gave claimant instructions to count and load a shipment for a customer. The employer gave claimant extra coaching and a worksheet to use as a tool to complete the assignment. Claimant used the worksheet, and completed correctly the portion of the assignment he was able to finish before the end of his shift. Claimant's supervisor told claimant he expected claimant to complete the shipment before the end of his shift, but instructed him to tell the next material handler on duty what work remained for him to complete if claimant did not complete the job assignment before the end of his shift. Claimant did not complete the assignment before the end of his shift, and gave the next material handler on duty a summary of the work that remained for him to complete.

(7) On November 20, 2013, the employer instructed claimant to unload a shipment and to stage it in rows in the employer's warehouse. The employer expected claimant to complete the assignment within ninety minutes. Claimant had difficulty moving the pallets of product because they were wet. Claimant spilled some of the product while he was unloading the shipment, and had to pick it up. The employer required claimant to complete additional duties in the production department while he was unloading and staging the shipment. It took claimant four hours to unload and stage the shipment.

(8) On December 19, 2013, the employer discharged claimant for repeatedly failing to meet the employer's performance standards for productivity and workmanship.

**CONCLUSIONS AND REASONS:** We agree with the Department and 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. 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). Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for unacceptable job performance. The employer testified that it discharged claimant for a series of performance issues from April through November 2013. However, the employer placed claimant on a ninety-day probation as a result of claimant's work performance before October 22, 2013. The employer did not discharge claimant until claimant continued to fail to meet the employer's performance standards during November 2013. Therefore, the November 2013 incidents that lead to the employer's final warning to claimant were the proximate cause of the work separation, and the focus of the misconduct analysis.

The issue is whether claimant's repeated failure to meet the employer's workmanship and productivity expectations was misconduct, and not mere inefficiency resulting from a lack of job skills or experience. Claimant testified that he "was doing the best [he] possibly could," but was "confused" and unable to select the pallets correctly or understand some of the order sheets. Transcript at 23, 27. Although he had prior experience loading pallets, he did not have experience selecting pallets to package product, or loading different types of pallets. The employer told claimant he would learn how to select and load pallets through practice and "osmosis." Transcript at 23, 28. Despite receiving additional training and work experience from the employer, claimant continued to make errors such as forgetting to include a container on November 2, and failing to complete his work assignments as quickly as the employer expected on November 8 and November 22, 2013. The employer failed to show by a preponderance of the evidence that claimant's errors and lack of productivity was not mere inefficiency resulting from a lack of job skills or experience. Absent such a showing, we cannot find misconduct. Claimant is not disqualified from receiving unemployment benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-12105 is affirmed.

Susan Rossiter and D. E. Larson;  
Tony Corcoran, not participating.

**DATE of Service:** April 10, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.