

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1370

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 124955). The employer filed a timely request for hearing. On August 4, 2014, ALJ R. Davis conducted a hearing, and on August 13, 2014 issued Hearing Decision 14-UI-23301, affirming the Department's decision. On August 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pendleton School District #16 employed claimant from August 1, 2006 to June 13, 2014 as a full time night custodian at Pendleton High School.

(2) On March 10, 2014, the employer met with claimant to begin a "program of assistance for improvement" for claimant because it was dissatisfied with his work performance. The program of assistance and custodial evaluation stated, in part, that the employer required claimant to meet the following expectations:

- Adhere to all guidelines with regard to breaks and lunches, including limiting his breaks to fifteen minutes, and his lunch to thirty minutes.
- Clean all restrooms appropriately. This included but was not limited to appropriate mopping, cleaning of walls, sinks and mirrors and toilet fixtures, and emptying trash. The employer noted specific problem areas on the bathroom walls.
- Follow procedures for cleaning the locker rooms, including cleaning his assigned locker room daily.
- Use the safety equipment provided by the employer.

Exhibit 1. The program of assistance stated that progress meetings would occur on March 21, April 11, and May 16, 2014, and that a final determination regarding claimant's employment would occur on June 13, 2014.

(3) After the March 10, 2014 meeting, claimant performed his duties to the best of his ability. At times, claimant was unable to complete all of his required duties during his shift due to lack of time. He used the safety equipment provided by the employer. He limited his break time to fifteen minutes and his lunch to thirty minutes.

(4) On April 11, 2014, the employer evaluated claimant's performance under the program of assistance. The employer determined claimant was adhering to break and lunch guidelines and that claimant's performance in cleaning the restrooms improved, including the problem areas identified by the employer. The employer was still dissatisfied with claimant's failure to follow proper mopping procedures. The employer updated the program for improvement to include that claimant was to rinse his mop and change the mop water he used to clean the bathrooms more frequently, clean the locker room showers two times per week, use deodorizers more frequently, and report cleaning issues to the facilities manager. Exhibit 1. The employer alleged claimant was not using the safety equipment provided by the employer.

(5) Claimant changed his cleaning procedures to include changing the water he used for mopping more frequently, cleaning the locker room showers two times per week, and using the deodorizer more frequently. Claimant reported any cleaning issues to the facilities manager.

(6) On May 16, 2014, the employer met with claimant to review his performance under the program of assistance. The employer determined claimant's cleaning performance had improved and that claimant had begun to follow proper mopping procedures. The employer told claimant it expected him to improve his speed and efficiency by stocking his cart with supplies and cleaning products to avoid having to return to the custodial closet multiple times during his shift.

(7) Claimant stocked his cart with paper products and cleaning products at the beginning of his shift. He was unable to avoid having to return to the custodial closet during his shift because he had to change the mop water there, and because his cart did not hold sufficient paper products for all the bathrooms he cleaned.

(8) On June 13, 2014 the employer discharged claimant for allegedly failing to improve his performance to a satisfactory level.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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).*

On June 13, 2014, the employer discharged claimant for allegedly failing to improve his performance to a satisfactory level. The employer had a reasonable right to require claimant to try to meet the terms of the program of assistance to the best of his ability. Claimant understood the terms required by the employer under the program of assistance as each requirement was included in the updates to the program. At hearing, claimant testified that he corrected all the problems set forth in the program of assistance to the best of his ability (Transcript at 36, 41), but that he was sometimes unable to meet the employer's expectations due to time constraints. Transcript at 23. Weighing the employer's hearsay evidence against claimant's firsthand testimony about whether he corrected the problems addressed by the employer, the record shows that, more likely than not, claimant followed the program of assistance to the best of his ability. The employer failed to show that claimant consciously engaged in conduct he knew or should have known would probably result in a violation of the expectations set forth in the program of assistance. Nor does the record show that claimant was indifferent to the consequences of his actions, given that he completed or improved the specific items identified by the employer as they were included in the program for assistance to try to comply with the employer's expectations. The employer therefore failed to show claimant's failure to meet the expectations set forth in the program of assistance was willful or wantonly negligent. Absent such a showing, we cannot find misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-23301 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** September 17, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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