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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0150

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 71110). The employer filed a timely request for hearing. On January 20, 2015, ALJ Wyatt conducted a hearing, continued on January 29, 2015, and on January 29, 2015 issued Hearing Decision 15-UI-33060, affirming the Department's decision. On February 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) South Coast Lumber employed claimant as an equipment washer from December 9, 2013 to September 17, 2014. Claimant worked the employer's swing shift from 12:00 p.m. to 9:30 p.m.

(2) The employer expected claimant to report for work as scheduled and take his breaks at specified times. The employer's swing shift supervisor gave claimant several warnings for failing to report for work as scheduled or taking his breaks at other than specified times, the last of which he received on September 9, 2014. Exhibit 1. Claimant was aware of the employer's expectations.

(3) On September 16, 2014, claimant was scheduled to take a 15 minute break at 7:00 p.m. However, at 6:00 p.m., claimant's work duties were about to take him away from his designated break area. He asked for, and received, consent from his immediate supervisor to take his break at 6:00 p.m. which he did. Claimant took no other breaks during the remainder of his shift. The following day, the swing shift supervisor learned that claimant had taken a break an hour before his designated break time and terminated his employment for that reason.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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. 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.

The employer discharged claimant for taking a 15 minute break at other than his scheduled break time on September 16, 2014. The employer had the right to expect claimant to take his break as scheduled because he had received verbal warnings in the past for failing to do so. However, the employer did not dispute that on September 16, 2014, claimant received his immediate supervisor's consent to take the break in question one hour early because his work duties were about to take him away from the designated break area.

Where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 conduct* and knew or should have known his conduct would probably result in violation of standards of behavior the employer had the right to expect of him.[1] Willful or wantonly negligent conduct may not be inferred from results alone. On this record, even if claimant violated the employer's expectation in question, his actions did not demonstrate *conscious indifference* to the employer's interests. He asked for received his immediate supervisor's permission to take the break when he did. Accordingly, the employer failed to meet its burden to show that claimant's conduct was at least wantonly negligent.

The employer discharged claimant, but for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

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[1] *See* OAR 471-030-0038(1)(c); *see also Cynthia Santos* (Employment Appeals Board, 2014-EAB-1818, January 27, 2015) (absent evidence that claimant was consciously indifferent to the employer's interests, her technical violations of the employer's expectations regarding medication administration were not wantonly negligent); *Aline I. Murray* (Employment Appeals Board, 13-AB-0549, May 7, 2013) (absent evidence that claimant was conscious she was making a mistake or not paying close enough attention, her failure to give a customer the correct prescription was not wantonly negligent); *Sathanuman Khalsa* (Employment Appeals Board, 12-AB-0737, April 9, 2012) (absent evidence that claimant was conscious he was not paying close enough attention, his failure to pay attention was not wantonly negligent); *Guadalupe Vallasenor* (Employment Appeals Board, 12-AB-0229, February 23, 2012) (absent evidence that claimant was conscious she was making a mistake at the time she made it, her mistake was not wantonly negligent); *Marina V. Burlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence that claimant was conscious that she was failing to be careful, the failure was not wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence that claimant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-0949, May 14, 2010 (absent evidence claimant's failure to read restricted delivery label was conscious, failure was not wantonly negligent).

DECISION: Hearing Decision 15-UI-33060 is affirmed.

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

DATE of Service: March 30, 2015

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. 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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