

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0220**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 130055). The employer filed a timely request for hearing. On February 5, 2015, ALJ Clink conducted a hearing, and on February 6, 2015 issued Hearing Decision 15-UI-33155, affirming the Department's decision. On February 26 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pacific Dental Services employed claimant as an operations manager from December 20, 2013 to December 3, 2014.

(2) The employer expected employees to refrain from mistreating other employees. Claimant believed she was complying with that expectation, and received no warnings or disciplinary actions for mistreating employees until November 18, 2014.

(3) On November 18, 2014, another operations manager complained to the employer that claimant was mistreating employees. The employer began an investigation and interviewed claimant, who denied the allegation. The employer instructed claimant to refrain from discussing its investigation with other employees.

(4) The employer completed its investigation and concluded that claimant was mistreating employees. The employer also concluded that claimant had discussed its investigation with other employees, and threatened them with retaliation if they complained about her treatment of them. The employer discharged claimant for those reasons.

**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). Good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for allegedly mistreating employees, allegedly discussing the employer's investigation with other employees, and allegedly threatening them with retaliation if they complained about her behavior toward them. However, claimant denied the employer's allegations, which were based on largely on hearsay. Transcript at 9, 26, 48. Although the other operations manager testified that she observed claimant mistreat employees on several occasions and that claimant discussed the employer's investigation with her, claimant disputed that testimony. Transcript at 26-36, 52-64. The record shows only that claimant lacked the managerial skills necessary to comply with the employer's expectations regarding the treatment of other employees. It does not show that she consciously engaged in conduct she knew or should have known through prior training, experience, warnings or as a matter of common sense probably violated the those expectations. Nor does the record show claimant discussed the employer's investigation with other employees, or threatened them with retaliation if they complained about her behavior toward them. Absent such showings, we cannot find misconduct.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-33155 is affirmed.

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

**DATE of Service:** April 14, 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](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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