

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

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0268**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71852). Claimant filed a timely request for hearing. On February 24, 2015, ALJ Murdock conducted a hearing, and on February 26, 2015 issued Hearing Decision 15-UI-34170, concluding the employer discharged claimant, but not for misconduct. On March 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) RM Beverage Delaware LLC employed claimant from November 23, 2003 to December 29, 2014 as a delivery driver.

(2) The employer expected claimant to complete its check-in procedure when he completed his delivery route each day, and to refrain from being rude or disrespectful to coworkers. Claimant understood the employer's expectations.

(3) The delivery driver check-in procedure consisted of printing out the paperwork from sold and returned product, and waiting for the check-in person to finalize the driver's route by checking to make sure the payments and product amounts balanced.

(4) After work on December 22, 2014, claimant broke one of his front teeth in half, and set an emergency dental appointment at 6:00 p.m. on December 23, 2014. There were no appointments available later than 6:00 p.m.

(5) On December 23, 2014, claimant told the supervisor at the beginning of his shift, at 5:30 a.m., about his dental appointment. The supervisor reassigned some of claimant's deliveries, but did not arrange for another employee to complete claimant's check-in procedure. Claimant called his supervisor at 2:30 p.m. and told him he was behind schedule. The supervisor told claimant to complete as much of his work as he could so customers had their orders for holiday sales.

(6) Claimant completed his deliveries and returned to the check-in room by 6:10 p.m. Claimant told the check-in person that he did not have time to complete the check-in procedure because he was already late for a dental appointment, and that he did not know who would complete the check-in process for him. There were several other delivery drivers waiting to complete the check-in process. Claimant went to his dental appointment. The check-in person told claimant's supervisor that claimant did not complete the check-in process before he left and "was very rude and disrespectful." Transcript at 6.

(7) On December 26, 2014, the employer discharged claimant because he did not complete the check-in procedure on December 23, and was allegedly rude and disrespectful toward the check-in person.

**CONCLUSIONS AND REASONS:** We agree with 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b)

The employer discharged claimant because of his conduct when he left his shift on December 23, 2014. The employer discharged claimant, in part, because he left work before completing the check-in procedure at the end of his shift on December 23. However, claimant left work early to attend an emergency dental appointment for an unexpected, serious dental injury. His absence therefore was due to a physical disability, and not misconduct. Claimant scheduled his appointment for the latest time available, informed the employer about his appointment at the beginning of his shift that day, and informed the employer when he fell behind schedule mid-shift. The record fails to show that claimant consciously engaged in conduct he knew or should have known would probably result in his failure to complete the check-in procedure before he had to leave work, or that he was indifferent to the consequences of his actions. The employer therefore failed to establish that claimant violated its expectations willfully or with wanton negligence.

The employer also discharged claimant, in part, because he was allegedly "rude and disrespectful" to the check-in person on December 23, 2014. Transcript at 6. At hearing, the check-in person testified that claimant was rude because he appeared indifferent about following the check-in procedure and creating extra work for her, and used a disrespectful tone of voice. Transcript at 28-29. However, claimant testified that he told the check-in person he had to leave and did not know who would complete his check-in process, but that he was not rude or disrespectful toward her. Transcript at 15. The record fails to show by a preponderance of the evidence that claimant consciously behaved in a manner he knew or

should have known probably violated the employer's expectations regarding workplace behavior. The employer therefore failed to establish that claimant violated those expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 15-UI-34170 is affirmed.

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

**DATE of Service:** April 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](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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