

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0454**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135322). Claimant filed a timely request for hearing. On March 31, 2015, ALJ R. Davis conducted a hearing, and on April 2, 2015 issued Hearing Decision 15-UI-36246, reversing the Department's decision. On April 20, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Winco Foods, Inc. employed claimant as a store clerk from September 14, 2014 until January 27, 2015.

(2) The employer expected claimant not to sell tobacco products to customers who were younger than eighteen, and to check the identification of any customers who looked thirty years of age or younger to verify that the customer was over eighteen before allowing a tobacco purchase. The employer encouraged claimant and its other clerks to input into its computer system the birthdate shown on any identification that was checked and allow the system to calculate the customer's age to ensure accuracy. Claimant was aware of the employer's expectations.

(3) On January 25, 2015, claimant had a migraine headache while she was working. On that day, a female customer approached claimant to purchase some cigarettes. Claimant asked the customer to produce identification to show that she was eighteen or older. The customer gave claimant her identification and claimant mistakenly read the year of the customer's birth as 1996, when it actually read 1998. The customer was seventeen years old, rather than the nineteen that claimant thought. Claimant rang up the cigarette purchase, and the computerized cash register prompted claimant to enter the customer's birthdate. Claimant bypassed that instruction because she "wasn't thinking straight," and

sold the cigarettes to the customer because she believed the customer was nineteen years old. Audio at ~33:02. The customer's purchase was part of a police sting operation. Claimant was issued a citation for selling tobacco products to an underage person.

(4) On January 27, 2015, the employer discharged claimant for selling tobacco products to a person under the age of eighteen.

**CONCLUSIONS AND REASONS:** 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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It is not disputed that claimant sold a tobacco product to an underage customer on January 25, 2015. It is also not disputed that claimant did not intend to do so, and mistakenly misread the birthdate on the customer's identification to lawfully permit the sale. In other words, there was no evidence to support that claimant's behavior was willful within the meaning of OAR 471-030-0038(3)(a). While claimant might have been mistaken about the birthdate shown on the customer's identification, to disqualify claimant from unemployment benefits, the employer must show at a minimum that claimant's sale of the cigarettes to the customer was wantonly negligent behavior.

Claimant's wantonly negligent behavior cannot be inferred from the mere fact that she sold a tobacco product to an underage customer. EAB has consistently held that a claimant's mistakes and oversights, without more, do not show the consciously aware mental state necessary to establish wanton negligence.<sup>1</sup> Claimant took the steps reasonably needed to comply with the employer's standards for

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<sup>1</sup> See e.g. *Guadalupe Villasenor* (Employment Appeals Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent); *Marina V. Berlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence 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) (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was

verifying age by asking the customer to produce identification to show her age before allowing her to purchase the cigarettes. The only evidence in the record about claimant's mental state when she was verifying the customer's age was that she "misread" the birthdate on the identification and somehow made a "mistake." Audio at ~17:28, ~24:49, ~32:11, ~33:02. Absent additional evidence showing that claimant made more than a careless error or mistake, the employer did not meet its burden to show that claimant had the requisite mental state needed to demonstrate that her behavior in incorrectly reading the birthdate on the customer's identification was wantonly negligent. When claimant bypassed entering the customer's birthdate in the employer's computerized cash register before selling the cigarettes to the customer, she explained that she "wasn't thinking straight," and we infer that her failure to input the birthdate was, at best, an inadvertent oversight or lapse. Audio at ~33:02. Moreover, even if claimant had entered the customer's birthdate into the register, claimant most likely would still have sold the customer the cigarettes because she had misread the birth year on the customer's identification, and entering the wrong birth year into the register would not have prevented the sale. Absent additional evidence from the employer, of which there was none, there is insufficient evidence in this record to establish that the mental state accompanying claimant's behavior in bypassing the computerized system was wantonly negligent behavior.

The employer did not meet its burden to establish that claimant engaged in misconduct when she sold the cigarettes to the underage customer on January 25, 2015. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-36246 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service:** June 18, 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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conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).