

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0818**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94440). Claimant filed a timely request for hearing. On June 15, 2015, ALJ M. Davis conducted a hearing, and on June 18, 2015 issued Hearing Decision 15-UI-40282, reversing the Department's decision. On July 8, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc employed claimant as package line worker from March 20, 2006 until April 28, 2015.

(2) The employer expected claimant to refrain from unsafe behavior in the workplace. Claimant understood the employer's expectation.

(3) On December 17, 2014, the employer gave a verbal warning to claimant for standing on the rollers in the roller case, which conveyed boxes past claimant's work station. On April 14, 2015, a lead worker or a foreperson observed claimant again standing on the roller case. On April 15, 2015, the safety manager informed claimant of the employer's "cardinal [safety] rules," which included a prohibition against standing on the rollers. Audio at ~10:44. On April 16, 2015, the employer held a group meeting of all employees who worked on the package line and told the employees that they were prohibited from standing or walking on the rollers in the roller case. On April 23, 2015, claimant was observed standing on the roller case. The employer suspended claimant for the remainder of the day to investigate why he had been standing on rollers. The employer decided that it was not going to discharge claimant for this alleged safety violation, but would continue his employment. On April 24, 2015, the employer issued a final written warning to claimant advising him that if he engaged in any further unsafe activities in the workplace he was subject to discharge. Audio at ~24:15.

(4) On April 28, 2015, as part of his usual work duties, claimant moved a full 55 gallon trash cart from his work area to the recycling bin. The trash cart was on wheels and weighed approximately 75 pounds when it was full. Audio at ~18:37. Claimant pushed the trash cart up to a corner where he needed to cross an aisle on which there often was forklift traffic to reach the recycling bin. Claimant pulled back on the trash cart before he reached the forklift aisle to stop it and, because of because of the weight of the full cart and sawdust and wood powder slickening the concrete floor, claimant's feet slid a little as he halted the cart's forward motion. Claimant stopped the trash cart before it entered the forklift traffic aisle. Claimant looked both ways, up and down the forklift aisle and, seeing that it was clear of traffic, pushed the trash cart across it. Claimant then took the trash cart to the recycling bin, emptied it and returned it to his work area. An employee who observed claimant pushing the trash cart reported to the employer that claimant did not have control of the cart and had not looked for forklift traffic before he entered the forklift aisle with the trash cart.

(5) On April 28, 2015, the safety manager spoke with claimant about the manner in which he had pushed the trash cart and crossed the forklift aisle earlier that day. After listening to claimant's explanation, the safety manager suspended claimant. Later that day, the safety manager told claimant that he was discharged for the unsafe manner in which he had pushed the trash cart to the recycling bin that day and for his past safety violations.

**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. 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).

At hearing and in its written argument, the employer appeared to contend that it discharged claimant not only for his allegedly unsafe behavior on April 28, 2015, but for past allegedly unsafe behaviors about which he had received reprimands or warnings. Audio at ~5:18, ~9:28; Employer's Written Argument at 1, 2. However, the employer did not decide to discharge claimant until after the April 28, 2015 incident occurred. Audio at ~13:41. Accordingly, and consistent with EAB's past decisions, EAB's initial analysis is focused on claimant's allegedly unsafe behavior on April 28, 2015.<sup>1</sup> Only if we concluded claimant engaged in willful or wantonly negligent unsafe behavior would claimant's past conduct be examined.

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<sup>1</sup> EAB generally examines only the event that precipitated claimant's discharge to determine whether claimant engaged in misconduct. See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

Although the employer contended that claimant's behavior on April 28, 2015 was "reckless" since he allowed the trash cart to "slide" into the forklift aisle without checking for oncoming forklift traffic, was "basically drifting" behind the cart or "skateboarding" on it and did not maintain control of the cart, none of the employer's witnesses observed claimant when he was pushing the trash cart. Audio at ~5:27, ~6:44, ~14:23, ~28:11, ~36:55. Claimant testified that he was pushing a heavy cart and, although his feet might have slid on the floor when he was stopping the cart after it built up momentum, he denied that he did not stop it before entering the forklift aisle, denied that he did not check the aisle for traffic before crossing it, and denied that he did not maintain control of the cart. Audio at ~18:37, ~35:48. Claimant's first-hand testimony describing his actions as he pushed the trash cart is entitled to greater weight than the employer's hearsay testimony about his actions. The employer did not present evidence that persuasively challenged claimant's point-by-point description of his actions in the final incident. Based on claimant's description of his actions, it does not appear that claimant intentionally or consciously pushed the trash cart or crossed the forklift aisle on April 28, 2015 in an unsafe manner. On this record, the employer did not meet its burden to demonstrate that claimant engaged in misconduct.

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

**DECISION:** Hearing Decision 15-UI-40282 is affirmed.

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

**DATE of Service: August 19, 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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