

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1048**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 110447). The employer filed a timely request for hearing. On August 17, 2015, ALJ R. Frank conducted a hearing, and on August 20, 2015 issued Hearing Decision 15-UI-43310, affirming the Department's decision. On September 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Denali Logging Co. LLC employed claimant as a yarder operator from March 17, 2014 to May 22, 2015.

(2) The employer expected employees to operate the employer's equipment in a safe manner. Claimant understood that expectation.

(3) In early 2015, claimant caused a cable to break while operating a yarder. On or about May 5, 2015, claimant again caused a cable to break while operating a yarder. The employer placed claimant on probation for 30 days for failing to operate the employer's equipment in a safe manner.

(4) On or about May 15, 2015, claimant exited a yarder he was operating. Claimant knew he was expected to set the brakes on the yarder's sky care before exiting, but he forgot to do so. As a result, the sky car swung into some logs near members of claimant's work crew, damaging the sky car. Members of claimant's work crew told the employer's owner they felt unsafe working with claimant. One crew member told the owner she would no longer work with claimant. The owner responded by discharging claimant.

**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. 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).

In the present case, the employer discharged claimant after members of his work crew complained that they felt unsafe working with claimant. Absent evidence to the contrary, we infer that claimant's crew members' complaints were the result of his conduct on May 15, 2015. We therefore focus on that conduct as the reason for claimant's discharge. On May 15, claimant forgot to set the brakes on a yarder's sky car before exiting the yarder, causing the sky car to swing into some logs near members of claimant's work crew, damaging the sky car. The employer did not assert or show that claimant consciously neglected to set the brakes on the sky car, or that he consciously engaged in other conduct he knew or should have known would probably result in his failure to do so. Absent such showings, the employer failed to establish misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 15-UI-43310 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** September 29, 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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