

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1239**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95026). Claimant filed a timely request for hearing. On September 18, 2015, ALJ R. Davis conducted a hearing, and on September 25, 2015 issued Hearing Decision 15-UI-44959, affirming the Department's decision. On October 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with her application for review, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also included documents and information that were not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the documents or information into evidence at the hearing as required by OAR 471-040-0023 (August 1, 2004) and OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Kaiser Foundation employed claimant as a certified surgical technologist from May 20, 2013 to June 25, 2015.

(2) The employer expected claimant to maintain her certification as a surgical technologist by the National Board of Surgical Technology and Surgical Assisting. Claimant's certification was due to expire on June 10, 2015. On or about March 10, April 10, and May 10, 2015, the employer mailed claimant notices that her certification was due to expire on June 10, and that she was expected to renew her license by that date.

(3) In May 2015, claimant asserted to her manager and the employer's certification specialist that she didn't need to be a certified surgical technologist to perform her current duties, and asked if she nevertheless was expected to renew her certification. Neither informed claimant that she was excused

from renewing her certification. Nor did the employer otherwise excuse claimant from renewing her certification.

(4) Claimant did not attempt to renew her certification by June 10, 2015, and therefore failed to do so. The employer placed claimant on administrative leave and gave her until June 24, 2015 to renew her certification. Claimant was unable to renew her certification by that date.

(5) The employer discharged claimant for failing to maintain her certification as a surgical technologist.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c) (August 3, 2011). 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).

In the present case, the record shows that, as of May 2015, claimant understood was expected to renew her certification as a surgical technologist unless the employer excused her from doing so. It also is undisputed that the employer never excused claimant from renewing her certification. Claimant therefore should have known that failing to maintain her certification probably violated the employer's expectations, and her delay in attempting to renew it demonstrated indifference to the consequences of her actions. Claimant's failure to maintain her certification therefore was wantonly negligent, and reasonably attributable to her.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 15-UI-44959 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** November 5, 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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