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

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2016-EAB-0247

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #123007). The employer filed a timely request for hearing. On February 23, 2016, ALJ Seideman conducted a hearing, and on February 25, 2016, issued Hearing Decision 16-UI-53763, concluding the employer discharged claimant for misconduct. On March 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the claimant's written argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Fed Ex Corp employed claimant as a commercial driver from March 16, 2014 to October 8, 2015.

(2) The employer had a vehicle safety policy provision it expected its drivers to follow when the driver exited a commercial vehicle the driver was operating. The policy required the driver to "properly secure…the vehicle from movement…" in accordance with its safety manual. Exhibit 3, p.5. The employer considered any violation of that provision to be serious and a basis for disciplinary action, up to and including termination. Claimant was aware of the employer's policy and expectations.

(3) On August 28, 2014, January 14, 2015 and March 26, 2015, claimant was involved in minor accidents involving the employer's vehicles the employer considered preventable but claimant received a formal warning only following the August 28, 2014 accident.

(4) On September 16, 2015, claimant was assigned a newer vehicle he had not been fully trained on to make "priority" deliveries. Audio Record ~ 17:00 to 20:00. After arriving at a destination, but before exiting the vehicle, he mistakenly believed he had properly set the gearshift to "park" and also forgot to set the emergency brake. Shortly after claimant exited the vehicle, it rolled a short distance and collided with a rain gutter attached to a parking structure, causing property damage. After claimant reported the incident to the employer, it placed him on paid suspension while it conducted an investigation.

(5) On October 8, 2015, the employer completed its investigation and discharged claimant for violating its vehicle safety policy on September 16, 2015 by not properly securing his vehicle from movement before exiting.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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 standards of behavior the 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 the 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 standards of behavior the employer had the right to expect of the employee.

Here, there was no dispute that the employer discharged claimant following the accident on September 16, 2015. Consequently, because that incident triggered the employer's decision to discharge claimant, it was the proximate cause[1] of the discharge and is the proper focus of the misconduct analysis.

In Hearing Decision 16-UI-53763, after finding claimant was aware of the employer's vehicle safety policy, and on September 16, 2015 "though[t]" he had set the gearshift to "park" and "forgot" to set the parking brake before exiting the vehicle, the ALJ concluded that claimant's conduct on September 16 was wantonly negligent, reasoning, in pertinent part,

> Claimant hadn't driven that type of truck before, but should have been able to tell whether it was in park. And, he admitted that he just forgot to set the emergency brake…but he should have looked and found it before exiting the vehicle. …Claimant's lack of attention to detail was a wantonly negligent disregard of the employer's interest and constituted misconduct.

Hearing Decision 16-UI-53763 at 1-3. However, in a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant *consciously* engaged in conduct that he knew or should have known would probably violate the employer's expectations. Here, in the absence of evidence showing that at the time in question on

[1] The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jeffrey F. Cooper* (Employment Appeals Board, 12-AB-1087, May 7, 2012) (discharge analysis focuses on proximate cause of the discharge); *Ryan K. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

September 16 claimant consciously, and for no good reason, failed to follow the employer's safety expectations before exiting the vehicle, misconduct has not been shown.

The record fails to contain evidence that claimant consciously disregarded the employer's safety policy on September 16, 2015. Claimant did not dispute that he was aware of the relevant provisions of employer's vehicle safety policy, but explained that on the day in question, "I took the gearshift level and pushed it all the way to the top which should have engaged it in park and…I forgot to set the parking brake." Audio Record ~ 18:00 to 18:35. The employer's witness's description of claimant's explanation of his September 16 conduct during its investigation was similar, and the witness added that the employer had concluded claimant had been "truthful" with his explanation. Audio Record ~ 8:00 to 8:45; 15:35 to 15:50. Although claimant's "lack of attention to detail" may have been careless, or even negligent, his conduct did not rise to the level of *wanton* negligence, as defined under OAR 471-030-0038(1)(c).

Although the employer concluded it had sufficient reason to discharge claimant, it failed to meet its burden to establish that it did so for misconduct under ORS 657.176(2)(a). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 16-UI-53763 is set aside, as outlined above.[2]

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

**DATE of Service: <u>March 25, 2016</u>**

**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. 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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[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.