

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0502**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 115204). The employer filed a timely request for hearing. On April 7, 2016, ALJ M. Davis conducted a hearing, and on April 13, 2016, issued Hearing Decision 16-UI-57136, concluding the employer discharged claimant for misconduct. On May 3, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) JeldWen, Inc. employed claimant from June 23, 2014 until February 2, 2016 as a shipping fork lift driver.

(2) The employer's "cardinal rules" provided, among other things, that it was an "egregious violation" for an employee to fail to use fall protection when required. On March 4, 2015, claimant signed a form acknowledging that he had read and understood the employer's "cardinal rules." Exhibit 1. The employer's "code of business conduct and ethics" specified that violating the employer's safety rules was one of several types of misconduct that could subject an employee to discipline up to and including termination. On June 23, 2014, claimant signed a form acknowledging that he had read the "code of business conduct and ethics" and agreed to comply with them. *Id.*

(3) On July 24, 2015, claimant completed training in the use of the employer's swing reach forklift, a forklift which included equipment allowing an operator to raise and lower him or herself. In this training, claimant learned that he was required to wear a safety harness at all times when the swing lift forklift was on and in operation.

(4) On September 23, 2015, claimant was operating a forklift he was unaccustomed to operating. He was urged to speed up his work by his supervisor; in his haste, claimant failed to properly load doors onto his forklift. As a result, the doors fell off the forklift and were damaged. The employer reprimanded claimant in writing for his actions; the reprimand warned claimant that any future violations of the employer's safety policies could result in discipline up to and including termination.

(5) On January 30, 2016, claimant had raised himself on his swing reach forklift to the second floor of the employer's facility in the course of performing his job duties. He noticed a coworker struggling to lift heavy pallets; claimant was afraid the coworker would injure himself. Claimant shut off his forklift, disconnected his safety harness, and stepped from the forklift to the second floor to assist the employee. Claimant's coworker observed claimant step off the forklift, and reported it as a safety violation to the employer's production manager. The production manager interviewed claimant, who admitted that he stepped off the forklift and onto the employer's second floor.

(6) On February 2, 2016, the employer discharged claimant for violating its "cardinal rules" and Occupational Safety and Health Administration (OSHA) standards by failing to wear required safety protection and by stepping off the forklift at an elevated height.

**CONCLUSION AND REASONS:** We disagree with the ALJ and conclude that 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. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant for failing to wear required safety equipment – a harness – while operating his swing reach fork lift because he removed the harness and stepped off the forklift at an elevated height on January 30, 2016. The employer asserted that claimant's actions violated its "cardinal rules" and OSHA standards. We conclude, however, that the employer failed to meet its burden to demonstrate that claimant's conduct was a willful or wantonly negligent of its safety policies. On January 30, claimant had raised himself on his swing reach forklift to the second floor of the employer's facility when he noticed an employee struggling to lift heavy pallets. Claimant switched off the forklift, disconnected his safety harness, stepped off the forklift onto the second floor, and assisted the employee. Based on his training, claimant understood that he was not required to wear the safety harness when he was not operating his forklift; because he had turned off the forklift, he sincerely believed that his actions were appropriate and did not violate the safety precautions with which his employer expected him to comply. Claimant's actions on January 30 resulted from a good faith, though possibly erroneous, belief that he was safely operating his forklift, and from a desire to help a coworker

avoid a possible injury. His conduct was motivated by a good faith error and not by a conscious or knowing disregard the employer's expectations. Good faith errors are not misconduct.<sup>1</sup>

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-57136 is set aside, as outlined above.

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

**DATE of Service:** May 31, 2016

**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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<sup>1</sup> The employer asserted that claimant's conduct violated OSHA standard 1910.67. The two standards applicable to the January 30 incident are OSHA standard 1910.67(c)(2)(iii), which prohibits an employee working in an aerial lift from "[b]elting off to an adjacent pole, structure or equipment" and 1910.67(c)(2)(v), which requires an employee to wear a "body belt" when working from an aerial lift. The employer did not meet its burden to show that claimant failed to wear his safety harness while working from an aerial lift on January 30: claimant had turned off the fork lift and stepped out of it to assist his coworker. Nor did the employer explain how or demonstrate why claimant violated the prohibition against "belting off" the forklift to an adjacent structure. Even assuming that claimant's conduct on January 30 violated OSHA standards, the employer failed to demonstrate that claimant's actions resulted from a knowing and conscious disregard of these standards.