

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0565**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81733). Claimant filed a timely request for hearing. On May 3, 2016, ALJ K. Monroe conducted a hearing, and on May 11, 2016 issued Hearing Decision 16-UI-59312, affirming the Department's decision. On May 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) AMA 97, Inc. employed claimant as a gas attendant and cashier at its combination gas station and convenience market from July 13, 2015 until February 21, 2016.

(2) Claimant final duties when he worked the closing shift at the store were to activate an alarm system and to lock the door behind him after leaving. The store manager advised claimant generally that "once you leave the store, you leave," by which she meant that she did not anticipate he would re-enter after the alarm was activated and the doors were locked.

(3) On February 19, 2016, claimant started work at 1:30 p.m. and was going to close the store at 8:00 p.m. when his shift ended. When claimant arrived, he brought with him an energy drink that he had previously purchased and placed the drink in the store's cooler since that was the only refrigeration available. Sometime before 8:00 p.m., claimant accepted cash from a customer for a purchase transaction and mistakenly charged \$3 less than he should have. The owner observed this transaction and intended to discuss it with claimant the next day he worked.

(4) On February 19, 2016, starting at 8:00 p.m., claimant performed the various tasks required to close the store. At approximately 8:15 p.m., claimant entered his code into the store's alarm system and activated the alarm. He then left the store and locked the doors behind him. Almost immediately, claimant thought that he might have left the light on in the store's office, so he unlocked the door and re-entered the store. Claimant checked the light panel near where he had entered the store and saw that all the light switches were in the off position. Claimant then went to the cooler, which was nearby, and retrieved his energy drink to take home with him. Before claimant could leave and relock the door, the

alarm began to sound. Claimant immediately went to the alarm panel, entered his access code and the alarm stopped. The alarm panel began to display the message “ready to be armed.” Audio at ~36:40. Claimant concluded he had successfully turned off the alarm system. Claimant then entered his access code again in the alarm panel and the panel display read “armed.” Audio at ~36:40. Believing that he had successfully dealt with the alarm, claimant left the store, locked the door and went home.

(5) Sometime after 8:15 p.m. on February 19, 2016, the company responsible for monitoring the store's alarm system called the employer's owner to report the alarm had been activated. In response, the owner and the local responding police officers went to the store. Viewing the store's surveillance system, they concluded the alarm had not been activated because store had been broken into, but because claimant had re-entered the store after he set the alarm and locked the door.

(6) On February 21, 2016, the employer's store manager called claimant and left a message stating that the employer was discharging him.

**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. 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 carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witnesses raised claimant's alleged mishandling of cash on February 19, 2016 as well as his re-entering the store on that day and causing the alarm to sound as justifications for discharging claimant. Audio at ~12:25, ~23:30, ~27:20. However, the owner's testimony was quite clear that he did not intend to discharge claimant for the mistake in cash handling, but only to discuss the incident with him on his next work day. Audio at ~27:20, ~44:22. It appears that claimant's actions in connection with the alarm were the proximate reason that the employer discharged him. We therefore begin the analysis of whether the employer discharged claimant for misconduct by focusing on the behavior that surrounded the activation of the alarm on February 19, 2016.

Based on the testimony of the employer's manager, she gave claimant a brief run-through about dealing with the alarm system when she provided his access code to him shortly after he was hired. Audio at ~16:15, ~17:07. From its vagueness, cursory nature and context in which she presented the information to claimant that “once you leave the store, you leave,” it is not likely he understood it, or reasonably should have, to mean he was barred under any circumstances and for any reason from re-entering the store after he had armed the alarm and locked the door behind him. Audio at ~33:46, ~37:50. When claimant re-entered the store to further the employer's interest by confirming he had shut off all of the lights, he was not indifferent to the employer's well-being and did not have cause to reasonably infer

that he was prohibited from doing so. This employer did not demonstrate that claimant's behavior in re-entering the store was wantonly negligent.

At hearing, the manager seemed not to object to claimant's re-entry into the store after he locked the door the first time, so much as to his failure to call the alarm company, her or the employer's owner after the alarm sounded. Audio at ~13:08. However, she did not assert or present evidence which supported the communication of that specific expectation to claimant. In addition, claimant testified that from prior experience with the setting the alarm system, he knew that he had forty-five seconds to one minute after the alarm was set to lock the door and he assumed he had that amount of time to deactivate the alarm after he re-entered the store to avoid triggering the alarm. Audio at ~39:30. Although he was incorrect in this assumption, based on the prior experience that informed it, claimant's failure to foresee that the alarm would sound earlier than he expected was not wantonly negligent. As well, from the messages shown on the alarm system's display when claimant disarmed the alarm system, which stopped the alarm from sounding, it was not unreasonable for claimant to infer he had successfully taken care of his prior triggering of it, and that inference was not wantonly negligent. Since there is no evidence in the record that the employer ever communicated to claimant that he was expected to call the manager, the owner or the alarm company whenever the alarm sounded, and claimant's assumption he had taken the necessary steps to correct the activation of the alarm was not wantonly negligent, it also was not wantonly negligent for claimant not to have made those calls on February 19, 2016. On this record, the employer did not meet its burden to show that claimant's behavior on February 19, 2016 constituted a willful or wantonly negligent violation of its standards of which claimant was or reasonably should have been aware.

Although the employer discharged claimant, it did not show that discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-59312 is affirmed.

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

**DATE of Service: June 24, 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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