

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0730**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104751). Claimant filed a timely request for hearing. On May 24, 2016, ALJ S. Lee conducted a hearing, and on June 2, 2016 issued Hearing Decision 16-UI-60926, reversing the Department's decision. On June 21, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Reed's Fuel & Trucking employed claimant as a truck driver from June 2, 2015 until March 21, 2016.

(2) The employer expected claimant to avoid having preventable accidents when he drove its trucks. Claimant was understood the employer's expectation.

(3) Before the employer hired claimant, he had never driven a truck. The employer trained claimant to operate a truck.

(4) On February 2, 2016, claimant was driving one of the employer's trucks on Highway 20. The truck was 65 feet in length. At around 12:30 to 1:00 a.m., the segment of the highway claimant was traversing made a right curve. As claimant took the curve in the dark, the truck and trailer drifted onto the right shoulder and the tires encountered loose gravel. Claimant was unable to gain the necessary traction to steer the truck back onto the roadway. Claimant tried to keep the truck on the shoulder, but the loose gravel caused the truck to slide off the shoulder into a ditch that was parallel to it. The angle at which the truck entered the ditch caused the truck and trailer to flip onto its side. The employer paid \$30,000 to tow the disabled truck from the accident site, to repair the damage to the truck and trailer and to clean

up the site. On February 4, 2016, the employer's general manager issued a written warning to claimant for his negligence in causing the accident. The warning advised claimant he could be discharged if his negligence while driving caused another truck accident. Exhibit 1 at 5.

(5) After the February 2, 2016 truck accident, claimant concluded that fatigue might have contributed to the accident. Claimant saw his physician for advice on how to get better sleep before he drove as a preventive measure to avoid future accidents. Subsequently, claimant made sure that he was well-rested before he drove the employer's truck.

(6) On March 18, 2016, claimant was driving the employer's truck during daylight hours. Claimant was travelling on a straight, two lane segment of Highway 126 and approaching an intersection. At the intersection, there was a service station off to the right side of Highway 126. Claimant was not distracted and was doing nothing other than driving the truck. Claimant suddenly noticed that a passenger vehicle was stopped in the lane in front of his truck, immediately before the intersection and signaling to take a right turn. Claimant had not observed the vehicle earlier, or that its turn signal and brake lights were activated. Claimant did not know where the vehicle had come from. Transcript at 18. As soon as he noticed the stopped passenger vehicle, claimant applied the truck brakes. Claimant was unable to stop the truck before it collided with the rear of the passenger vehicle. The damage to the passenger vehicle was significant.

(7) On March 19, 2016, claimant telephoned the employer's general manager to notify him of the March 18, 2016 truck accident. The general manager told claimant he likely would be discharged as a result of having a second accident so soon after the February 2, 2016 accident.

(8) On March 21, 2016, the employer discharged claimant for his alleged negligence in causing the March 18, 2016 truck accident only a month and a half after the February 2, 2016 accident.

**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).

The proximate cause of claimant's discharge was his involvement in the March 18, 2016 collision between his truck and the passenger vehicle, and that is the proper focus of the discharge analysis. Throughout the hearing, the employer's witness, the general manager, referred to claimant's "negligence" in causing that collision as supporting claimant's disqualification from benefits. Transcript at 7, 8, 10, 13. However, showing that claimant was merely "negligent" is not sufficient to establish

disqualifying “misconduct.” To demonstrate claimant’s misconduct, the employer must show that claimant’s behavior was willful or wantonly negligent. In general, the “conscious” mental state needed to establish willful or wantonly negligent behavior is more heightened than that required for negligence. *See* OAR 471-030-0038(1)(c). Mere carelessness, inadvertent lapses of attention, accidental occurrences or mistakes are, by definition, not generally matters of which one is consciously aware when one is acting, and they usually are not accompanied by a willful or wantonly negligent mental state. That claimant’s involvement in the March 18, 2016 accident might have been due to his negligence or his failure to exercise reasonable care is not, in and of itself, sufficient to establish that claimant violated the employer’s standards willfully or with wanton negligence. Absent additional evidence, the employer will not meet its burden to show claimant’s misconduct.

The employer did not present evidence showing that claimant’s involvement in the March 18, 2016 was accompanied by aggravating factors that enhanced his behavior to the level of willful or wanton negligence. In particular, after his first accident on February 2, 2016, claimant took reasonable steps to avoid a recurrence of the factors that he believed contributed to that accident. Since claimant took reasonable precautions against foreseeable negligence, his behavior in this respect was not wantonly negligent. As well, there was no evidence that by the manner in which he was driving his truck on March 18, 2016, claimant consciously knew or reasonably should have foreseen that he was risking involvement in an accident, *e.g.*, claimant was exceeding the speed limit on the road, claimant was driving in unsafe road conditions, claimant was impaired, claimant was engaged in behaviors that distracted him from driving, *etc.* Absent such evidence or like evidence, the employer did not show that claimant’s involvement in the March 18, 2016 collision was due to his willful or wantonly negligent behavior.

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

**DECISION:** Hearing Decision 16-UI-60926 is affirmed.

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

**DATE of Service:** August 3, 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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