

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0217**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153628). Claimant filed a timely request for hearing. On February 1, 2017, ALJ Wyatt conducted a hearing, and on February 3, 2017 issued Hearing Decision 17-UI-76219, concluding claimant's discharge was not for misconduct. On February 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its 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) Bennington Properties, LLC employed claimant as a runner and outside tech from late 2015 until December 4, 2016.

(2) On November 16, 2016, the employer assigned claimant to winterize a customer's home. The employer provided claimant with a winterization checklist of things he was supposed to do, including installing vent plugs. Claimant felt rushed to complete the work, forgot to install the vent plugs, and forgot to complete the checklist before he left that customer's home. Claimant then drove to his next assignment. Upon arriving at his next assignment, he realized he had not completed the checklist for his last assignment. He had to complete that checklist in order to open the checklist for the next house but did not remember whether he had performed all the tasks on the checklist and felt he did not have time to go back to the customer's home to verify that he had completed all the tasks before completing the checklist. He had the idea that he would complete the checklist but go back to the house at the end of the workday to check that he had actually performed all the tasks. Claimant did not have specific memories of completing all the tasks on the checklist, but marked on the checklist that he had installed the vent plugs. By the end of the work day, claimant forgot that he intended to go back to the customer's house. Claimant did not install the vent plugs or change the checklist to indicate that he did not know whether or not he had completed that task.

(3) On November 21, 2016, the customers reported to the employer that claimant had not installed the vent covers at their home. The employer sent another employee to check on other homes claimant had been assigned to winterize. The employee reported back to the employer that claimant had failed to perform about a half-dozen tasks at the other homes. The employer reviewed the checklists and found that claimant had falsely reported to the employer that he had completed those tasks even though he had not.

(4) On December 4, 2016, the employer discharged claimant for failing to complete his work but reporting that he had.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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.

There is no dispute that claimant violated the employer's reasonable expectations by failing to perform his assigned tasks and falsely reporting to the employer that he had. In order for claimant's violation to amount to misconduct, however, claimant must have acted willfully or with wanton negligence. Wanton negligence requires more than just a negligent failure to act where a reasonable person would likely have acted; it requires that claimant must have acted with indifference to the consequences of his actions, where he knew or should have known that his conduct would probably violate the employer's expectations. *Compare* Black's Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> Ed. (defining "negligence"); OAR 471-030-0038(1)(c) (defining "wanton negligence").

In this case, claimant did not fail to install the vent covers or perform other tasks, and did not falsely report that he had, with the intent to violate the employer's expectations or because he was indifferent to the employer's expectation that he do the work and accurately report his activities. He did so because, as he testified, he felt rushed and forgot to perform the tasks; he had a vague idea of going back to the homes at the end of the day to check that he had performed the work and correct any defects, but, by the time he finished his assignments for the day he would "completely forget about it" or it "completely would leave my mind." Audio recording at ~ 23:35. Claimant's failure to complete his tasks and his decision to complete the checklists even though he was not certain he had completed all the work he was supposed to do was negligent, but, given his mental state at the time and the rationale behind his decisions to act as he did, it appears that his conduct was not done willfully or with the requisite indifference to the consequences of his conduct necessary to make his conduct wantonly negligent.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 17-UI-76219 is affirmed.

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

**DATE of Service: March 20, 2017**

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.