

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0326**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 84617). The employer filed a timely request for hearing. On March 7, 2017, ALJ Seideman conducted a hearing, and on March 8, 2017 issued Hearing Decision 17-UI-78405, affirming the Department's decision. On March 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Black Butte Builders LLC employed claimant as a laborer from March 2016 to December 30, 2016.

(2) On December 30, 2016, the employer discharged claimant for allegedly claiming unemployment insurance benefits for the week of November 20 through 26 (week 47-16), which claimant allegedly chose not to work, although the employer allegedly had full time work available.

(3) Claimant had filed an initial claimant for unemployment insurance benefits on November 30, 2016. However, he did not file his first weekly claim for benefits until January 10, 2016, for the week of January 1 through 7, 2017 (week 01-17).<sup>1</sup>

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that the employer failed to establish claimant's discharge was 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

<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On December 30, 2016, the employer discharged claimant for allegedly claiming unemployment insurance benefits for week 47-16, which claimant allegedly chose not to work, although the employer allegedly had full time work available. At hearing, claimant admitted that he filed an initial claim for benefits after week 47-16, but testified that it was because the employer had no work available that week, and that he did not claim benefits for that week. Audio Record at 22:00-28:30. Claimant's testimony is supported by Department records showing that claimant filed his initial claim for benefits on November 30, 2016, but did not file his first weekly claim for benefits, for week 01-17, until January 10, 2016, 11 days after his discharge. The record there shows that claimant did not claim benefits for week 47-16, and the evidence as to whether the employer had work available that week is, at best, equally balanced. The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 17-UI-78405 is affirmed.

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

**DATE of Service:** April 3, 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.

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