

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0408**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114906). Claimant filed a timely request for hearing. On March 21, 2017, ALJ S. Lee conducted a hearing, and on March 23, 2017 issued Hearing Decision 17-UI-79529, affirming the Department's decision. On April 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Sunlight Solar employed claimant as a solar racking installer from November 28, 2016 until January 10, 2017.

(2) The employer expected that claimant would not leave the work area unless he informed a supervisor and was given permission to leave. Claimant understood the employer's expectations.

(3) Prior to December 19, 2016, claimant's supervisors became concerned because they sometimes were unable to locate claimant on job sites when he did not have permission to leave those sites. On December 19, 2016, the employer issued a written warning to claimant directing him not leave a job site without permission.

(4) On approximately Friday, January 6, 2017, the employer began working on a job at a high school. Claimant was assigned to that job. The work at the high school continued on Monday, January 9, 2017. The high school job site encompassed a very large area of land.

(5) On January 9, 2017, it was snowing and there was an accumulation of snow on the ground when the crew was at the shop preparing to travel to the job site at the high school. The crew, including claimant, was waiting at the shop for some trucks to arrive so they could load the trucks with materials needed for the job and travel in a convoy to the high school site, where the crew would unload the trucks. The crew

loaded the trucks and the trucks left for the job site. Claimant had a four-wheel drive vehicle and did not immediately leave the shop so he could help other crew members who might have trouble getting their vehicles moving in the snow. Ultimately, claimant had to push one crew member's vehicle with his truck to build up the momentum needed to drive that vehicle in the snow. Claimant was the last crew member to leave from the shop that day.

(6) While on route to the job site, claimant received a call on his cell phone from a union apprenticeship coordinator that he had been trying to reach for some time about setting up an interview that would allow him to re-enter the union apprenticeship program. Up to the time of this call, claimant had not been able to directly connect with the coordinator and had been exchanging voicemail messages with her. Claimant pulled over to the side of the road, spoke with the apprenticeship coordinator, and set up an appointment for the interview he needed. At the conclusion of that call, claimant received a call from the manager of the installers at the job site inquiring as to his whereabouts. Claimant took the call, explained that he was delayed by a call from the apprenticeship coordinator he received when travelling to the job site and informed the manager of the appointment he had set up. The manager did not express that he disapproved of claimant stopping and taking the call from the apprenticeship coordinator. Claimant then proceeded to the job site, arriving 15 to 20 minutes after the other crew members. Once at the job site, claimant worked with the crew on a roof and did not leave the job site for the remainder of the work day. Claimant left the roof once to visit the "porta-potty," but told a supervisor before he left. Near the end of the work day, claimant and one crew member accompanied the electrician to examine the locations where conduit was going to be laid and where some of the equipment that the crew worked with would later be installed. Claimant left the job site at the end of the day.

(7) On January 9, 2017, the employer's operations director received a call from the manager of the installers at the job site stating that claimant had not been at present at work locations on the high school job site where he should have been when the manager tried to find him. The operations director received a similar call from the electrician.

(8) On January 10, 2017, the employer discharged claimant for leaving or being off he high school work site without a supervisor's permission.

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

In Hearing Decision 17-UI-79529, the ALJ concluded that the employer demonstrated that claimant was discharged for engaging in misconduct. The ALJ reasoned that claimant was “at least wantonly negligent when he chose to delay his arrival at the work site on January 9, 2017 in order to accept a personal phone call without notifying the employer or getting authorization to do so.” Hearing Decision 17-UI-79529 at 4. We disagree.

At the outset, the ALJ was correct in centering her inquiry on claimant’s behavior on January 9, 2017. The employer’s operations manager testified that the “the straw that broke the camel’s back” and resulted in claimant’s discharge was the reports that he received from supervisors at the high school job site that claimant was “not around” the job site at time when he should have been working and “they didn’t know where [claimant] was.” Transcript at 11. The high school job started on January 6, 2017 and continued on January 9, 2017. The employer’s witness, the operations director, did not specify the details of the incidents, if any, that were reported to him and which culminated in claimant’s discharge and claimant testified only about what he thought had caused him to be discharged which were behaviors that occurred on January 9, 2017. Absent further evidence, of which there was none, claimant’s behavior at the job site on January 9, 2017 will be the focus of our discharge analysis.

Claimant testified that the employer might have been unable to locate him on the job site, and might have thought he left it, because he did not arrive at the site when the rest of the crew did, left the site once to visit the restroom, and stopped working with the crew when he and the electrician examined a job site area where the crew would be installing equipment on a later day. Transcript at 15, 16, 24. As the ALJ noted, claimant was admittedly delayed in arriving at the job site on January 9, 2017 because, while on route to the site, he took a phone call. However, it was not correct for the ALJ to characterize the call as a “personal call,” rather than work-related. The call was from a union apprenticeship coordinator that claimant had been trying for some time to reach about reentering the apprenticeship program, which claimant had previously discussed doing with the manager of installers. Transcript at 17. Immediately after the call, before continuing to the job site, claimant spoke with the manager of the installers and told him that his arrival at the site had been delayed by that call, and the manager did not in any way express disapproval that claimant had taken the call. Transcript at 17, 22. Since the call was about entering an apprenticeship program in which claimant presumably would become an apprentice working for the employer, the call was more business-related than personal, particularly since claimant had previously discussed entering the program with the manager and when he reached the job site, immediately notified the manager of his scheduled an appointment with the apprenticeship coordinator. Transcript at 22. On these facts, claimant’s short delay in reaching the job site on January 19, 2017 was not a willful or a wantonly negligent violation of the employer’s expectations since it did not exhibit indifference to the employer’s interests and since claimant immediately informed the manager of installers that he was delayed and why.

As to the other occurrences on January 9, 2017 that claimant speculated might have caused him not to be present when a supervisor searched for him, the employer’s director of operations testified that it was “completely feasible” that claimant left the crew “for a few minutes” on January 9, 2017, and that he and the electrician discussed and examined “inverter locations.” Transcript at 31-32. The director of operations did not contend that such an activity on claimant’s part was not work-related, that it took claimant off the job site, or that the electrician did not have supervisory authority over claimant and was not authorized to briefly take him away from his work with the crew. On these facts, it does not appear that by leaving the crew to examine and discuss inverter and conduit locations with the electrician,

claimant willfully or with wanton negligence violated the employer's standards. Finally, the operations director did not dispute that, while claimant might have left his immediate work location to visit the restroom, he told his supervisor and received permission to do so. Transcript at 31. Accordingly, the employer did not show that claimant willfully or with wanton negligence violated the employer's standards when he left the work area to visit the restroom. Since the employer did not raise any additional incidents on January 9, 2017 in which claimant allegedly violated the employer's standards, there are none to be evaluated for purposes of determining if claimant engaged in misconduct on that day.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-79529 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** May 5, 2017

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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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