

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0433**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93724). Claimant filed a timely request for hearing. On March 28, 2017, ALJ Shoemake conducted a hearing, and on March 30, 2017 issued Hearing Decision 17-UI-79978, reversing the Department's decision. On April 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) RM Beverage Delaware, LLC employed claimant as a sales utility representative from November 13, 2015 until January 23, 2017.

(2) The employer expected that claimant's locations and activities during the work day would be consistent with that reported in the employer's "mobility" program, in which claimant was expected to enter the time when he started working at a particular account location and to enter when he stopped working on that location by activating the "end sales call" function. Transcript at 13. Claimant understood the employer's expectations.

(3) Before January 23, 2017, the employer had issued two written warnings to claimant. One warning stated that claimant had started work in the field later than instructed on three occasions in August 2016. The other warning stated that on approximately January 4, 2017 claimant had started working in the field later than instructed and had stopped working before he had put in eight hours.

(4) On January 17, 2017, sometime before 2:00 p.m., claimant completed his work on the Urban Market account at the market's location, but failed to enter in the mobility program that the sales call had ended. At that time, claimant decided to have his lunch break and travelled to a grocery store approximately five miles from Urban Market to buy lunch and other groceries. Sometime between 2:00 and 2:30 p.m., one of the employer's directors observed claimant in the store where he was purchasing his lunch. The

director reported what he had seen to the employer and the employer determined that while in the grocery store, claimant was still logged in as working at the Urban Market location.

(5) On January 23, 2017, the employer discharged claimant for being at another grocery store shopping when the mobility program showed that, at that time, he should have been at the Urban Market location because “it [the other store’s location] is not where he was supposed to be and it’s not where his mobility program said he was.” Transcript at 9.

**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).

Claimant’s explanation for why the mobility program showed him as being at Urban Market on January 17, 2017 at between 2:00 and 2:30 p.m. rather than being at the grocery store where he was observed, was that he “simply failed to end my time there [at Urban Market]” by entering “end sales call” in the mobility system. Transcript at 13, 28. Significantly, the employer did not dispute claimant’s explanation and did not contend that any other reason than the discordance between the location where the mobility program showed him to be and the location where he actually was between 2:00 and 2:30 p.m. caused his discharge, such as, for example, that he was not allowed to take his lunch at that time or that he was attempting to deceive the employer that he actually was working when he was not. Transcript at 11, 13. It appears that claimant merely overlooked, or inadvertently failed to make the necessary entry into the mobility program to show he was no longer at Urban Market at 2:00 to 2:30 p.m. on January 17, 2017. Mistakes, errors, inattentiveness or inadvertent lapses, such as that claimant made on January 17, 2017, are not willful and do not have the element of conscious awareness needed to show that a claimant’s behavior in violation of an employer’s standards was wantonly negligent. *See* OAR 471-030-0038(1)(c). Lacking a showing that claimant had the requisite state of mind, the employer did not meet its burden to show claimant’s behavior at issue constituted misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-79978 is affirmed.

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

**DATE of Service: May 12, 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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