

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0579**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133449). Claimant filed a timely request for hearing. On April 26, 2017, ALJ S. Lee conducted a hearing, and on April 28, 2017 issued Hearing Decision 17-UI-82129, affirming the Department's decision. On May 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Fred Meyer Stores employed claimant from November 2003 until February 16, 2017, last as a customer service manager.

(2) When selling tobacco products, the employer expected claimant to inspect the state-issued identification of each customer who appeared to be under the age of 27 years and to enter the birthdate shown on the identification into the employer's computer system. The computer system would confirm whether or not by the birth date shown on the identification the customer was at least 18 years old and allowed to purchase tobacco under state law. If a customer appeared to be "obviously" over the age of 27, the employer allowed claimant to bypass entering the customer's birthdate. Claimant understood the employer's expectations.

(3) On February 12, 2017, a female customer approached claimant while he was assisting customers at the customer service desk. The customer wanted to purchase cigarettes. Claimant asked for and inspected the customer's identification for her birthdate. Claimant then handed back the identification to the customer. Before claimant had the opportunity to enter the birthdate in the computer system, an associate interrupted him with a question. While dealing with the associate, claimant forgot the customer's birthdate. However, claimant recalled that he had informally calculated the customer's age as being at least 27 years when he had her identification in his possession. Rather than asking to inspect the customer's identification again, claimant bypassed the age verification function and sold the

cigarettes to the customer. In fact, the customer was younger than 18 as shown by the birthdate appearing on her identification and was participating in an undercover sting operation conducted by the Oregon State Police. After claimant sold the tobacco to the minor, he was immediately issued a citation for selling tobacco to an underage person. Shortly thereafter, the employer suspended claimant.

(4) On February 16, 2017, the employer discharged claimant for selling a tobacco product to the underage customer in violation of the employer's policy of verifying the ages of customers who appeared to be under the age of 27.

**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-82120, the ALJ concluded that the employer demonstrated that it discharged claimant for misconduct. The ALJ reasoned that claimant was aware of the employer's policy of age verification before selling tobacco products, and he did not comply with that policy when he bypassed the age verification function even though he "believed the customer was of legal age for the purchase." Hearing Decision 17-UI-82120 at 3. Although not explicitly stated, the ALJ apparently assumed that claimant's failure to verify the customer's age by inputting the birthdate shown on her identification was wantonly negligent. *See* Hearing Decision 17-UI-82120 at 4. We disagree.

Claimant followed all of the steps set out in the employer's age verification policy except entering the customer's date of birth in the employer's computer system to confirm that he had correctly calculated the customer's age. Claimant asked for and inspected the customer's identification, intended to enter that date in the employer's computer but did not do so when an associate distracted him. Claimant then forgot the birthdate shown on the identification, and made a hasty decision to bypass the age verification function, rather than ask to see the identification again, since he recalled that he had initially calculated the customer's age as being at least 27. Notably, the employer did not present evidence suggesting that the underage customer appeared significantly younger than 27 or that any other factors existed which should have placed claimant on notice that the initial informal calculation of the customer's age, which he had performed in his head, was in error. Claimant's failure to utilize the employer's computerized age verification system may have fallen short of exercising due care, but the employer did not show that the failure was willful or wantonly negligent since claimant had no reason to doubt the accuracy of his initial estimate of the customer's age. Errors such as claimant made in calculating the customer's age, his lapse in not requiring a second presentation of the identification to verify the correctness of his initial calculation by using the computerized system, as well as other types of mistakes, inadvertent oversights

and the like are generally considered not to be accompanied by the consciously aware mental state needed to establish willful or wanton negligence since, by definition, claimant did not know he was making an error or experiencing a lapse at the time he was doing so. Absent evidence demonstrating that circumstances existed which made claimant's errors and mistakes wantonly negligent, of which there was none, the employer did not meet its burden to show that claimant's behavior on February 12, 2017 was willful or wantonly negligent and that it constituted misconduct.

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

**DECISION:** Hearing Decision 17-UI-82120 is set aside, as outlined above.

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

**DATE of Service: June 6, 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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