

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1004**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103331). The employer filed a timely request for hearing. On August 15, 2017, ALJ S. Lee conducted a hearing, at which claimant failed to appear, and on August 18, 2017, issued Hearing Decision 17-UI-90778, affirming the Department's decision. August 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted a written argument to EAB, but failed to certify that it provided a copy of its argument to claimant as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) The Cellular Connection LLC employed claimant as a tech advisor and salesperson from approximately May 2015 to May 29, 2017.

(2) The employer expected its salespersons to follow its inventory control policy which required sales persons to complete all necessary paperwork and receive payment for any communication device sold before activating the device and allowing it to leave the store with a customer. Claimant was aware of and understood the employer's expectations.

(3) On April 18, 2017, claimant worked without approval, being scheduled or clocking in, which the employer viewed as an attempt to manipulate the employer's bonus policy which was based on sales in relation to hours worked. The employer issued claimant a warning for his conduct. On May 7, 2017, claimant was responsible for closing the store after completing the employer's closing checklist, which he failed to do, resulting in several devices in the employer's inventory being left out in the open. Although nothing was stolen, the potential loss to the employer was significant, and on May 11, 2017, the employer gave claimant a final written warning for failing to follow its policies.

(4) On May 13, 2017, claimant only partially processed a customer order that included two phones and a tablet device. When questioned by the employer about his mistake, claimant explained that he was busy with other customers as well as the customer in question, and “forgot” to process one of the phone sales and receive payment for it prior to the customer leaving the store with it. Audio Record ~ 14:45 to 15:45. The following day, the employer contacted the customer, who returned to the store and paid for the phone.

(5) On May 29, 2017, the employer discharged claimant for violating the employer’s inventory control policy on May 13, 2017.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ. 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. 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 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 is conscious of his conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would probably result in a violation the employer’s reasonable expectations. Here, the employer failed to satisfy that evidentiary burden.

Although claimant violated known employer policies on April 8 and May 7, 2017, the employer was clear that it discharged claimant for violating its inventory control policy on May 13, 2017, making that incident the proximate cause of his discharge and the initial focus of the misconduct analysis. Audio Record ~ 10:15 to 12:00; 26:00 to 26:45. Although claimant violated the employer’s reasonable policy by his actions that day, the employer admitted that when questioned, claimant explained that he was busy with other customers as well as the customer in question, and “forgot” to process one of the phone sales and receive payment for it prior to the customer leaving the store with it. In the absence of any other evidence regarding claimant’s mental state at the time of the infraction, the employer failed to establish that on May 13, claimant *consciously* engaged in conduct that he knew or should have known would probably result in a violation of the employer’s inventory control policy. Accordingly, the employer failed to meet its burden to establish that claimant violated the employer’s expectations willfully or with wanton negligence.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-90778 is affirmed.  
J. S. Cromwell and D. P. Hettle.

**DATE of Service: September 21, 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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