

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1232**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132139). Claimant filed a timely request for hearing. On October 3, 2017, ALJ M. Davis conducted a hearing, and on October 6, 2017, issued Hearing Decision 17-UI-94017, concluding the employer discharged claimant, but not for misconduct. On October 25, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant submitted written argument to the EAB. Both parties' arguments contained information that was not part of the hearing record. Neither party showed that factors or circumstances beyond that party's reasonable control prevented that party from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We also considered both parties' written arguments to the extent they were based on the record.

**FINDINGS OF FACT:** (1) FF Properties Limited Partnership employed claimant from 2016 until it discharged him on July 13, 2017.

(2) The employer expected claimant to perform his employment duties in an ethical, honest manner. Claimant understood this expectation to the extent that it required him to complete permit paperwork accurately and truthfully, and to refrain from asking other employees to lie while applying for a demolition permit.

(3) The employer's policies did not specifically state that claimant was required to disclose all known conditions on a site when applying for permits for that site. Nor had the employer ever advised claimant that it expected him to voluntarily disclose all known conditions.

(4) Before June 2017, claimant completed an application requesting a demolition permit for two buildings on one of the employer's project sites managed by claimant. Claimant and a newly-hired project engineer met with permit processors for the city where the project was located regarding the

terms of the permit. Claimant answered the permit processors' questions truthfully, and told the new project engineer that he should answer the permit processors' questions, but directed him to refrain from providing any additional information. Three days after the meeting, the permit was approved with certain conditions. The city did not ask claimant if the buildings had basements, and claimant did not disclose that one of the buildings had a basement. Claimant expected the city inspectors would address the basement issue in the field at the time of excavation with the existing permit, or would ask claimant to seek a revision to the permit.

(5) On June 27, 2017, the employer's vice president of construction learned that an employee who reported directly to claimant had complained to the employer's human resource department that claimant asked him to lie and tell city permit processors that the buildings on a demolition site managed by claimant did not have basements.

(6) The vice president subsequently reviewed the permit documents for the site at issue and saw the permit stated there were no basements in the buildings at issue, although one building did have a basement. The vice president did not review the permit applications.

(7) On July 13, 2017, the vice president met with claimant and asked him about the permit and his failure to disclose to the city that one of the buildings had a basement. Claimant stated that he did not lie to the permit processors, but did not disclose that one building had a basement to avoid certain inspections and costs before the demolition process began. The employer had not given claimant any warnings before July 13.

(8) On July 13, 2017, the employer discharged claimant for allegedly instructing a subordinate to lie to city permit processors when obtaining a permit, and for failing to disclose to the city granting the permit that one of the buildings had a basement.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude that 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) 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. 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).

The employer discharged claimant because claimant allegedly told an employee that reported to lie to city permit processors about whether the buildings on the project site had basements. Claimant denied that he told another employee to lie and testified that he told the subordinate not to volunteer information to the permit processors, but that he did not tell the employee to lie. Audio Record at 29:34-

30:21. The employer provided double hearsay testimony regarding the incident because neither the employee who initiated the complaint about claimant nor the human resources representative who received the complaint testified at hearing. There is no discernable reason in the record to conclude that the employer's testimony is more credible than claimant's testimony. Thus, claimant's firsthand testimony about what happened at the meeting with the city permit processors is entitled to greater weight than the employer's hearsay testimony. We have thus found facts in accordance with claimant's account of what occurred during the meeting with the city permit processors. On this record, it is more likely than not that claimant did not tell a subordinate employee to lie to obtain a permit. Thus, to the extent the employer discharged claimant for telling a coworker to lie, which would have violated the employer's reasonable expectation that claimant refrain from asking other employees to act dishonestly while applying for a demolition permit, the employer did not establish that claimant engaged in misconduct.

The employer also discharged claimant because he did not disclose that one of the buildings to be demolished on the project site had a basement. Although the record shows the permit itself stated the buildings on the site had no basements, claimant testified that neither the permit application nor the permit processors asked if the buildings had basements. Thus, to the extent the employer discharged claimant because he lied to the city permit processors about the building having a basement, the record does not show that claimant lied. It is undisputed, however, that claimant did not voluntarily disclose that information during the permit process. The employer had a policy requiring its employees to perform their duties in an ethical and honest manner and reasonably believed the burden of disclosing information necessary for permits is on the employer and its employees, not the city. Audio Record at 39:37-40:19. The pertinent issue is therefore whether claimant knew or should have known that his failure to voluntarily disclose to the city that one of the buildings had a basement would probably violate the employer's expectation that he conduct his duties in an ethical manner. However, the employer's policies did not state that claimant was required to disclose all known conditions when applying for permits. Claimant testified that he had the employer's best interest in mind by not volunteering information not explicitly requested by the city and believed it was the duty of the city to inquire about the pertinent information, including the basement. Audio Record at 23:36-24:41. Moreover, on this record, the employer did not establish that claimant knew or should have known from prior warnings, training, industry standards, or common sense that the employer would consider his failure to voluntarily disclose the presence of the basement would reasonably be considered dishonest or unethical by the employer and a violation of its expectations.

Because the preponderance of the evidence does not show that claimant willfully or with wanton negligence violated the employer's expectations, claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 17-UI-94017 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** November 27, 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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