

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0080**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 4, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision #84341). The employer filed a timely request for hearing. On January 16, 2018, ALJ Frank conducted a hearing, and on January 19, 2018, issued Hearing Decision 18-UI-101243, affirming the Department's decision. On January 23, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) North Clackamas School District #12 employed claimant as a school bus driver from April 17, 2017 until October 20, 2018.

(2) The employer expected claimant not to be involved in more than three bus accidents in any 36 month period and, if she did, she was subject to discharge. Claimant was aware of the employer's expectations.

(3) On May 31, June 12 and September 11, 2017, claimant was involved in accidents while driving one of the employer's buses.

(4) On October 12, 2017, while on duty, claimant stopped the bus she was driving in a student loading and unloading area at a school. Another bus was also parked in that same area in front of claimant's bus. When claimant completed the loading, she pulled sharply out of the loading area and away from the curb. As she did so, the rear overhang of the bus swung out and struck an awning located two or three feet away that was attached to the school building. The bus that claimant was operating was damaged as a result of the impact.

(5) On October 20, 2017, the employer discharged claimant for being involved in four accidents with a bus that she was driving in less than 36 months.

**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 was discharged because as a result of the October 12, 2017 accident, she was involved in more than three bus accidents in 36 months. Accordingly, the accident of October 12, 2017 was the proximate cause of claimant's discharge and is the focus of the inquiry into whether claimant engaged in misconduct.

OAR 471-030-0038(1)(c) requires that, to find misconduct, the employer must demonstrate that claimant had willful or wantonly negligent state of mind at the time claimant failed to comply with the employer's standards. Here, the employer did not present any evidence at hearing about claimant's state of mind, but only showed that claimant caused a bus accident on October 12, 2017. Nothing in the evidence presented suggests that claimant intended to cause the accident on October 12, 2017 or that she was aware that she would likely strike the awning and become involved in an accident before the impact happened. Behavior that is the result of an accident, a mistake, an inadvertent oversight, a lapse in judgment or the like is generally not accompanied by the consciously aware mental state required to show misconduct since, by definition, the person does not know when he or she is acting or failing to act that he or she is might violate the employer's standards. Absent evidence that the October 12, 2017 accident was the result of a claimant's willfulness or claimant's conscious awareness, of which there was none in this record, the employer did not meet its burden to show that claimant engaged in misconduct when she caused the October 12, 2017 accident.

Although the employer discharged claimant, it did not show that it was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 18-UI-101243 is affirmed.

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

**DATE of Service:** February 23, 2018

**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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