

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0132**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83227). Claimant filed a timely request for hearing. On January 18, 2018, ALJ Clink conducted a hearing, and on January 22, 2018 issued Hearing Decision 18-UI-101388, concluding claimant's discharge was not for misconduct. On February 7, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that, while perhaps submitted to the Employment Department during its adjudicatory process, was *not* part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Tillamook County Shopper employed claimant as a receptionist from July 1, 2014 to October 27, 2017.

(2) Claimant's duties included reception, billing and accounting. She performed her duties in the same manner throughout her employment. The employer provided employees lists of daily tasks claimant was expected to perform, but claimant did not always complete her daily task lists, which, in turn, put other people behind on other task lists. The employer generally assumed that claimant was proficient at her duties and would call her attention to any mistakes or problems.

(3) Toward the end of claimant's employment, the employer identified a number of mistakes on claimant's part, including failing to pursue past due accounts, undercharging some customers, and making other mistakes that affected the employer's revenues. He came to believe that claimant's errors, including billing customers the wrong amounts for a couple of years, charging the wrong accounts, attributing payments to the wrong accounts, or making errors that resulted in the employer having to

give refunds to some customers, were done intentionally or because claimant did not care about her job. On one occasion claimant posted to social media that she had a bad day at work. Although the posting did not identify the employer's business or blame the employer for her bad day, the employer felt the posting denigrated the business and was inappropriate.

(4) On September 28, 2017, the employer gave claimant a warning to improve her work performance. The employer identified a number of billing errors to claimant and explained that claimant was expected to correct the errors and avoid making other errors in the future.

(5) Claimant tried her best to correct the problems the employer identified, but her job performance did not improve in the month following the written warning. She felt that many changes the employer made with the intent of improving processes made her job more difficult. The employer kept identifying mistakes and lost revenue and thought claimant made errors because she did not care.

(6) The employer felt that claimant's mistakes and attitude were harming his business and reputation in the community, and, on October 27, 2017, discharged claimant because of her mistakes.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The employer expected claimant to perform her work in a reasonably mistake-free manner, and claimant violated the expectation by repeatedly making billing errors despite having been warned about the mistakes. The employer felt that claimant did not care about her mistakes, and that her errors and attitude about them harmed his business. For claimant's errors and attitude to constitute misconduct, however, the employer must prove by a preponderance of the evidence that claimant's acts were either demonstrated a conscious indifference to, or a willful deviation from, the standards the employer had the right to expect of her. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Although the employer alleged that claimant's mistakes were purposeful or indicated that she did not care about her duties, claimant testified that at all relevant times she was trying her best to accurately perform her duties. It appears just as likely that claimant's mistakes were the result of unintentional errors made despite her attempt to do her duties correctly, or the result of her lack of skills, as it is that claimant's mistakes were intentional or because she did not care about doing her job correctly. The preponderance of the evidence therefore fails to show that claimant engaged in misconduct.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 18-UI-101388 is affirmed.

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

**DATE of Service:** March 6, 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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