

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0408

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73753). Claimant filed a timely request for hearing. On April 3, 2018, ALJ Shoemake conducted a hearing, and on April 9, 2018, issued Order No. 18-UI-106960, affirming the Department's decision. On April 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Green Planet Inc. employed claimant, last as a bud tender, in its marijuana shop from December 15, 2017 to February 16, 2018.

(2) The employer expected its employees to wear protective gloves whenever an employee handled marijuana flowers to ensure that the employee complied with Oregon Liquor Control Commission (OLCC) regulations regarding marijuana handling. The employer notified employees that if an employee violated its expectation regarding marijuana handling or compliance with any OLCC regulation more than once, their employment would be terminated. Claimant was aware of and understood the employer's expectation.

(3) On January 18, 2018, claimant handled marijuana flowers without wearing protective gloves and the employer gave him a written warning for violating the employer's marijuana handling expectations.

(4) On February 14, 2018, claimant was wearing protective gloves while handling marijuana flowers in the employer's store. However, when the store got busy, claimant began assisting at the register and to do so, he had to remove his protective gloves. A short time later, claimant left the register to assist a customer in handling marijuana flowers and "forgot" to put his protective gloves back on before doing so. Audio Record ~ 16:30 to 17:30. The employer became aware of claimant's conduct and placed him on suspension.

(5) On February 16, 2018, the employer discharged claimant for handling marijuana flowers without wearing protective gloves on February 14, 2018.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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.

The employer discharged claimant for violating its policy against handling marijuana flowers without wearing protective gloves on February 14, 2018. The employer had the right to expect claimant to follow its policy because after violating the policy for the first time on January 18, 2018, claimant was warned against violating that specific policy in the future. In Order No. 18-UI-106960, after finding that claimant was aware that he was required to wear gloves when handling marijuana flowers, the ALJ concluded that the employer discharged claimant for misconduct, reasoning,

The employer discharged claimant for...handling marijuana flower without gloves. Claimant knew, based on the employer policy...that such conduct was a violation. In the final incident, claimant handled marijuana flower without gloves when working with a client. Claimant did so because it was a busy time. Claimant's conduct was a wantonly negligent disregard of the employer's interests.

Order No. 18-UI-106960 at 3. We disagree.

When misconduct under ORS 657.176(2)(a) is alleged, the employer has the burden to establish, by a preponderance of the evidence, that the claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 his conduct would probably result in violation of standards of behavior the employer had the right to expect of him.¹ Willful or wantonly negligent conduct cannot be inferred from results alone. At hearing, claimant testified that he simply "forgot" to put his protective gloves back on after helping out at the register, and the employer did not present any evidence that contradicted claimant's explanation for his conduct that day. The employer's

¹ See OAR 471-030-0038(1)(c); see also *Appeals Board Decision*, 12-AB-0737, April 9, 2012 (absent evidence that claimant was conscious he was not paying close enough attention, his failure to pay attention was not wantonly negligent); *Appeals Board Decision*, 12-AB-0229, February 23, 2012 (absent evidence that claimant was conscious she was making a mistake at the time she made it, her mistake was not wantonly negligent); *Appeals Board Decision*, 11-AB-0810, March 24, 2011 (absent evidence that claimant was conscious that she was failing to be careful, the failure was not wantonly negligent); *Appeals Board Decision*, 11-AB-0777, March 17, 2011 (absent evidence that claimant was conscious of his failure to perform a task, the failure was not wantonly negligent).

witness did not assert or show that she observed claimant's conduct on February 14 or that she was present on February 16 when the incident was discussed and claimant was discharged. The record fails to show that claimant's failure to wear protective gloves on February 14 was either willful or demonstrated *conscious* indifference to the employer's interests.

The employer failed to meet its burden to show that claimant's February 14 conduct constituted misconduct under ORS 657.176(2). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 18-UI-106960 is set aside, as outlined above.²

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

DATE of Service: May 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. 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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² This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.