

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0669**

*Order Nos. 18-UI-111694 and 18-UI-111695 Affirmed ~ No Disqualification*

**PROCEDURAL HISTORY:** On May 4, 2018, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding that the employer suspended claimant for misconduct (decision # 134918) and another that the employer discharged claimant for misconduct (decision # 131301). The employer filed a timely request for hearing for both decisions. On June 14, 2018, ALJ Wyatt conducted a consolidated hearing for both decisions, and on June 20, 2018 issued Order No. 18-UI-111694 regarding decision # 134918 concluding the suspension was for an isolated instance of poor judgment and not misconduct, and Order No. 18-UI-111695 regarding decision # 131301 concluding the employer discharged claimant not for misconduct. On July 3, 2018, the employer filed an application for review of each order with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders Nos. 18-UI-111694 and 18-UI-111695. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0669 and 2018-EAB-0668).

The employer submitted written argument to EAB, but 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). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

EAB reviewed the entire consolidated hearing record. On *de novo* review and pursuant to ORS 657.275(2), Order No. 18-UI-111694 regarding the suspension is **adopted**.

**FINDINGS OF FACT:** (1) Roseburg Forest Products employed claimant from August 25, 2016 until March 30, 2018 as a forklift driver.

(2) The employer had a written personal protective equipment (PPE) policy stating that the employer expected claimant to wear arm guards and a protective apron while handling product. Claimant was not required to wear arm guards and an apron while driving a forklift. Claimant received training at hire regarding the proper PPE to be used for each job he performed.

(3) On occasion, claimant was assigned to drive a forklift and stop intermittently to get out of the forklift and sort rough lumber before it entered the planer. The correct PPE for that job according to the written PPE policy included arm guards and an apron. During the three or four months before his employment ended, claimant and other forklift drivers performing the same jobs failed to wear the arm guards and apron while alternating between driving the fork lift and sorting rough lumber. Neither claimant nor the other forklift drivers had been coached or reprimanded for failing to follow the PPE policy on those occasions.

(4) On March 23, 2018, claimant returned to work following a suspension for failing to follow proper lock-out procedures on March 10, 2018. Claimant committed to following proper safety procedures upon his return to work. The employer did not review the PPE policy with claimant at that time or advise claimant to follow written safety rules instead of the employer's actual practices outside the written rules.

(5) On March 26, 2018, claimant was working driving a forklift and stopping intermittently to get out of the forklift and sort rough lumber before it entered the planer. Claimant did not put on the arm guards or apron before handling the rough lumber. He believed he was permitted to alternate between driving the forklift and stacking lumber without arm guards and an apron because the employer had not enforced its written PPE policy in that regard. Members of upper management walked through the planer area and saw claimant working without the PPE required by the employer's written PPE policy. Claimant was cited for failing to follow the written PPE policy.

(6) On March 30, 2018, the employer discharged claimant for failing to follow its written PPE policy on March 26, 2018.

**CONCLUSION 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. OAR 471-030-0038(3)(a) (January 11, 2018) 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to wear required safety equipment, arm guards and an apron, while sorting rough lumber on March 26, 2018. Claimant arguably should have known from the employer's written PPE policy he was prohibited from sorting lumber without the proper PPE. However, the record shows that claimant believed he was allowed to do so because he and other forklift drivers did not wear the PPE when they got off their fork lifts to sort lumber, and claimant and the other drivers were not told they were violating the employer's PPE expectations on those occasions. Based on his observations regarding common practice in the plant and the employer's implicit permission excepting employees from wearing the PPE while alternating between jobs, claimant sincerely believed, and had a rational basis for believing, that his conduct on March 26 either complied with the employer's safety expectations or, to the extent that it violated the expectations, that the employer would condone the

violation. Claimant's actions on March 26 resulted from a good faith, though apparently erroneous, understanding of the employer's PPE expectations and not from a conscious or knowing disregard of the employer's expectations. Good faith errors are not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Order Nos. 18-UI-111694 and 18-UI-111695 are affirmed.

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

**DATE of Service:** August 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.