

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0680**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140142). Claimant filed a timely request for hearing. On June 25, 2018, ALJ Seideman conducted a hearing and issued Order No. 18-UI-111980, affirming the Department's decision. On July 5, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Trinity St. Elizabeth employed claimant as a housekeeper from 2008 to April 9, 2018. On July 7, 2017, claimant was transferred to the employer's hospital in Baker City, OR.

(2) The employer expected claimant to perform general housekeeping tasks, such as cleaning approximately 30 offices, cubicles and conference rooms, in a satisfactory and timely manner. The employer also expected claimant to satisfactorily and timely clean general patient rooms, as well as "terminal rooms" or "isolation rooms", which were where patients with infectious diseases were quarantined. Audio Record ~ 15:45 to 16:30; Exhibit 5. On September 9, 2017, claimant signed off that he had reviewed cleaning checklists for all those tasks. Exhibits 6 and 7.

(3) Between September 2017 and January 2018, claimant's supervisor routinely criticized claimant's work performance concerning both work quality and his inability to complete assigned work tasks in a timely manner. As a consequence, the employer retrained claimant regarding the performance of cleaning duties for both regular and "isolation" patient rooms on December 12, 2017. Exhibit 5. After claimant's performance deficiencies continued, claimant was required to meet with both his direct supervisor and a hospital manager to discuss them. During the meeting, claimant explained that his supervisor had caused confusion by constantly changing work assignment duties and checklists before destroying them and assigning special work duties in addition to his general housekeeping duties, which he was not able to perform during the time allowed. Shortly after the meeting, on February 23, 2018, claimant signed a "Memorandum of Expectations" prepared by the manager, in which he committed to performing all of his work duties "correctively," with the understanding that future violations could

result in discipline, including possible termination. Exhibit 4. Similarly, on March 7, 2018, claimant signed a “Letter of Commitment” in which he committed to performing “special projects” such as patient discharges, in addition to his “daily tasks,” within his shift time to the extent it was “humanly possible” and “to the best of [his] ability.” Exhibit 3.

(4) On April 4, 2018, a quarantined patient with tuberculosis was discharged from an “isolation room,” after which claimant was assigned to clean the room during his evening shift. Claimant’s checklist duties for such rooms included removing “patient equipment” from the room “per hospital procedure,” but he did not remove certain equipment from the room, including two air purification units that were attached to windows with flexible ducts, because he believed that facilities employees were required to disconnect them before housekeeping did its cleaning. Exhibit 6. He observed fecal material in various locations within the room and wiped those areas down but reportedly missed other areas where fecal material was visible, including in the bathroom area near a porta-potty. Claimant took twice as much time he was typically allotted to clean the room. The next day, however, when claimant’s supervisor inspected the room, she observed that equipment, including a blood pressure cuff and the two air purification units, had not been removed as required, that fecal material was visible in the bathroom and in various spots within the room, and that a toilet paper roll, used by the patient, had not been removed. She reportedly took pictures of the room’s condition and had two other employees help her re-clean the room.

(5) On April 9, 2018 the employer discharged claimant for “inability to clean to the standards that he has been trained to” based on the results of his April 4 cleaning assignment. Exhibit 2.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude 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) (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. 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. Good faith errors or mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

In Order No. 18-UI-111980, the ALJ concluded the employer discharged claimant for misconduct, reasoning:

[Claimant] had several problems [after his transfer] and received much counseling. Employer felt he was not paying attention to detail. He also received a warning that any further problem could result in termination of employment.

Then in the last instance, he was asked to clean a room which was potentially very infectious. He claimed that he properly did it, but when personnel entered after, they found much feces on the bed, floor, walls, porta potty and bathroom... Employer concluded that claimant did not pay attention to what he was doing, and did not clean-up which could be a very dangerous situation. Claimant had several warnings about that and other similar situations and was obligated to use extreme care in his work, because of the nature of it and the danger of infection and perhaps death. His failure to do that was a wantonly negligent disregard of the employer's standards and constituted misconduct.

Order No. 18-UI-111980 at 3. Notably, the ALJ did not make any findings concerning claimant's mental state at the time he failed to clean the isolation room to the employer's specifications other than "[Claimant] claimed that he properly did it." It is not enough that claimant knew the employer expected him to be thorough when performing his job duties. Where, as here, a claimant is discharged because of certain failures to act, a finding that he did so with wanton negligence requires evidence that the failure was conscious. *See* OAR 471-030-0038(1)(c). An *unconscious* failure to act is, at most, evidence of ordinary negligence, or the failure to exercise due care. Negligence, even repeated negligence, in the performance of work-related duties, may be a valid basis for a discharge, but it is not sufficient to establish misconduct under OAR 471-030-0038(1)(a).

The ALJ apparently concluded that claimant had to have been conscious that he had failed to clean up fecal matter in various locations within the room, because those conditions were apparent to his supervisor the morning after claimant finished cleaning. However, claimant asserted that he wiped up whatever fecal matter was visible to an unaided eye, which the employer disputed. Audio Record ~ 31:00 to 38:30. Although the employer's witness testified that pictures of the isolation room were taken on April 5 and other employees assisted in re-cleaning it that day, it offered no pictures or other the testimony in support of its position. The record also shows that claimant believed, in good faith, that facilities employees were obligated to remove the air purification machines from the room, however mistaken he may have been. Viewing the record as a whole, we agree with the ALJ that claimant believed he had cleaned the room properly. The fact that his supervisor remained dissatisfied with claimant's work is not sufficient to establish wanton negligence. Moreover, it appears from the record that despite retraining and numerous warnings, claimant consistently failed to meet employer's expectations, which suggests that he wasn't sufficiently skilled for the job, and mere inefficiency resulting from a lack of job skills is not misconduct.

On this record, we cannot find that the conduct for which claimant was discharged was either willful or wantonly negligent. Claimant was, arguably, negligent, in failing to properly clean the isolation room assigned to him on April 4, and the employer may have had good reason to discharge claimant. Nevertheless, for the reasons discussed above, the discharge was not for misconduct as defined by OAR 471-030-0038(1). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 18-UI-111980 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** August 9, 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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<sup>1</sup> 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.