

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0202**

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On December 4, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #160947). Claimant filed a timely request for hearing. On January 28, 2014, ALJ Erwin conducted a hearing, and on January 30, 2014 issued Hearing Decision 14-UI-09445, concluding the employer discharged claimant, but not for misconduct. On January 31, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Mt. Hood Polaris, Inc. employed claimant from July 29, 2008 to November 14, 2013 as an office worker.

(2) The employer expected employees to report to work as scheduled, and to be in their work areas and ready to work at the their designated start times.

(3) Claimant's shift started at 9:00 a.m. On September 17, 2013, claimant reported to work at 9:05 a.m. On September 18, 2013, claimant reported to work at 9:07. The On September 19, 2013, the employer's vice president met with claimant to discuss her tardiness. The vice president told claimant she had to be at her work area by 9:00 a.m.

(4) After the September 19, 2013 meeting with the vice president, claimant began leaving her home earlier. She believed she was on time if she arrived at work by 9:00 a.m. based on the clock on her desktop computer. Her desktop computer did not show seconds, only the hour and minute.

(5) On November 13, 2013, claimant arrived at her work area seventeen seconds after 9:00 a.m., based on the time on the employer's audio-surveillance camera. Her desktop computer said it was 9:00 a.m. The employer decided at that time that it would discharge claimant for tardiness.

(6) On November 14, 2013, the employer discharged claimant for failing to report to work on time.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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) (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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because she violated the employer's attendance policy. The employer reasonably expected claimant to be in her work area by her starting time of 9:00 a.m. Claimant understood she was to be at her work area by 9:00 a.m. according to the clock on her desktop computer. Claimant testified that, according to the clock on her desk, she was at work by 9:00 a.m. every day after the employer warned her about her attendance on September 19, 2013. Transcript at 22. The employer's witness testified that the employer did not expect claimant to arrive at work before her start time, "as long as at 9:00 she was sitting at her desk to answer the phone if it rang." Transcript at 14. Neither the employer's prior warning to claimant nor its written attendance policy explained its expectation that arriving within 59 seconds after 9:00 a.m., as indicated by the employer's surveillance camera's clock, would not constitute a timely arrival for work. The employer did not meet its burden to show claimant understood that requirement. Thus, the employer failed to show claimant consciously engaged in conduct she knew or should have known would probably result in a violation of the employer's attendance expectations.

In sum, claimant's tardiness on November 13, 2013 was not the result of her willful or wantonly negligent disregard of the employer's attendance policy. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-09445 is affirmed.

Susan Rossiter and Tony Corcoran;  
D. E. Larson, not participating

**DATE of Service: March 4, 2014**

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.