

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0943**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant not for misconduct (decision # 162218). The employer filed a timely request for hearing. On May 13 and 15, 2014, ALJ Francis conducted a hearing, and on May 16, 2014, issued Hearing Decision 14-UI-17871, concluding that the employer discharged claimant for misconduct. On May 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant 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) Joseph R. Greenwood, DMD, PC, employed claimant as an office manager from January 1, 2013 to March 5, 2012. Dr. Greenwood supervised claimant's work, and expected that claimant would contact him if she was unable to report to work, or would be late. Claimant knew and understood the doctor's expectation.

(2) Claimant worked Monday through Friday, and normally began her work day at 7:30 a.m. During the six months to a year preceding the date of her discharge, claimant regularly worked more than 40 hours per week.

(2) Because claimant was the only employee experienced and knowledgeable in the employer's practice software, billing procedures, and insurance claims processes, the doctor wanted claimant to cross-train other employees. In addition, the doctor wanted to reduce the number of overtime hours claimant

worked, and wanted claimant to work later so that claimant could complete the daily business reports and have them ready for his review by the end of the day.

(3) On or about February 28, 2014, claimant and the doctor discussed changing claimant's schedule so that claimant could cross-train another employee, work less overtime, and have sufficient time to complete the daily business reports by the end of her workday. Claimant understood that the doctor was proposing a schedule in which she would work fewer days, but more hours on the days she worked. The doctor believed he was ordering claimant to work slightly later than she customarily worked on Monday, Tuesday, Wednesday and Friday, and to take Thursday off. The doctor intended to have claimant cross-train another employee who would perform claimant's duties on Thursday. The doctor believed that he directed claimant to begin the new schedule on Thursday, March 6 and not report to work on that day. Claimant did not want to work longer days. Because she believed the doctor was only suggesting a change in her work schedule, she jokingly told the doctor that she did not want to work late and the doctor could fire her for her refusal to do so.

(4) Before leaving work on March 3, 2014, claimant asked the doctor if she could report for work at 10 a.m. on the following day. Claimant explained that if she started work later than she normally did, she could prepare the daily business reports, present them to the doctor by the end of the day, and complete her work within a 40 hour week. The doctor agreed with claimant's proposed change in her schedule.

(5) On March 4, 2014, claimant arrived at work at 10 a.m.

(6) After leaving work on March 4, 2014, claimant became ill and was unable to sleep all night.

(7) On March 5, 2014, at approximately 7 a.m., claimant texted another employee and explained that she would coming to work late. Claimant also called the doctor but "was a little bit out of it." May 13, 2014 Hearing Transcript at 47. Sometime between 9:30 and 10 a.m., claimant arrived at work. At the end of the day, the employer then discharged claimant because she had reported late to work.

**CONCLUSION AND REASONS:** We disagree with the ALJ. The employer discharged claimant, 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that the employer discharged claimant "because she did not appear for work as scheduled on two occasions" and did not contact the doctor to report her tardiness. The ALJ also

concluded that the employer discharged claimant because she refused to comply with the employer's order to change her work hours and work days. According to the ALJ, claimant's refusal to follow the employer's directive to change her schedule, and her refusal to follow office procedure to report she was going to be late, constituted wilful disregard of the employer's interests. We disagree.

In regard to her work schedule, claimant testified that the employer proposed, rather than directed, that she change her schedule. The doctor, however, testified that he ordered claimant to alter her work hours and work days, and that the new schedule was to become effective on March 6. Claimant and the doctor also disagreed regarding her tardiness on March 3 and 4, 2014. Claimant testified that she received the doctor's permission to begin work at 10 a.m. on March 3, and that she notified the doctor that she would be late on March 4. May 13, 2014, Hearing Transcript at 46-47. The doctor denied that he authorized claimant to report to work at 10 a.m. on March 3, and denied that claimant notified him of her late arrival on March 4. May 13, 2014, Hearing Transcript at 38. The evidence regarding these issues is, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant refused to comply with a directive to change her work schedule, and failed to notify her supervisor of her late arrival to work on March 3 or 4, 2014.

Because the employer did not establish that it discharged claimant for a violation of its expectations regarding attendance and work schedules, it failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 14-UI-17871 is set aside, as outlined above.

Tony Corcoran and Susan Rossiter;  
Tony Corcoran, not participating.

**DATE of Service:** July 9, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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