

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0999

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141659). Claimant filed a timely request for hearing. On May 28, 2014, ALJ Hoppe conducted a hearing, and on June 2, 2014 issued Hearing Decision 14-UI-18762, affirming the Department's decision. On June 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Fred Meyer Stores, Inc. employed claimant from April 22, 2013 to April 12, 2014 as a clerk.

(2) The employer expected claimant to report to work on time for his scheduled shifts. Claimant understood the employer's expectation.

(3) Each Wednesday or Thursday, the employer posted claimant's weekly schedule for the next seven days. The employer posted the schedule at the workplace and online. If a manager made a change to the schedule after it was originally posted, the employer expected the manager to write the change on the schedule in the workplace, and inform the affected employee. The manager did not change the original online schedule to conform with changes to the written schedule.

(4) On April 9 and 10, 2014, claimant was not scheduled to work. On Thursday, April 10, 2014, at about 1:00 p.m., claimant checked his work schedule online and read that he was scheduled to work on April 11, 2014 at 3:00 p.m. Claimant normally began his shift at 6:00 a.m. or 3:00 p.m.

(5) On April 11, 2014, claimant's manager called claimant at 11:00 a.m. and left claimant a message stating the employer had required him to report to work at 10:00 a.m. that day. Claimant returned the manager's call at 11:40 a.m. and told the manager he did not report to work at 10:00 a.m. because the online schedule said he was scheduled to work at 3:00 p.m. The manager told claimant the employer was suspending him for three days.

(6) On April 12, 2014, the employer discharged claimant for failing to report to work for his scheduled shift on April 11, 2014.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he failed to report to work for his scheduled shift on April 11, 2014. The employer had a right to expect claimant to report to work on time, absent illness or other exigent circumstances. Claimant understood that expectation. Claimant testified that he checked the online schedule on April 10, 2014, and saw he was scheduled to work at 3:00 p.m. on April 11, 2014. Audio Record ~ 26:30 to 26:45. The employer's manager testified that the online schedule showed claimant's shift began at 10:00 a.m., and had not been changed. Audio Record ~ 29:06 to 29:30.

In Hearing Decision 14-UI-18762, the ALJ concluded claimant's failure to report to work at 10:00 a.m. on April 11 was a wantonly negligent violation of the employer's attendance expectation, reasoning:

I am not persuaded by claimant's testimony that the online calendar stated he was supposed to report to work at 3:00 p.m. Employer testified that they had a copy of the online calendar, that it showed 10:00 a.m. as his starting time, and that it had not changed. Employer's testimony was very clear and was supported by their own records which they referred to at the hearing. I find it more likely that claimant made an error in reading his schedule, particularly since he ordinarily did not work at 10:00 a.m. Despite this error, claimant was conscious of his conduct in not reporting to work as scheduled, and knew or should have known that it would violation the employer's reasonable expectations.<sup>1</sup>

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<sup>1</sup> Hearing Decision 14-UI-18762 at 4.

Absent a reason to disbelieve claimant's testimony about having checked his schedule online and what he saw on the schedule for April 11, the record shows that claimant made a mistake when he read his schedule. The record fails to show claimant's attendance violation was due to his willful or wantonly negligent disregard of the employer's expectations. Claimant checked the work schedule the day before his next scheduled shift. He believed it said he was to report to work at 3:00 p.m. The record does not show that the employer contacted him to say his schedule had been changed. Claimant was not at work April 10 to check the written schedule. Nor does the preponderance of evidence show that claimant knew or should have known that the employer expected him to go to the workplace on his day off to check if the written schedule varied from the online schedule. The record thus shows that claimant's failure to report to work at 10:00 a.m. on April 11 was, at worst, an inadvertent error, and not a conscious disregard of the employer's expectations. The employer therefore failed to establish that claimant violated those expectations willfully or with wantonly negligence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance compensation because of this work separation.

**DECISION:** Hearing Decision 14-UI-18762 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** July 15, 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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