

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1104

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On May 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130450). Claimant filed a timely request for hearing. On June 17, 2014, ALJ Monroe conducted a hearing, and on June 20, 2014 issued Hearing Decision 14-UI-20100, concluding the employer discharged claimant, but not for misconduct. On June 25, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pacific Timbercraft Construction employed claimant as a carpenter from August 20, 2013 to February 25, 2014.

(2) As of January 5, 2014, claimant's regular work schedule was Wednesdays through Fridays. However, the employer's owner typically allowed claimant to change his schedule, and granted claimant's requests to take days off from work.

(3) On February 21, 2014, claimant asked the owner if he could work Monday through Wednesday during the week of March 3 through 7, 2014. The owner said that would be "fine." Transcript at 17.

(4) On February 24, 2014, claimant sent the owner a text message reminding the owner that he wanted to work Monday through Wednesday during the week of March 3 through 7, 2014. Exhibit 1. Claimant also stated that he could only work on Friday the following week, and offered to work more days and hours during subsequent weeks.

(5) Based on past experience, claimant assumed the owner would allow him to take Wednesday and Thursday off during the week of March 10 through 14, 2014. On February 25, 2014, however, the owner discharged claimant for failing to commit to his regular work schedule.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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).

The employer had a right to expect claimant to commit to his regular schedule if required to do so. However, the record fails to claimant knew or should have known that notifying the employer he could work only one day during the week of March 10 through 14, 2014 violated the employer's expectations in that regard. It is undisputed that the employer's owner typically allowed claimant to change his schedule, and granted claimant's requests to take days off from work. At hearing, claimant testified that based on that prior experience, he assumed the owner would allow him to take two days during the week of March 10 through 14. Transcript at 18. Absent a showing that the owner told claimant he was required to work his regular schedule, and that claimant refused to do so, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-20100 is affirmed.

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

**DATE of Service:** July 25, 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.

**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.