

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1177

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115825). Claimant filed a timely request for hearing. On April 22, 2014, ALJ Sime conducted a hearing, and on April 23, 2014, issued Hearing Decision 14-UI-15812, affirming the Department's decision. On April 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On June 12, 2014, the EAB issued Appeals Board Decision 2014-EAB-0720, reversing Hearing Decision 14-UI-15812 and remanding the case to the Office of Administrative Hearings for additional evidence. On June 30, 2014, ALJ R. Davis conducted a hearing at which claimant failed to appear, and on July 2, 2014, issued Hearing Decision 14-UI-20715, concluding claimant was discharged, but not for misconduct. On July 9, 2014, the employer filed an application for review of Hearing Decision 14-UI-20715 with the EAB.

**FINDINGS OF FACT:** (1) Azure Standard employed claimant as an invoice puller from June 5, 2012 to January 17, 2014.

(2) The employer expected its employees to report for work as scheduled. On October 15 and December 12, 2013, claimant failed to report for work as scheduled for unknown reasons and received verbal and written warnings for violating the employer's attendance policy. Claimant was aware of the employer's expectations.

(3) On January 16, 2014, claimant was scheduled to be driven to work by a coworker with whom she carpooled under an employer sponsored incentive program known as "green dollars." Audio Record, June 30, 2014, ~ 19:00 to 20:00. The coworker failed to pick her up without explanation and claimant notified the employer when it became apparent she would be late and reported for work after the start of her shift after obtaining a ride from an office employee.

(4) On January 16, 2014, claimant arranged a ride to work for the next day from her roommate rather than through the employer's carpool program and set her alarm to awake in time to report for work as

scheduled. However, the morning of January 17, claimant slept through her clock alarm. After she awoke, she immediately called the warehouse supervisor, explained what had happened and that she would be late to work. The supervisor told her to not come in until she heard from the employer, and later that day the employer discharged her for failing to report as scheduled on January 17, 2014.

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

Barring illness or exigent circumstances, the employer had the right to expect claimant to arrive for work on time, and it had given her at least two warnings for previous violations of that expectation. The employer discharged for violating that expectation on January 17, 2014 after she slept through her alarm and called in to report she would be late. Audio Record, April 22, 2014, ~ 8:00 to 8:45. However, claimant took reasonable steps to ensure she arrived for work on time that day by arranging for a ride to work by someone other than carpool driver who had failed to pick her up the day before and setting her alarm clock to awake in time to report for work as required. There was no evidence that she previously slept through her alarm and we agree with the ALJ that there was insufficient evidence that she consciously ignored it that day. Hearing Decision 14-UI-20715 at 3. That claimant took reasonable steps to ensure she would arrive at work on time and that she telephoned the employer as soon as she was able after she awakened shows that she was not indifferent to the employer's expectations. The employer failed to meet its burden to show that claimant's failure to report to work on time on January 17, 2014 was a willful or wantonly negligent violation of the employer's expectation that she report for work as scheduled.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 14-UI-20715 is affirmed.

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

**DATE of Service:** August 12, 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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