

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1398

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 102753). The employer filed a timely request for hearing. On August 11, 2014, ALJ Lohr conducted a hearing and issued Hearing Decision 14-UI-23184, concluding that claimant's discharge was for misconduct. On August 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant asserted that the ALJ erred in receiving Exhibit 1 into evidence. However, because we find in claimant's favor on other grounds, we need not, and do not, address that issue. EAB considered the entire hearing record when reaching this decision, including Exhibit 1.

**FINDINGS OF FACT:** (1) Wildhorse Resort & Casino employed claimant as a slot floor worker from January 8 to March 10, 2014.

(2) The employer expected employees to report for work as scheduled, or at least call the employer by the end of the first hour of their shift. Claimant understood those expectations.

(3) On March 10, 2014, claimant was scheduled to start work at 12:30 a.m. Claimant used her daughter's cell phone as her alarm clock. On March 9, 2014, claimant set the alarm for 11:00 p.m. and went to bed. The alarm sounded, but did not wake claimant. At approximately 11:30 p.m. claimant's mother attempted to wake claimant, but was unsuccessful. At approximately 2:20 a.m., claimant awakened, discovered she was late for work, and called the employer.

(4) The employer discharged claimant for failing to report for work as scheduled on March 10, 2014, or call the employer by the end of the first hour her shift.

**CONCLUSIONS AND REASONS:** We agree with the Department, and not 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 Hearing Decision 14-UI-23184, the ALJ concluded that claimant's failure to report for work as scheduled on March 10, 2014, or call the employer by the end of the first hour her shift, was wantonly negligent.<sup>1</sup> In support of that conclusion, the ALJ asserted that claimant's testimony that her mother was unable to waken her was not persuasive, and that claimant gave no plausible reason why it was "impossible" for either her mother or her daughter to waken claimant in time to comply with the employer's expectations.<sup>2</sup> However, claimant did not testify that it was "impossible" for either her mother or daughter to waken her. She testified, and that her mother attempted to waken her, but was unsuccessful, and that her daughter did not attempt to wake her. Audio Record at 25:00, 34:00.

The failure of claimant's mother or daughter to awaken claimant is not reasonably attributable to claimant. A conclusion that claimant was wantonly negligent requires a finding that she consciously engaged in conduct she knew or should have known would probably result in a violation of the employer's expectations. In this case, the employer failed to show claimant knew or should have known that relying on her daughter's cell phone would probably result in her failure to report for work as scheduled, or call the employer by the end of the first hour of her shift. Absent such a showing, 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 her work separation from the employer.

**DECISION:** Hearing Decision 14-UI-23184 is set aside, as outlined above.<sup>3</sup>

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

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<sup>1</sup> Hearing Decision 14-UI-23184 at 3.

<sup>2</sup> *Id.*

<sup>3</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**DATE of Service: September 26, 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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