

**EMPLOYMENT APPEALS BOARD DECISION**

**2015-EAB-0069**

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100545). Claimant filed a timely request for hearing. On January 5, 2015, ALJ Kirkwood conducted a hearing and issued Hearing Decision 15-UI-31265, concluding the employer discharged claimant, not for misconduct. On January 26, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc. employed claimant as a painter from January 28, 2013 to September 5, 2014.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer no less than 30 minutes before their shift started. Claimant understood the employer's expectations.

(3) On August 30, 2014, claimant was arrested for Menacing (ORS 163.190) and Sex Abuse III (ORS 163.415), and remained incarcerated until November 2014 when he was released on his own recognizance. The menacing charge was later changed to a charge for Unlawful Use of a Weapon (ORS 166.220).

(4) Claimant was scheduled to work on September 2, 3 and 4, 2014. He did not report to work or call the employer because he was in jail, and did not have access to the employer's telephone number.

(5) On September 5, 2014, the employer discharged claimant for failing to report to work or call the employer.

(6) As of January 5, 2015, claimant was contesting the charges and awaiting trial.

**CONCLUSIONS AND REASONS:** We agree 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. When a claimant is discharged for failure to comply with an employer's attendance requirements due to incarceration, the relevant inquiry is whether claimant willfully, or with wanton negligence, created the situation that made it impossible for him to attend work. See *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505 (1991). 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 discharged claimant because, as a result of his incarceration, he did not comply with the employer's expectations that he report for work, or notify the employer that he was unable to do so. Claimant's incarceration was caused by an arrest for criminal charges. However, claimant is contesting the charges, and the record fails to show that he consciously engaged in conduct he knew or should have known would probably result in his arrest and incarceration. Absent such a showing, we cannot find that claimant willfully, or with wanton negligence, created the situation that made it impossible for him to attend work.

The employer asserted that, in addition to failing to report to work, claimant violated its expectations by failing to notify the employer he would be absent. Audio Record at 13:23 to 13:52. However, claimant failed to notify the employer he would miss work because he was in jail and did not have access to the employer's telephone number. The record does not show claimant deliberately failed to notify the employer he was going to be late, or consciously engaged in other conduct he knew or should have known would probably result in his failure to do so. Absent such a showing, we again cannot find that claimant violated the employer's expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-31265 is affirmed.

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

**DATE OF SERVICE: March 10, 2015**

**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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