

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1215**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 71903). The employer filed a timely request for hearing. On September 16, 2015, ALJ Murdock conducted a hearing, and on September 21, 2015, issued Hearing Decision 15-UI-44570, affirming the Department's decision. On October 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Cueria Law Firm LLC employed claimant as a clerical worker from April 6, 2015 to July 8, 2015.

(2) The employer expected its employees to report for work as scheduled. Several times during the last month of her employment, the employer's owner warned claimant about being late for work after she arrived at work after her scheduled start time. The owner told claimant "You don't seem like you care. I'm not going to be able to keep you if you don't care about your job." Audio Record ~ 12:00 to 12:15. Claimant was aware of the employer's expectation.

(3) On or about July 8, 2015, claimant reported late for work and the owner concluded the reason given by claimant either was "not a sufficient explanation" or no explanation at all. Audio Record ~ 12:00 to 12:15. On July 8, 2015, the owner terminated claimant's employment for failing to report for work as scheduled.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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 standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly

negligent disregard of the 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably violate a standard of behavior the employer had the right to expect her. The employer has 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).

As a preliminary matter, the employer chose not to discharge claimant until after her late arrival on or about July 8, and to limit the inquiry to relevant matters, the discharge analysis initially is focused on the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. *See e.g. Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred when it did). Here, the initial analysis of whether claimant's discharge disqualifies her from unemployment benefits is, therefore, properly limited to claimant's July 8 tardiness which reportedly occurred after previous warnings were given during the prior month, and proximately caused her discharge on July 8.

We agree with the ALJ that the record contains insufficient evidence that claimant's violation of the employer's expectation on or about July 8 constituted misconduct as defined under ORS 657.176(2)(a). Hearing Decision 15-UI-44570 at 3. When the ALJ questioned the owner about the final incident, he was unable to recall the date of the incident, initially stated that the reason given by claimant for her lateness was "not a sufficient explanation" and then asserted that she gave no explanation at all. When questioned about reasons given by claimant for her lateness in the past, the owner asserted he "[could not] recall." Audio Record ~ 12:30 to 13:00. Accordingly, on this record the owner merely summarized his own conclusions that claimant consistently violated his expectation regarding reporting to work on time without providing any detail regarding dates and circumstances. While those conclusions were sufficient for the owner to make his discharge decision, without more, they are insufficient for the employer to meet its burden to establish misconduct, as defined under ORS 657.176(2)(a), by a preponderance of the evidence.

We considered the employer's arguments at hearing concerning jurisdiction, but did not find them persuasive. Claimant filed her initial claim on July 15, 2015, the Department determined that the base year for her claim ran from July 1, 2014 to June 30, 2015 and most of claimant's wages during her base year came from Oregon employers.<sup>1</sup> However, according to the laws that govern the Oregon Employment Department's benefits decisions, the Department also had to review claimant's most recent

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<sup>1</sup> We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

work separation, regardless which state she had performed that work, to determine whether claimant was disqualified from receiving benefits for the purposes of ORS 657.176. The Department has the authority to deal with interstate matters involving unemployment insurance claims and EAB has the authority to review their decisions and those issued by OAH concerning such matters. ORS 657.760 *et seq.*

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

**DECISION:** Hearing Decision 15-UI-44570 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** November 19, 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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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