

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0099**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93021). The employer filed a timely request for hearing. On January 14, 2016, ALJ Vincent conducted a hearing, and on January 22, 2016 issued Hearing Decision 16-UI-51551, affirming the Department's decision. On January 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he made several objections to the manner in which the ALJ handled the hearing and the ALJ's evidentiary rulings. In light of our disposition of this matter, we need not and do not address claimant's objections.

**FINDINGS OF FACT:** (1) Oregon Department of Transportation employed claimant as an office specialist from February 15, 2015 until November 23, 2015.

(2) The employer expected claimant to arrive on time to start his scheduled shifts and to notify the employer before his shift began if he was going to be late. Claimant understood the employer's expectations.

(3) Claimant's regularly scheduled shift was 8:00 a.m. until 5:00 p.m. on Mondays through Fridays. On June 24, 2015, the employer reduced claimant's salary as a penalty for, among other things, arriving late to work. On June 29, 2015, claimant arrived twenty minutes late for work.

(4) Between June 29, 2015 and September 30, 2015, claimant “swiped” his badge into the employer’s timekeeping system at “8:00 a.m. or later” on twenty-nine work days. Exhibit 1 at 15.

(5) On October 7, 2015, claimant called the employer before the 8:00 a.m. start of his shift to request a personal leave because the street on which his residence was located was blocked by construction vehicles working on an adjacent house and he could not leave his driveway. The employer allowed claimant one hour of leave without pay, and he was expected to report for work at 9:00 a.m. Transcript at 15-16. On that day, claimant “swiped” his badge in to the employer’s timekeeping system sometime “after 9:00 a.m.” Exhibit 1 at 15.

(6) On November 23, 2015, the employer discharged claimant for tardiness and for unsatisfactory work performance.

**CONCLUSIONS AND REASONS:** 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 show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At the outset, the employer contended that it discharged claimant for chronic tardiness and for unacceptable work performance. Transcript at 5; Exhibit 1 at 33-39. However, the employer’s witness conceded at hearing that the employer did not know if claimant’s allegedly deficient work performance was due to lack of skills or other factors beyond his control or the result of willful or wantonly negligent behavior. Transcript at 7-8. Given the employer’s failure to contend or demonstrate that claimant’s allegedly unsatisfactory work performance was caused at least wantonly by negligent behavior, the ALJ was correct in not considering that performance in assessing whether claimant had engaged in misconduct and in limiting his analysis to claimant’s alleged tardiness. Hearing Decision 16-UI-51551.

The ALJ concluded in Hearing Decision 16-UI-51551 that the employer demonstrated that claimant’s tardiness was willful or wantonly negligent behavior. The ALJ reasoned that the number of times claimant was allegedly tardy between June 29, 2015 and September 30, 2015 and claimant’s alleged tardiness on June 29, 2014 and October 7, 2015 demonstrated that he “either intentionally failed to report to work or made conscious decisions that interfered with reporting to work on time and thereby violated the employer’s [attendance] policy.” Hearing Decision 16-UI-51551 at 3. We disagree.

With respect to claimant’s alleged tardiness on June 29, 2015 and between June 29, 2015 and September 30, 2015, the employer presented insufficient facts from which claimant’s willful or wanton negligence can be inferred. No evidence was presented about the alleged tardiness on June 29, 2015 that ruled out

it was the result of circumstances that were beyond claimant's reasonable control, such as the automobile accident which he testified had delayed his commute sometime in the final ninety days of his employment, but about which he was confused as to the date. Transcript at 12, 14, 21, 23. With respect to claimant's allegedly late arrivals to work between June 29, 2015 and September 30, 2015, the employer contended only that claimant "swiped" in his badge at "8:00 a.m. or later," when it was not disputed that claimant's scheduled starting time was 8:00 a.m. Exhibit 1 at 15. On this record, it is impossible to determine whether, in fact, claimant was tardy on any of these days and, if so, the number of times he was. However, claimant explained that the employer wanted him at his desk and ready to work by 8:00 a.m. and the employer did not dispute claimant's testimony that many of his tardies during this period were a result of his misunderstanding this aspect of the employer's attendance standards. Transcript at 14-15. The employer also did not dispute claimant's testimony that, once he correctly understood the employer's expectation, he complied with it and was at his desk by 8:00 a.m. Transcript at 15. Finally, with respect to claimant's tardy arrival for work on October 7, 2015, the employer did not challenge claimant's testimony that he unsuccessfully attempted to request a "personal business leave" that day to account for his late arrival because his driveway was blocked. The employer never clarified at the hearing whether the employer or claimant decided that claimant's arrival to work would only be delayed one hour, until 9:00 a.m. as a result of the blocked driveway.. Transcript at 15-16. Moreover, the employer presented no evidence that claimant's willful or wantonly negligent behavior on that day, rather than circumstances beyond his reasonable control, caused him to arrive for work after the 9:00 a.m. time established for a timely arrival.. Absent evidence that one or more of claimant's late arrivals to work were the result of his willful or wantonly negligent behavior, the employer did not meet its burden to show that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 16-UI-51551 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** February 22, 2016

**NOTE:** 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.

**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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