

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0205**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 154332). The employer filed a timely request for hearing. On February 17, 2016, ALJ Murdock conducted a hearing, and on February 19, 2016, issued Hearing Decision 16-UI-53417, affirming the administrative decision. On February 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer 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). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) J & J Mini Mart employed claimant as part-time a gas station attendant from August 17 until October 25, 2015.

(2) On October 24, 2015, at 9:46 a.m., the employer's co-owner called claimant to ask that claimant come to work to cover the shift of an employee who was absent. Claimant was not scheduled to work on that day. Claimant's mother answered the phone, and the owner had to wait approximately 10 minutes while claimant's mother woke claimant up.

(3) The owner was angry with claimant for making him wait, and shouted at claimant when he came to the phone, telling claimant he needed claimant to come to work. Claimant did not speak to the owner, but put the phone down so he did not have to listen to the owner shout. The owner eventually hung up when he realized that claimant was not talking to him. Claimant did not report for work on October 24.

(4) On October 25, 2015 the owner discharged claimant because he believed that claimant had been rude to him during the October 24 phone call, and because claimant had refused to work when asked to do so.

**CONCLUSION AND REASONS:** We agree with the ALJ, and conclude that 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. 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's owner discharged claimant because he believed claimant had been rude to him when he called claimant and asked him to come to work on October 24, 2015 and because claimant had refused to work on that day. Claimant and the owner presented completely different accounts of the October 24 telephone call. The owner asserted that claimant was an on-call employee who was expected to cover the shifts of absent coworkers. According to the owner, claimant's bad-mannered refusal to come to work on October 24 violated this expectation. Claimant, however, testified that he was a part-time employee who was not expected to be on call, and that he never spoke to the employer's owner on October 24 because he was upset by the owner's angry tone of voice. On this record, the evidence regarding whether claimant was rude to the employer during the October 24 telephone call, and whether he failed to fulfill his duties as an on-call employee is no more than equally balanced. The employer therefore failed to meet its burden to establish that claimant willfully or with wanton negligence violated the employer's expectation regarding his obligations as an on-call employee.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-53417 is affirmed.

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

**DATE of Service:** March 14, 2016

**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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