

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0309**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 113441). Claimant filed a timely request for hearing. On March 3, 2016, ALJ Vincent conducted a hearing, and on March 10, 2016, issued Hearing Decision 16-UI-54796, concluding that the employer discharged claimant, but not for misconduct. On March 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) WinCo Foods employed claimant as a cashier from December 8, 2003 until September 14, 2015.

(2) The employer's attendance policy provided that an employee received points each time the employee was late to work, absent for a shift, or left work before completing a shift. The employer considered an accumulation of 9 points within a rolling three month period or 15 points within a rolling one year period to be excessive, and cause for discipline. Claimant understood the employer's attendance policy, because she received a copy of the policy when she was hired. Exhibit 1.

(3) On November 2, 2014, claimant received a verbal warning for accumulating 15 attendance points within 364 days. On July 20, 2015, claimant received a written warning for accumulating excessive attendance points. On August 17, 2015, claimant was placed on an unpaid suspension for accumulating 18 attendance points within a three month period and 36 attendance points within a 12 month period. Exhibit 1.

(4) On Monday, September 14, 2015, claimant was scheduled to begin work at 10:15 a.m. In accordance with its practice, the employer had posted the weekly schedule on September 10, in an area accessible to employees in the store where claimant worked. Claimant believed she had checked the schedule and thought she was scheduled to begin work at 11 a.m. on September 14. As a result, she did not report for work at 10:15 a.m. on that date. After the employer contacted claimant at 10:45 a.m. to ask why she had not reported for her shift, claimant got to work by 11 a.m. on September 14.

(5) On September 15, 2015, the employer discharged claimant for accumulating excessive points under its attendance policy.

**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. 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 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 expected that employees would report on time for their scheduled shifts. The employer's policy provided that an employee would receive points each time the employee was absent, late to work or failed to complete a scheduled shift; employees with excessive points were subject to discipline. Claimant understood the employer's policy because she was disciplined for accumulating excessive attendance points on November 2, 2014, and July 20 and August 17, 2015. When claimant failed to report on time for her September 14, 2015 shift, the employer discharged her. When a claimant has been discharged because of the total number of points accrued under an attendance policy, EAB limits its evaluation to whether the circumstances of the final incident constituted disqualifying misconduct. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). For this reason, claimant's failure to report on time for her scheduled shift on September 14, 2015, and the circumstances that caused her tardiness are the proper focus of the misconduct analysis.

Claimant failed to report on time for work on September 14 because she was mistaken about the time she was scheduled to begin work. On this record, it is reasonable to infer that claimant's mistake resulted from her negligent failure to carefully check the weekly work schedule, which the employer had posted on September 10. To disqualify claimant from unemployment benefits, however, the employer must show more than carelessness or mere negligence. To prove misconduct, the employer must demonstrate that claimant's mistake resulted from willful or wantonly negligent behavior, *i.e.*, indifference to the consequences of her actions or a conscious disregard of the employer's expectations. OAR 471-030-0038(3)(a). The employer failed to meet this burden.

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-54796 is affirmed.

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

**DATE of Service: April 15, 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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