

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0374**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 71708). The employer filed a timely request for hearing. On March 22, 2016, ALJ Seideman conducted a hearing, and on March 29, 2016 issued Hearing Decision 16-UI-56008, affirming the Department's decision. On April 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) C & K Market, Inc. employed claimant in its bakery and delicatessen from April 15, 2015 until October 8, 2015.

(2) The employer expected claimant to report for work on time and to inform it at least two hours before the scheduled start of her shift if she was going to be late. Claimant understood the employer's expectation.

(3) Claimant worked at the employer's store in Central Point, Oregon. At the beginning of her employment, claimant lived in Central Point and was able to reliably report for work on time. In early July 2015, claimant moved to Eagle Point, Oregon, which was approximately ten miles from the employer's store. At the time she moved and after, claimant did not have her own transportation to commute to work. Claimant relied on others to give her rides to work. Between approximately early July and early October 2015, claimant was either absent from work or tardy arriving to work several times due to transportation difficulties.

(4) Sometime before October 2015, the manager of the employer's store expressed to claimant his displeasure about her unreliability in arriving for work on time. Claimant discussed her lack of transportation with the store manager and the bakery/deli manager and whether she might transfer to the employer's store in Eagle Point. At the suggestion of those managers, claimant met with the bakery/deli manager of the Eagle Point store, but that store did not have an available position.

(5) Sometime in approximately late September or early October 2015, claimant again discussed her transportation difficulties with the store manager. At that time, claimant regularly worked a shift from 4:00 p.m. until 8:00 p.m. The store manager agreed to change the shifts of other employees to allow claimant to work only during day shift hours, when public transportation was available to take her to and from work. The store manager told claimant because he was making such efforts to enable her to continue working that he was going to discharge her if she was absent or tardy to work ever again. Claimant was to start working the day shift on October 9, 2015.

(6) October 8, 2015 was the last day claimant was scheduled to work from 4:00 p.m. until 8:00 p.m. Claimant had arranged for a female acquaintance to give her a ride to work that day. Sometime before 4:00 p.m. on October 8, 2015, claimant was waiting in her house for the arrival of her acquaintance when she heard several police sirens and a commotion at the end of her street. Claimant ran down the street, and saw that police officers had stopped the acquaintance's car and were taking the acquaintance into custody. Claimant learned that the officers were transporting the acquaintance to a local hospital because of her intoxication. Claimant ran back to her house and immediately called the employer's bakery/deli manager to let her know what had happened to disrupt her timely arrival at work. Had the acquaintance not been taken into custody, there was sufficient time remaining for her to get claimant to the store before the start of her shift. During claimant's explanation, the bakery/deli manager asked claimant how she was going to get to work and claimant stated she would try to get to arrange for alternative transportation. The bakery/deli manager then stated, "Well, you know what [the store manager] said," which claimant understood as a reference to the store manager's statement that claimant would be discharged if she was absent or late to work one more time. Audio at ~24:15. Although claimant tried "several times" to arrange for another ride to work on October 8, 2015, she was unable to do so. Audio at ~24:23. Believing that she was automatically discharged because she had not arrived on time for work on October 8, 2015, claimant did not report for work as scheduled October 9, 2015 or thereafter.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. Claimant contended that she did not report for work on and after October 8, 2015 because she thought she was automatically discharged due to her inability to arrive on time for work. Audio at ~23:48, ~26:56. The employer's witness at hearing, the bakery/deli manager, stated she was "not sure" whether claimant was discharged, but thought claimant probably quit because she did not to return to work on October 9, 2015. Audio at ~15:48, ~16:13, ~18:13. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining whether a work separation is properly considered a discharge or a voluntary leaving. It states that if claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although the employer's bakery/deli manager did not mention in her direct testimony that the store manager had told claimant she would be discharged if she was absent or tardy to work one more time, she did not dispute that the store manager made to this statement to claimant. The bakery/deli manager also testified that "all [claimant] had to do was show up [on October 8, 2015]," seemingly confirming that claimant was discharged as a result of failing to report for work that day. Audio at ~ 14:14, ~18:01,

~18:13. Notably, the bakery/deli manager did not contend the employer, or the store manager in particular, made any attempt to communicate with claimant after she did not arrive for work on October 8, 2015. The employer's lack of subsequent attempts to communicate with claimant most strongly implies that employer knew the reason that claimant did not report for work after the events that delayed her on October 8, 2015, and made no effort to inform claimant that she was mistaken and that her inability to report for work on October 8, 2015 had not resulted in an automatic discharge. On this record, the preponderance of the evidence shows that claimant likely was discharged on October 8, 2015.

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. 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).

Barring unforeseeable exigent circumstances, the employer had a right to expect claimant to report for work as scheduled or to notify the employer of an absence or a tardy arrival to work. Here, the employer did not dispute the reason that claimant was unable to report for work on time on October 8, 2015. The employer did not dispute that claimant could not have reasonably foreseen that the arrangement she made to travel to work on October 8, 2015 would fail. The employer did not dispute that had the exigency of her acquaintance's arrest not arisen when it did, claimant would have been able to timely arrive at work. Finally, the employer did not dispute that claimant notified the employer that it was likely she would not be able to make it to the workplace on October 8, 2015 as soon as reasonably possible after she was aware of it. Given that the matters that caused claimant not to report for work on October 8, 2015 were reasonably out of her control and not reasonably foreseeable, the employer did not meet its burden to demonstrate that claimant willfully or with wanton negligence violated the employer's standards on October 8, 2015. The employer did not show that it discharged claimant for misconduct.

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

**DECISION:** Hearing Decision 16-UI-56008 is affirmed.

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

**DATE of Service:** May 2, 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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