

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0789**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 114609). The employer filed a timely request for hearing. On June 7, 2016, ALJ Holmes-Swanson conducted a hearing, and on June 14, 2016 issued Hearing Decision 16-UI-61720, affirming the Department's decision. On July 5, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) R. Tyson Scott, DPM LLC employed claimant as a receptionist at Coastline Foot from August 12, 2015 to March 29, 2016.

(2) The employer expected claimant to work when scheduled. Claimant had attendance problems throughout her employment. On March 15, 2016, the employer gave claimant a written warning and placed claimant on a two-week probation period during which claimant was required to report to work for all of her scheduled shifts. Claimant understood the employer's expectation.

(3) On March 25, 2016, claimant notified the employer she was going to be absent from work. On March 28, 2016, claimant again notified the employer she was going to be absent from work. Claimant was absent on both occasions because she lacked childcare due to her childcare provider's pregnancy. Claimant tried to arrange alternative childcare but was unable to do so.

(4) On March 29, 2016, the employer discharged claimant for being absent during her probationary period.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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 had the right to expect claimant to report to work as scheduled, and claimant understood the expectation. On March 25, 2016 and March 28, 2016, claimant violated the employer's expectation. For claimant's violations to be considered "misconduct" for purposes of disqualifying her from receiving unemployment insurance, however, the violation must have been done willfully or with wanton negligence. In this case, it appears that the violation was the result of exigent circumstances, the illness of her regular childcare provider and claimant's inability to secure an alternative childcare provider despite her efforts to do so. She therefore missed work to care for her children when no one else was available to do so, and not because she wanted to be absent or was indifferent to the employer's business needs or expectation that she work as scheduled. Absent a showing that claimant missed work willfully or with wanton negligence, claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-61720 is affirmed.

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

**DATE of Service:** August 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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