

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0844**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 122900). Claimant filed a timely request for hearing. On June 17, 2016, ALJ Vincent conducted a hearing, and on June 24, 2016, issued Hearing Decision 16-UI-62529, concluding that the employer discharged claimant for misconduct. On July 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) International Resource, a company that provides environmental and waste management services, employed claimant as a sales coordinator from August 17, 2015 until March 10, 2016.

(2) When claimant began her work for the employer, she was expected to report for work at 7:30 a.m. From August through October 2015, claimant was regularly late to work. In November 2015, the employer agreed to change her hours so that she could begin work at 8 a.m. Claimant continued to report late for work, however.

(3) Claimant's supervisor talked with her several times about the need to report for work on time, but never disciplined her in writing or warned her about the consequences of continued tardiness.

(4) In January 2016, claimant began to experience major health problems. She became physically ill and nauseated in the morning, and "started throwing up almost every single morning before I went to work." Transcript at 22. Although claimant underwent numerous tests, the cause of her health problems was never determined. Transcript at 23.

(5) After she became ill, claimant got up earlier than she had in the past, hoping that her nausea would subside so that she would be able to get to work on time. Transcript at 26. She was unsuccessful in these efforts, however, and during January and February 2016, was often late to work.

(6) Sometime in January 2016, the employer decided it would discharge claimant for excessive tardiness. The employer waited until March 10, 2016 to discharge claimant, however, because it needed time to reorganize its operations so that the work performed by claimant could be assigned to another employee. Transcript at 7.

**CONCLUSION AND REASONS:** We disagree 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for excessive tardiness. Claimant understood, as a matter of common sense, that the employer expected her to report for work on time. The record shows that claimant demonstrated a repeated inability to get to work on time during the seven months she worked for the employer. The record also shows, however, that the final incidents of tardiness in January and February 2016, which caused the employer to discharge claimant on March 10, 2016, occurred because the nausea she experienced in the morning prevented her from getting to work on time. Because claimant's actions in reporting late to work resulted from an illness or health condition, and not from a deliberate and conscious disregard of the employer's expectations, they were not willful or wantonly negligent.

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

**DECISION:** Hearing Decision 16-UI-62529 is set aside, as outlined above.

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

**DATE of Service:** August 12, 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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