

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1130**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 102532). Claimant filed a timely request for hearing. On September 27, 2016, ALJ M. Davis conducted a hearing, and issued Hearing Decision 16-UI-68157, concluding that the employer discharged claimant, but not for misconduct. On October 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument in reaching this decision.

**FINDINGS OF FACT:** (1) Willamette Family, Inc., an agency that provides treatment for drug and alcohol addiction, employed claimant as a billing specialist from July 21, 2014 until June 13, 2016.

(2) The employer's policy required employees to accurately record time worked. Claimant knew about and understood the employer's expectation.

(3) On May 27, 2016, claimant's supervisor and the employer's chief fiscal officer met with claimant and presented her with memorandum that cited a number of written reprimands in her personnel file. The memorandum mentioned reprimands for alleged incidents of claimant's inappropriate behavior that occurred on April 29, 2015, November 6 and 11, 2015, April 28, 2016 and May 16, 2016, and also mentioned an "attendance warning" given to claimant on October 9, 2015. The memorandum included a list of "professional expectations" with which claimant was expected to comply; one of these expectations was that claimant needed to obtain advance approval for any overtime she worked. Exhibit 1. Claimant refused to sign the memorandum because she did not believe she had engaged in any inappropriate conduct and had not violated the employer's attendance expectations. Claimant told her supervisor and the chief fiscal officer that she was resigning, and they told her she needed to submit a written resignation.

(4) On May 31, 2016, claimant came to the employer's office, told the employer that she was not going to submit a written resignation, and asked for her job back. The chief fiscal officer agreed to allow claimant to return to work. Transcript at 7.

(5) On June 10, 2016, claimant asked and received permission from her supervisor to work 1.75 hours of overtime. Claimant also offered to work overtime on Saturday, June 11, if her supervisor needed her to do so. Claimant's supervisor did not ask her to work on June 11, however. Exhibit 1.

(6) The employer concluded that claimant worked 2.5 hours of overtime on June 11. On June 13, 2016, the employer discharged claimant for working overtime without obtaining prior authorization to do so.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant, not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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.

At the hearing, the employer's chief financial officer asserted that it discharged claimant for "[s]everal examples of gross misconduct, multiple instances of insubordination, and lying." Transcript at 5. The chief financial officer was apparently referring to the incidents for which claimant was reprimanded and which he discussed with her on May 27. The employer did not discharge claimant until after it concluded that she had worked overtime hours on June 11, 2016 without obtaining prior permission to do so, however. Claimant's allegedly unapproved overtime work was therefore the proximate cause of her discharge and the appropriate focus of our misconduct analysis.

Claimant and her supervisor presented entirely different accounts of what occurred on June 11. According to her supervisor, claimant was able to access the building on June 11, did so, and then recorded on her time card that she had worked 2.5 hours on that date. Transcript at 29-30. Claimant, however, denied that she had a key that would allow her to access the building on a Saturday, and asserted that she had been out of town on June 11. Transcript at 17 and 24. Claimant testified that she was not responsible for recording 2.5 hours of overtime worked on June 11. Transcript at 20. There is no reason in the record to question the credibility of any of the witnesses or to doubt the accuracy of any of their testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty is resolved against the employer because it is the party that carries the burden of persuasion in a discharge case. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore did not meet its burden to demonstrate that claimant worked unapproved overtime hours on June 11.

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-68157 is affirmed.

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

**DATE of Service: October 21, 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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