

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1234**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 144925). The employer filed a timely request for hearing. On October 19, 2016, ALJ Wyatt conducted a hearing at which claimant did not appear, and on October 26, 2016, issued Hearing Decision 16-UI-69952, affirming the administrative decision. On November 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

**FINDING OF FACTS:** (1) Roseburg Forest Products employed claimant as a utility/clean up person from April 13, 2012 until June 10, 2016.

(2) The employer's attendance policy required that an employee who was unable to report to work or was going to be late for a scheduled shift call an attendance line and leave a voice mail message to notify the employer about the absence or tardiness. The employer's attendance policy specified that an employee who attained a certain number of unexcused absences or incidents of tardiness would receive a "final shop steward" warning that any additional unexcused absence or incident of tardiness would result in the employee's discharge. Audio Recording at 11:46. Claimant knew about and understood the employer's procedure for reporting that an absence or tardy.

(3) On May 1, 2015, and August 14, 2015, claimant's supervisor gave him a written warning for violations of the employer's attendance policy. Exhibit 1.

(4) On March 12, 2016, claimant called the employer's attendance line and said that he would not report for his scheduled shift because was taking leave that had been approved under the Family and Medical Leave Act (FMLA). Claimant's supervisor subsequently discovered that the claimant had not received approval to take FMLA leave for that day. On March 18, 2016, claimant's supervisor gave him a "final shop steward" warning for violating the employer's attendance policy due to his unexcused absence on

March 12. The warning instructed claimant to “[f]ollow company policy regarding critical absences,” and told claimant that the consequence of failing to correct his behavior would be “termination.” Exhibit 1.

(5) On May 23, 2016, claimant called the employer’s attendance line after his shift was scheduled to begin and left a message that he was going to be late to work because of a “family emergency.” A coworker told claimant’s lead worker that the coworker saw claimant being arrested on his way to work. The lead worker then contacted the Douglas County Sheriff’s office and learned that claimant had been arrested and incarcerated. Claimant was arrested on an old, outstanding warrant.

(6) On June 10, 2016, the employer discharged claimant for unexcused tardiness on May 23 and for allegedly misrepresenting the reason for his tardiness.

**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 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. 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 carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected that claimant would report to work on time, and call the employer’s attendance line prior to the time his shift was scheduled to begin if he was going to be late or was unable to report to work. Claimant understood the employer’s expectations because he had violated them twice during the 365 days preceding his June 10, 2016 discharge, and had been warned on March 12, 2016 that any future violation of the employer’s attendance policy would result in his discharge. On May 23, 2016, sometime after his shift was scheduled to begin, claimant notified the employer that he would be late due to a “family emergency;” the employer subsequently found out that claimant was tardy because he had been arrested and incarcerated. On June 10, 2016, the employer discharged claimant for unexcused tardiness and for allegedly misrepresenting the reasons for his tardiness.

To the extent the employer discharged claimant for allegedly misrepresenting the reasons for his tardiness, it failed to demonstrate that it discharged him for misconduct. We do not find that claimant’s characterization of his arrest and incarceration as a “family emergency” was inaccurate. The relevant definition of an emergency is “an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy, pressing necessity; exigency.” Webster’s Online Dictionary, [www.webster-dictionary.org/definition/emergency](http://www.webster-dictionary.org/definition/emergency). Claimant’s arrest was certainly an “unforeseen occurrence” for him and his family, and one which called for “immediate action or remedy.” The employer’s attendance policy included no specifications regarding the level of detail an employee

needed to provide when reporting the reasons for an absence or tardy. As a result, the employer failed to demonstrate that claimant knowingly violated the employer's attendance policy by describing his arrest and incarceration as a "family emergency."

To the extent the employer discharged claimant because his tardiness resulted from his arrest and incarceration, it also failed to demonstrate that it discharged him for misconduct. When an employee's violation of an employer's attendance policy occurs because of incarceration, the relevant issue for the purpose of a misconduct analysis is whether claimant willfully or with wanton negligence created the situation that made it impossible for him to comply with the requirements of the attendance policy. *Weyerhaeuser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991). The record here contains no information about the old, outstanding warrant that resulted in claimant's arrest and incarceration. Without such information, we cannot determine if claimant engaged in willful or wantonly negligent conduct that he knew would directly lead to his arrest on a warrant.

In its written information, the employer contended that "having an outstanding warrant per se is such a wantonly negligent situation," and noted that under Oregon law, arrest warrants are typically issued when an individual failed to comply with a legal duty. The employer also noted that claimant's arrest occurred when he was stopped by a law enforcement officer while driving to work and argued that "his actions in engaging in some sort of traffic violation ... should suffice as evidence of a further wantonly negligent [sic] action on his part. Employer's Argument at 2. However, because the record is devoid of evidence regarding the reasons for claimant's outstanding warrant or the reasons why he was stopped by a law enforcement officer, we have no evidence upon which to base a conclusion that claimant's tardiness was directly attributable to willful or wantonly negligent behavior, and therefore constituted misconduct.<sup>1</sup>

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-69952 is affirmed.

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

**DATE of Service:** November 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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<sup>1</sup> See, e.g., *Campbell v. Employment Department*, 256 Or App 682, 683, 303 P3d 775 (2013), citing *SAIF v. Ramos*, 252 Or App 361,363, 287 P3d 1220 (2012) and *Endres v. DMV*, 255 Or App 226, 229, 297 P3d 505(2013) (the court reviews EAB's orders to determine whether its analysis "comports with substantial reason"; to "comport with substantial reason," an order must demonstrate a "rational connection" between the facts and legal conclusions).

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