

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0236**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 84814). Claimant filed a timely request for hearing. On February 7, 2017, ALJ Hall conducted a hearing, and issued Hearing Decision 17-UI-76389, affirming the administrative decision. On February 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

**FINDINGS OF FACT:** (1) Duncan Aviation employed claimant as an administrative assistant from August 25, 2015 until August 15, 2016. Claimant's job duties including serving as a receptionist, and performing general administrative tasks to support the employer's satellite shops.

(2) The employer expected that claimant would take a one hour lunch break during his shift, and take a longer lunch only if his manager gave him permission to do so. Claimant knew about and understood the employer's expectation regarding his lunch break.

(3) The employer became concerned about claimant's ability to competently perform his job duties, and his attendance. On June 24, 2016, it placed claimant on a written plan to improve his "unacceptable performance" in regard to "attendance, attention to detail and following instructions." As examples of claimant's deficient performance, the plan noted that on January 5, 2016, claimant arrived to 30 minutes late, and also described a number of incidents when claimant had failed to adequately perform assigned tasks. Exhibit 1.

(4) By memorandum dated August 15, 2016, the employer notified claimant that it was discharging him, effective immediately, because "your attendance continues to be unacceptable with you extending your lunch breaks without approval from your manager." In support of its assertion, the employer described an hour and one-half lunch break claimant took on June 24, an hour and fifteen minute lunch break claimant took on June 28, and an August 8 incident when claimant returned from a lunch break at 12:10

p.m. and took a break at 12:25p.m. In the memorandum, the employer also stated that on July 20, 2016 claimant “failed to follow SRI procedures to open a package to receive extrusion.” Exhibit 1.

**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 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. 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).

The employer expected that claimant would take a one hour lunch break during his work day, and obtain permission from his supervisor to take a longer lunch break. The employer discharged claimant because it believed that he took lunch breaks longer than one without permission on June 24 and 28, and took a rest break 15 minutes after he returned from lunch on August 8. In Hearing Decision 17-UI-76389, the ALJ agreed with the employer’s account of the facts, and concluded that claimant’s conduct demonstrated “his indifference to the employer’s attendance expectations” and constituted misconduct. Hearing Decision 17-UI-76389 at 3. We disagree.

At the hearing, claimant testified that he did not remember taking a long lunch without permission on June 28, or an inappropriately scheduled rest break on August 8. Claimant also testified that his supervisor was always aware of when claimant took his breaks, and never brought any issues regarding his attendance on June 28 and August 8 to claimant’s attention. Audio recording at 21:05. In addition, claimant testified that he submitted weekly time sheets that accurately listed the hours he had worked, and that these time sheets were always approved and never questioned. Audio recording at 22:08. The employer’s witness provided hearsay testimony about claimant’s conduct. Claimant’s first-hand testimony about his actions is entitled to greater weight than the employer’s hearsay evidence. We therefore conclude that the employer failed to meet its burden to demonstrate that claimant engaged in willful or wantonly negligent conduct by taking long lunch breaks without permission and an inappropriately scheduled rest break.<sup>1</sup> Because the employer has not met its burden, we conclude that claimant’s discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

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<sup>1</sup> The ALJ concluded that the employer failed to prove that claimant’s July 20 “failure to follow SRI procedures” was misconduct, because the employer’s witness had no first-hand knowledge of what occurred and could not explain how claimant’s actions violated an employer policy or expectation. Hearing Decision 17-UI-76389. Because no adversely affected party requested review of the ALJ’s conclusion regarding the July 20 incident, we confined our review to the issue of claimant’s alleged violation of the employer’s attendance policy. Even if we had, the outcome of this decision would remain the same because we agree with the ALJ with respect to that incident.

**DECISION:** Hearing Decision 17-UI-76389 is set aside, as outlined above.

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

**DATE of Service:** March 20, 2017

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

**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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