

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0407**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 84737). The employer filed a timely request for hearing. On March 22, 2017, ALJ Meerdink conducted a hearing, and on March 23, 2017 issued Hearing Decision 17-UI-79508, concluding the employer discharged claimant for misconduct. On April 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Horsefeathers, Inc. employed claimant as a line cook from June 2015 until December 16, 2016.

(2) The employer expected employees to report to work on time and when scheduled by the restaurant manager. Claimant understood the employer's expectation as a matter of common sense.

(3) On December 15, 2016, claimant arrived at least 36 minutes late to his scheduled shift without permission from the employer. The restaurant was not busy that day.

(4) On December 16, 2016, claimant was scheduled to begin work at 4:00 p.m. He picked up his paycheck from the employer's restaurant at 3:00 p.m., and left to address a personal car insurance matter. He called his manager before 4:00 p.m. and left messages for the manager asking if he could report late to work so that he could resolve his car insurance matter before he went to work. The manager did not call claimant back. Claimant called his employer shortly after 4:00 p.m. and discussed his desire to arrive at work late. The manager told him he could report late to work because the restaurant was not busy at that time. Claimant did not contact the employer again until he reported to work at 5:41 p.m., immediately after he finished his car insurance matter.

(5) The manager discharged claimant when he reported to work on December 16, 2016, because he reported to work late.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, we find that the final incident and proximate cause of claimant's discharge was his failure to arrive at work on time on December 16, 2016. The record shows that although the employer also had concerns about claimant's attendance before December 16, and his girlfriend's presence in the kitchen where claimant worked, the employer knew claimant arrived late for work on December 15 and continued to employ claimant without interruption or investigation. Nor would the employer have allowed claimant to continue working after December 16 regardless of his girlfriend's presence at the restaurant that evening. The employer's manager testified that he reminded claimant on December 15 that the employer expected him to report to work on time, and that, but for claimant's late arrival to work on December 16, the employer would not have discharged him on December 16. Audio Record at 28:47 to 28:58, 22:00 to 22:07, 14:05 to 14:14. Claimant's tardiness on December 16 is, therefore, the initial focus of the discharge analysis. Only if we conclude claimant's conduct in that instance was willful or wantonly negligent would we then analyze the prior incidents for evidence of willful or wantonly negligent misconduct.

The employer reasonably expected claimant to arrive on time for his shifts as scheduled by his manager. Claimant knew or should have known the employer's expectation as a matter of common sense. In Hearing Decision 17-UI-79508, the ALJ found facts in accordance with testimony from the employer's manager and concluded that claimant acted with a willful or wantonly negligent disregard for the employer's attendance policy.<sup>1</sup> The ALJ found that claimant's conduct was not an isolated instance of poor judgment because he had been late for work on other occasions, including on December 15.<sup>2</sup> We disagree that the final incident was misconduct.

It is undisputed that claimant arrived at 5:41 p.m., well after the time he was originally scheduled to begin work. However, claimant testified that his manager told him it was "slow" at work and that he could arrive late for his shift on December 16, and to "get [to work] when you can" after he obtained his insurance. Audio Record at 32:49 to 33:30, 33:19 to 33:22. The ALJ reasoned that claimant's

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<sup>1</sup> Hearing Decision 17-UI-79508 at 2, 3.

<sup>2</sup> *Id.* at 2.

testimony was not credible “in that he presented contradictory statements,” and found in accordance with the manager’s testimony, that he directed claimant to arrive at work by 4:30 p.m.<sup>3</sup> The ALJ did not detail contradictions in claimant’s testimony, and our review of the record does not reveal that claimant contradicted himself or otherwise lacked credibility. We find the evidence equally balanced. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden. As a result, we disagree that the record shows claimant was willful or wantonly negligent in arriving at work after 4:30. Moreover, we do not find that claimant’s failure to call the restaurant between his telephone call with the manager and when he arrived at work was wantonly negligent because the manager told claimant it was not busy, and the restaurant had been slow the prior day, too. The record does not show claimant knew or should have known he should contact the employer when his personal business took longer than he perhaps expected.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 17-UI-79508 is set aside, as outlined above.<sup>4</sup>

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

**DATE of Service:** April 25, 2017

**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>3</sup> *Id.* at 2, 3.

<sup>4</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.