

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0761**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 90534). Claimant filed a timely request for hearing. On May 12 and 31, 2017, ALJ Frank conducted a hearing, and on June 8, 2017, issued Hearing Decision 17-UI-85270, affirming the administrative decision. On June 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Belmont Station employed claimant as a bartender from August 2015 until January 24, 2017.

(2) The employer expected that claimant would notify it if he was going to be absent or late for a scheduled shift. Claimant understood the employer's expectations.

(3) On August 16, 2015, claimant failed to report for his scheduled shift and failed to contact the employer to explain that he would be absent. Claimant's supervisor talked with claimant about the need to notify the employer of absences, warned him about the "precarious nature of his employment," and told him that any future tardiness or absence without notice could result in discharge. Exhibit 1 at 9.

(4) On November 9, 2016, the employer issued to claimant a written disciplinary action for "multiple tardy arrivals," "poor work ethic," failing to "sign off on the daily task sheet," and an "[u]nenthusiastic attitude toward job in general." Exhibit 1 at 10. The disciplinary action stated that claimant's employment would be terminated if he failed to correct the behaviors on which it was based. Exhibit 1 at 10.

(5) On December 12, 2016, claimant slept through his alarm and reported 45 minutes late for his scheduled shift. The employer verbally reprimanded claimant for this tardiness and warned him that "he was on thin ice." Exhibit 1 at 12.

(6) Sometime prior to January 14, 2017, a work schedule was distributed to claimant showing that he was scheduled to work the closing shift, from 5:00 p.m. until closing, on Monday, January 23, 2017. Claimant reviewed that schedule. The employer had been scheduling claimant to work the closing shift on Mondays for a number of months.

(7) On January 14 and 21, 2017, the employer sent emails to claimant and other employees to which revised work schedules for the week that included January 23, 2017 were attached. On both of the revised schedules, claimant was scheduled to work from 2:00 p.m. to 10 p.m. on Monday, January 23, 2017. Exhibit 1 at 3-6. However, neither the subject lines nor the bodies of the emails that the employer sent indicated that the schedules that were attached were revised work schedules, different from the ones initially issued. Exhibit 1 at 3, 5. Claimant did not review the revised schedules because he assumed the employer had continued to schedule him for the closing shift on Mondays in January since nothing in the mails alerted him that that the employer had issued revised schedules. Claimant continued to think he was scheduled to work the closing shift on January 23, 2017.

(8) On January 23, 2017, claimant failed to report for work at 2:00 p.m. Upon claimant's failure to report, one of the employer's managers called him and told him he had been scheduled to work the mid-shift that day, from 2:00 p.m. until 10:00 p.m. Claimant arrived at work at approximately 2:25 p.m.

(9) On January 24, 2017, the employer discharged claimant for failing to report for work on time on January 23, 2017.

**CONCLUSION AND REASONS:** 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).

Although the employer cited two reasons for claimant's discharge – excessive incidents of tardiness and failure to perform assigned job duties on January 23, 2017 - the employer discharged claimant only after he failed to report on time for his scheduled January 23, 2017 shift. Audio at ~10:30. Claimant's tardiness on January 23 was therefore the proximate cause of his discharge and the appropriate focus of the misconduct analysis.

Claimant understood, both as a matter of common sense and because he had been previously disciplined for absences and tardiness without notice, that the employer expected him to report on time for his scheduled shifts, and contact the employer if he was going to be absent or late. Claimant did not report on time for his January 23, 2017 shift, as scheduled, because he was unaware he was expected to work

the mid-shift on that day. Sometime before January 14, 2017, claimant had received and reviewed a work schedule for January 23, 2017, which assigned him to work his customary closing shift, from 5 p.m. until closing. While claimant failed to review the two schedules subsequently sent to him, which changed the shift to which he was assigned on January 23, 2017, nothing in either of the emails to which the schedules were attached alerted him that any changes had been made to the work schedule he had already reviewed. It cannot be concluded that claimant's behavior in failing to open the revised schedules that would have notified him that the shift he was working on January 23, 2017 had been changed was a willful or wantonly negligent violation of the employer's standards. Although it might have been negligent of claimant, and he might not have exercised due care by failing to open and review the revised schedules, nothing in claimant's behavior evidenced that he was consciously aware that he was acting or failing to act in a manner that would probably result in a violation of the employer's standards, or that he was consciously indifferent to the consequences of his behavior and that it might result in him missing his shift. Absent such evidence, there is insufficient evidence in this record to show claimant engaged in misconduct on January 23, 2017.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-85270 is affirmed.

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

**DATE of Service:** July 26, 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.