

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0912**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 131200). The employer filed a timely request for hearing. On July 12, 2017, ALJ Lohr conducted a hearing, and on July 18, 2017, issued Hearing Decision 17-UI-88177, affirming the administrative decision. On July 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) WinCo Foods employed claimant as a freight clerk from April 8, 2013 until May 4, 2017.

(2) The employer's discipline policy was based on a point system and provided for progressive discipline. Employees accrued two points for each incidence of tardiness and three points for each absence. An employee who accrued more than 15 attendance points during a 364 day period received a verbal warning. Additional accruals of attendance points resulted first in a written warning, second in a suspension and third in a discharge. Employees could also accrue points for violations of the employer's policies other than attendance. Transcript at 13-14. Claimant knew about and understood the employer's policy because he received a copy of it when he was hired, and was also required to periodically review the policy. *Id.*

(3) The scheduled starting times for claimant's shifts varied; he was usually scheduled to begin work at 11:00 p.m. or 11:30 p.m., but occasionally was scheduled to begin work at 12:00 a.m. Claimant's supervisor emailed weekly work schedules to claimant and other employees; a copy of the weekly schedule was also posted in the break room of the store where claimant worked.

(4) On or about December 14, 2016, claimant's supervisor verbally warned him that his attendance was unsatisfactory because he had accrued 16 points over a 364 day period.

(5) On December 23, 2016, claimant's supervisor warned him in writing that his attendance was unsatisfactory because he had accrued additional points since December 14.

(6) On February 7, 2017, claimant was suspended without pay because he was involved in an accident in which company property was damaged. Transcript at 12.

(7) On May 2, 2017, claimant reported for work at 12:01 a.m. because he thought he was scheduled to begin his shift at 12:00 a.m.<sup>1</sup> Claimant was actually scheduled to begin work at 11:30 p.m.

(8) On May 4, 2017, the employer discharged claimant because of his attendance.

**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. 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 discharged claimant because he had accrued sufficient violations to warrant discharge under the employer's progressive discipline policy. Because claimant's tardiness on May 2 caused the excessive accrual of attendance points that resulted in his discharge, we focus on this event to determine whether claimant's discharge was misconduct.

On May 2, 2017, claimant reported to work 31 minutes late. Claimant believed that he was scheduled to begin his shift at 12:00 a.m.; he was actually scheduled to start work at 11:30 p.m. As a matter of common sense, claimant knew that the employer expected him to check the weekly schedules his supervisor prepared and note the time he was scheduled to begin his shift for each day he was scheduled to work. However, the record fails to show that claimant consciously reported for work late or consciously neglected to check the work schedule for the week including May 2, 2017, as opposed to forgetting to do so or misreading his start time for that day. The record therefore fails to establish that claimant's failure to report for work on time was willful or the result of wanton negligence, as defined in OAR 471-030-0038(1)(c), and not mere carelessness or ordinary negligence, which does not constitute misconduct.

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<sup>1</sup> The employee did not consider an employee to be tardy unless the employee was more than 2 minutes late for a shift. Transcript at 31.

The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-88177 is affirmed.

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

**DATE of Service:** August 16, 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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