

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1109**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70319). Claimant filed a timely request for hearing. On August 29, 2017, ALJ Amesbury conducted a hearing, and on September 1, 2017 issued Hearing Decision 17-UI-91820, affirming the Department's decision. On September 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) ES-O-EN Management, LLC employed claimant as a Taco Bell manager from January 14, 2014 to July 3, 2017.

(2) The employer expected claimant to report to work on time. Claimant understood the expectation, and he understood that as a manager it was important for him to set a good example for his subordinate employees by reporting to work on time.

(3) Claimant was repeatedly late for work, primarily because he overslept, and the employer had given claimant at least two written warnings prior to June 14, 2017. On June 14, 2017, the employer issued claimant a final written warning for tardiness. The warning stated that claimant could be demoted, suspended or discharged if he was late to work again. Claimant took steps to improve his attendance by changing his routine and setting multiple alarms.

(4) On the night of June 27, 2017, claimant set multiple alarms to ensure that he woke up in time to report to work on time. He slept well, woke up earlier than usual on June 28, 2017 feeling rested, and readied himself for work. Claimant was ready for work approximately 15 minutes early and laid down on the couch to watch television before leaving. He inadvertently fell asleep, slept for 30 minutes, and ultimately reported to work 17 minutes late. The employer suspended claimant when he arrived at work and sent him home. On July 3, 2017, the employer discharged claimant for tardiness.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant's discharge was 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 ALJ concluded that claimant's discharge was for misconduct, reasoning that claimant "lay down on his couch" with "less than 15 minutes to relax before he had to leave for work," knowing that "he was supposed to report to work on time" after repeated warnings. Hearing Decision 17-UI-91820 at 3. The ALJ characterized claimant's decision to lay down on the couch a "willingness to risk violating employer's attendance policy so he could take a nap of less than 15 minutes" which "shows that claimant consciously chose a course of action that was likely to lead to a violation of employer's policy, and that claimant was indifferent to the consequences of his actions." *Id.* We disagree.

Claimant did not lay down on the couch "so he could take a nap of less than 15 minutes" at the "risk [of] violating" the employer's attendance policy by oversleeping again. Rather, at the time he laid down, he felt rested from a good night of sleep, had been awake and moving around for some period of time readying himself for work, and was fully dressed for work. Given those circumstances, it is more likely than not that he was feeling alert rather than tired. Claimant's purpose in laying down on the couch was to watch a television program before going to work. He did not intend to take a nap, nor is there evidence suggesting that he knew he was at risk of falling asleep if he lay down. There is little reason for an individual who is awake, alert, fully dressed and ready to begin his work day to suspect that laying down to watch a television program for a few minutes was likely to cause him to fall asleep and report to work late, meaning that his decision to watch television was not indicative of either his willingness to risk violating the employer's policy or his indifference to the consequences of reporting late to work again. The record fails to show that claimant acted willfully or that he consciously created circumstances under which he would probably violate the employer's attendance policy by reporting late to work. Claimant's June 28<sup>th</sup> tardiness was, therefore, not the result of willful or wantonly negligent behavior, and since that incident was the reason his discharge occurred when it did, claimant's discharge was not for misconduct, and he is not subject to disqualification from benefits because of it.

**DECISION:** Hearing Decision 17-UI-91820 is set aside, as outlined above.<sup>1</sup>

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 10, 2017**

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<sup>1</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.

**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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