

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1158**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74712). The employer filed a timely request for hearing. On September 8, 2017, ALJ Murdock conducted a hearing, and on September 12, 2017 issued Hearing Decision 17-UI-92359, affirming the Department's decision. On September 29, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire hearing record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) O'Reilly Auto Parts employed claimant from May 31, 2016 until June 13, 2017 as a merchandiser and stocker.

(2) The employer expected claimant to follow its attendance policy by being present at work during his scheduled shift, requesting time off work at least two hours in advance, and refraining from leaving work during his shift without approval from his supervisor or manager. Exhibit 1 at 13-14.

(3) Claimant had a son who was autistic. Claimant had an individualized education program (IEP) meeting for his son on June 13, 2017 and had scheduled his son for intensive therapy during that week in response to an incident at school. Claimant had 32 hours of accrued vacation time. On June 6, 2017, claimant requested to have the week including June 13 off work to take his son to therapy. The schedule covering June 13 was supposed to be completed by June 11. Claimant asked his supervisor and the employer's scheduler repeatedly about his vacation request, but the employer did not respond to claimant's request to have time off from work before June 13.

(4) On June 13, 2017, claimant reported to work for his shift. Claimant learned when he arrived at work that the employer denied his vacation request for that week. Claimant thought he could try to postpone his son's appointments for one week and submitted a modified vacation request for the following week. Later that morning, the manager denied claimant's modified vacation request. Claimant told his manager he needed time off work to take his son to therapy, and if could not have vacation, needed to at least come in late and leave early a few days, including leaving at 2:15 p.m. instead of 3:00 p.m. that day to attend his son's IEP meeting. The manager denied claimant's requests. Claimant stated, "Okay, well, if this is going to be a problem in the future, maybe I should just start looking for other employment and when I find that, we can part ways." Audio Record at 20:38 to 20:45. The manager responded, "Consider yourself terminated," and walked away in an angry manner. Audio Record at 16:57 to 17:03. Claimant left work because the manager told him he was terminated.

(5) On June 13, 2017, the employer discharged claimant for allegedly violating the employer's attendance policy.

**CONCLUSIONS AND REASONS:** We agree 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. 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.

As a preliminary matter, claimant's first hand testimony about the incident on June 13 that led to his discharge differed from the testimony of the employer's witness, which was based on hearsay from the manager who denied claimant's requests for time off work. Absent a basis for concluding that claimant was not a credible witness, claimant's firsthand testimony regarding the final incident outweighs the employer's hearsay information. Moreover, 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). We therefore found facts in accordance with claimant's testimony regarding the final incident.

The employer's hearsay evidence was that claimant told the manager who denied claimant's requests for time off on June 13 that he was going to leave work early on June 13, without the manager's approval, and left work early. Audio Record at 9:10 to 9:41. The employer then discharged claimant for allegedly violating its attendance policy by leaving work without approval on June 13. Claimant asserted that he did not leave work early, but rather, was discharged the morning of June 13 after informing his manager that he would have to look for other work if scheduling time off to address his son's needs would continue to be a problem. On this record, we cannot find that claimant violated the employer's attendance policy because the preponderance of the evidence shows the manager discharged claimant, prompting claimant to leave work the morning of June 13, and not that claimant left work early without

permission. Moreover, the employer's witness did not assert and the record does not otherwise show that claimant spoke to his manager in an angry, insubordinate or otherwise unprofessional manner during the final incident when he stated that he might need to look for other work. Claimant's statement was reasonable under the circumstances. To the extent that the employer discharged claimant for his conduct during that verbal exchange, the employer did not show claimant engaged in conduct he knew or should have known would probably violate the employer's expectations.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 17-UI-92359 is affirmed.

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

**DATE of Service: October 31, 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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