

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0140**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81513). Claimant filed a timely request for hearing. On January 25, 2018, ALJ Vaughn conducted a hearing, and on January 26, 2018, issued Hearing Decision 18-UI-101793, concluding the employer discharged claimant, but not for misconduct. On February 12, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Pathway Enterprises, Inc. employed claimant as a direct support professional from May 15, 2014 to November 2, 2017.

(2) The employer expected its employees to report for work as scheduled or notify the employer at least two hours in advance if the employee would be late or absent. Employees recorded their work hours by hand on time cards, and often filled them out in advance based on their scheduled hours; if they did, they were expected to later correct their time cards if they did not work all scheduled hours. Claimant was aware of the employer's expectations.

(3) In 2016, claimant applied for protected intermittent leave under the Family and Medical Leave Act (FMLA) to provide care for her husband, who had ongoing medical issues. The employer approved claimant's request for said leave, at a frequency of two to four times per week. At the employer's request, claimant renewed her application for that leave in 2017, and on October 20, 2017, the employer again approved claimant's application. To exercise intermittent leave on a day she was at work, the employer expected claimant to notify her supervisor if possible, or to otherwise inform coworkers and insure that the employer had sufficient coverage for her work duties before leaving work. Claimant was aware of those employer expectations.

(4) In 2017, the employer gave claimant a written warning for arriving late to work on August 17, 2017 without giving the employer prior notice and a final written warning for arriving to work late on October 19, 2017 without giving the employer two hours prior notice that she would be late.

(5) On October 27, 2017, claimant was scheduled to work until 3:00 p.m. At approximately 2:30 p.m., she received a call from her husband that he was having medical difficulties and might need to be transported to the emergency room. Claimant notified at least one coworker that she was leaving work early and why and left work at approximately 2:45 p.m. Claimant had recorded her work hours for the week the previous day, recording a departure time of 3:00 p.m., and did not correct her work hours for October 27 prior to leaving because she was preoccupied with getting home to assist her husband, and later because she “forgot.” Audio Record ~ 30:45 to 33:30; 11:25 to 11:45; 15:00 to 15:45.

(6) On November 2, 2017, the employer discharged claimant for leaving work early on October 27, 2017 and not accurately reporting her work hours for that day.

**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 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for leaving work early on October 27, 2017 and not accurately reporting her work hours for that day. The employer presented hearsay evidence that claimant left work at 2:00 p.m. without telling coworkers that she was leaving work early and why, but claimant testified that she left work at approximately 2:45 p.m. that day and informed a named coworker that she was leaving when she did and the reason she was leaving, after insuring that there was adequate coverage for her work duties. Audio Record ~ 34:00 to 35:45. Both employer witnesses also testified that claimant asserted that she “forgot” to modify her time card for the day in question although her supervisor also testified that claimant had also responded that she could not remember why she had left early that day. Audio Record ~ 11:25 to 11:45; 15:00 to 15:45. Absent a sufficient basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath at least as much weight as the employer's hearsay and other evidence. In a discharge case, when the evidence on disputed issues is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer has the burden of proof. Accordingly, we find that the employer failed to establish by a preponderance of evidence that claimant consciously violated the employer's expectations regarding leaving work early on October 27, 2017 and accurately reporting her work time for that day on her time card.

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 her work separation.

**DECISION:** Hearing Decision 18-UI-101793 is affirmed.

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

**DATE of Service:** March 16, 2018

**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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