

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0507**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105557). Claimant filed a timely request for hearing. On May 7, 2018, ALJ Scott conducted a hearing, and on May 10, 2018 issued Order No. 18-UI-109103, concluding the employer discharged claimant, but not for misconduct. On May 16, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Cinnabon employed claimant as a training mentor at a store location in Corvallis, Oregon from April 23, 2016 to September 20, 2017.

(2) The employer had a written attendance policy that set forth its expectation that employees report for work as scheduled. Under the policy, the first two attendance violations resulted in informal counseling, a third violation resulted in a more formal counseling, a fourth violation resulted in a final written warning, and a fifth violation resulted in discharge. Under the policy, tardiness of five minutes or less was not considered an attendance violation. The employer's attendance policy was reviewed with employees during their orientation and a copy of the policy was included in the employee handbook that was issued to employees at hire. Claimant was aware of and understood the employer's expectation and policy regarding attendance.

(3) Prior to August 4, 2017, claimant was late for work several times and had received both informal and formal counseling regarding her tardiness on at least three occasions. On August 4, 2017, claimant was 20 minutes late for work and was issued a final written warning for her attendance violation. At that time, claimant was suffering from insomnia she attributed to anxiety caused by a difficult personal relationship.

(4) On September 17, 2017, claimant attended a late Oregon State University event at which she met with her supervisor and received employer coupons for her team. On September 18, 2017, claimant was scheduled to report for work at 7:00 a.m. Although claimant set her alarm for 6:00 a.m., at 4:00 a.m. she was still awake and decided to get up, so she turned off her alarm. However, claimant fell asleep and

did not wake up until 11:40 a.m. Upon doing so, claimant realized she was several hours late for work and immediately called the employer. A manager at the store told her that he had already covered her shift and that she need not report for work that day.

(5) On September 20, 2017, the employer discharged claimant from her employment because she failed to report for work as scheduled on September 18, 2017.

(6) After her discharge, claimant sought and received medical attention for her sleep disorder.

**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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would violate the employer's expectation. Here, the employer failed to satisfy that evidentiary burden.

Although the employer discharged claimant for "her pattern of poor attendance" under its policy, the immediate or "but-for" cause of the discharge was claimant's tardiness on September 18, 2017, which apparently was her fifth violation. Audio Record ~18:30 to 19:00. Accordingly, the proper focus of the misconduct analysis is her tardiness that day.

Barring illness or other exigent circumstances, the employer had the right to expect claimant to report to work as scheduled. Claimant violated that expectation on September 18, 2017 when she failed to report for work at the start of her scheduled shift. However, claimant had taken the reasonable step of setting an alarm to ensure she would awake in time for her to arrive for work as scheduled, but due to some combination of her insomnia and exhaustion, claimant fell back to sleep after she had decided to get out of bed at 4:00 a.m. By setting an alarm and then calling the employer immediately upon waking at 11:40 a.m. after realizing she was late for work, claimant demonstrated that she was not indifferent to the employer's expectation or interests. Accordingly, claimant's failure to report for work on time on September 18 was not a willful or wantonly negligent violation of the employer's expectation that she report for work as scheduled as she was not conscious of her conduct during the time she overslept.

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:** Order No. 18-UI-109103 is affirmed.

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

**DATE of Service: June 15, 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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