

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0807**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90222). Claimant filed a timely request for hearing. On July 26, 2018, ALJ Snyder conducted a hearing, and on August 3, 2018 issued Order No. 18-UI-114408, concluding that claimant's discharge was not for misconduct. On August 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS FACT:** (1) Wholesale Furniture Outlet employed claimant from April 30, 2018 until June 5, 2018.

(2) The employer expected claimant to report for work as scheduled and to notify his team leader before his shift began if he was going to be absent. If the team leader could not be reached, the employer expected claimant to a team member of his absence. Exhibit 1 at 3. The employer's policy required speaking in live time with the team leader or team member, as appropriate, and stated that it was not acceptable notification to leave a message or send a text about an absence. *Id.* The employer's policy provided that a failure to call in and to report for work for two consecutive days would result in discharge. *Id.*

(3) On May 31, 2018, sometime before claimant's shift started, claimant's wife slipped in the shower and hit her head. Shortly after, claimant transported his wife to the hospital. After reaching the hospital, claimant was unable to call anyone in the employer's management because he did not have access to those phone numbers. As a result, claimant sent a text message to the lead delivery driver under whom he worked and whose number he knew. The text that claimant sent stated, "SOS. In hospital. Call for any details." Audio at ~10:22; Exhibit 1 at 1. The lead driver informed the supervisor of claimant's text message. Neither they nor any other employer representative contacted claimant in response to the text.

(4) June 3, 2018 was claimant's next scheduled work day. Claimant was not able to report for work on that day because he needed to tend to his wife and take her to an appointment with her doctor. Claimant and his wife were at the doctor's office for four hours. At some point that day, claimant called the

employer, and a coworker who was claimant's peer answered the phone. Claimant asked the coworker to let his supervisor know that he was not able to be at work because of his wife's condition, that he probably would not attend work on June 4 and that he needed to take a few days off. Exhibit 1 at 1. The coworker told claimant, "No problem, bro." Audio at ~26:30.

(5) On June 4, 2018, claimant did not report for work because he needed to stay home to look after his wife. Claimant did not call the employer to report that he was going to be absent that day because he thought his May 31 text and his June 3 conversation with the coworker were adequate to notify his team leader that he was not going to report for work.

(6) On June 5, 2018, claimant again did not report for work due to looking after his wife. Claimant did not call the employer to report his absence from work that day for the same reasons he had not done so on June 4.

(7) On June 5, 2018, the employer notified claimant that he was discharged for not calling to report his absences on June 3, 4 and 5 to a supervisor.

**CONCLUSIONS AND REASONS:** 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) (January 11, 2018) 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 employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant due to his ostensible failure to call in the report his absences to management on June 3, 4 and 5, 2018, which it concluded caused him to be a no call/no show for at least two consecutive days in violation of its attendance policy. Audio at ~8:11; Exhibit 1 at 1. However, for purposes of determining whether claimant is disqualified from benefits, the issue is whether the manner in which claimant notified the employer of his absence on June 3 and his failure to notify to contact the employer about his absences on June 4 and 5 was a wantonly negligent, as opposed to a merely negligent, violation of the employer's standards.

With respect to claimant's absence on June 3, the employer's attendance policy does not require management notification when an employee is not able to reach a member of management. Exhibit 1 at 3. In that instance, it is sufficient for the absent employee to have notified a "team member." *Id.* The record shows that on June 3 claimant was not able to reach a member of management to notify management of his absence that day, or that the coworker with whom claimant spoke to report that absence was not a "team member." Exhibit 1 at 3. On the facts in this record, it does not appear that the

employer established that claimant's manner of reporting his absence on June 3 was a willful or wantonly negligent violation of the employer's standards.

With respect to claimant's failure to call in to report his absences on June 4 and 5, the employer agreed that claimant notified the lead delivery driver by text message on May 31 that he could not report for work as a result of his wife's condition and his need to take her to the hospital, and that he had invited the lead or the employer to contact him if an additional explanation about his absence was required. Audio at ~10:22; Exhibit 1 at 1. The employer also did not challenge claimant's contention that he spoke to and notified a coworker on his next scheduled work day of June 3 that he was still absent due to his wife's condition and his need to attend to her, that he needed to take a few more days off from work and that he likely would not be in on June 4. Exhibit 1 at 1. While claimant did not notify a member of management on either June 4 or June 5 that he was going to be absent, it is reasonably inferable that claimant was distracted from doing so by his wife's condition and the disruption that accompanied her medical treatment. Under these circumstances, claimant's failure to contact a member of management did not exhibit indifference to the employer's standards given the substance of the May 31 text message to the lead driver, and the June 3 conversation with a coworker, in which he expressly asked the coworker to inform his supervisor of the reasons underlying his absences. On this record, the employer did not demonstrate that claimant willfully or with wanton negligence failed to report his absences on June 4 or 5 to his supervisor or another member of management.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-114408 is affirmed.

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

**DATE of Service:** September 18, 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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