

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0799

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On January 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104713). Claimant filed a timely request for hearing. On March 19, 2014, ALJ S. Lee conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-15947, concluding claimant's discharge was not for misconduct. On May 8, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Northwest Alloys, Inc. employed claimant as a machine operator from August 19, 2013 through October 31, 2013.

The employer expected claimant to report to work as scheduled, or notify the employer in advance if he was unable to work. Claimant understood the employer's expectations.

On October 16, 2013 and October 17, 2013, claimant had the flu and was unable to work. He sent text messages to the employer's owner at approximately 6:30 a.m. The owner did not receive the text messages. He called the owner between 8:00 a.m. and 8:30 a.m. each day. The owner did not recall receiving the calls.

(2) On October 31, 2013, the employer discharged claimant for missing two days of work without notifying the owner he was going to be absent.

**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. 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.

To the extent the employer discharged claimant for being absent from work, claimant was absent because he had the flu. Absences due to illnesses are not misconduct. OAR 471-030-0038(3)(b).

The employer also discharged claimant for failing to notify the employer he would be absent from work. In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means, in this case, that the employer has to show, more likely than not, that claimant failed to report his absences on October 16 and October 17, 2013. In this case, claimant testified that he sent text messages to and called the owner to report his absences on the days at issue, and the owner testified that he received no messages and did not recall speaking with claimant either day. The evidence is, therefore, equally balanced. Absent a reason to disbelieve either witness, we conclude that the employer failed to meet its burden to prove misconduct.<sup>1</sup>

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance because of his work separation.

**DECISION:** Hearing Decision 14-UI-15947 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** June 17, 2014

**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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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<sup>1</sup> The employer submitted a page of what appears to be phone records after the hearing ended, showing no activity on the days at issue. However, the ALJ excluded that document from evidence. Hearing Decision 14-UI-15947 at 1. Even if the document was in evidence, however, the outcome of this decision would remain the same because the record fails to show what phone number claimant called on the days in question, whether it was the phone number associated with the document, what number claimant called from, or whether the phone records shown on the document are complete.