

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0916

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 131326). Claimant filed a timely request for hearing. On May 19, 2014, ALJ Micheletti conducted a hearing, and on May 21, 2014, issued Hearing Decision 14-UI-18050, concluding claimant was discharged, but not for misconduct. On May 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) New Horizons Adult Care employed claimant as a staffing coordinator from June 25, 2010 to March 20, 2014.

(2) The employer expected its employees to report for work as scheduled or notify the employer they would be absent. The employer also expected employees to submit required documentation for a leave of absence in a timely manner. Claimant was aware of the employer's expectations.

(3) On December 7, 2013, claimant began a continuous medical/parental leave of absence from work due to the premature birth of her child. The leave was granted pursuant to the Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA) and was set to expire on March 2, 2014. The required forms for the leave were completed and processed primarily through the efforts of the employer rather than claimant.

(4) On March 3, 2014, claimant asked the employer for an extension of her leave due to her own health problems, her baby's health problems and the behavioral problems of a son which prevented her from returning to work as scheduled. The employer tentatively excused claimant's absences from work, sent claimant required FMLA extension forms and notified her that the forms, which needed to be completed by a physician, were due back to the employer by March 19, 2014.

(5) At various times between March 4 and March 19, 2014, including the period between March 17-19, claimant communicated or attempted to communicate with the employer's human resources manager regarding her mastitis, a breast infection for which she received treatment on March 16, and the continuing health problems of both her newborn baby and son which prevented her from returning to work. She also communicated or attempted to communicate about her confusion regarding how the leave extension forms should be completed, particularly which medical practitioner was the appropriate one to complete them.

(6) On March 20, 2014, after claimant failed to submit her completed FMLA extension forms by the March 19 deadline, the employer sent claimant a letter notifying her that her employment had ended as it "assume[d]" she had "abandoned" her position because she had been absent without authorization since March 3, 2014, that her final pay statement would be sent to her and that she was required to return any employer property in her possession. Exhibit 1.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The parties disputed the nature of the work separation with the employer asserting that claimant quit when she "abandoned" her position by being absent from work without authorized leave after March 3, 2014 and without communication between March 17 and 20, 2014. Exhibit 1. However, claimant asserted that she "made several phone calls" to the employer between March 17 and 21, 2014 regarding her circumstances and that the employer's head of human resources previously told her she would get back to her regarding which doctor needed to complete the forms and that she failed to do so despite "several messages" from claimant. Audio Record ~ 19:35 to 19:55; 15:00 to 15:45. The employer disputed that claimant communicated with the employer at all between March 17 and 21, 2014 but provided only hearsay evidence in support of its assertion. Exhibit 1. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath as much weight as the employer's hearsay evidence, and accordingly, because the employer failed to meet its burden of proof on this issue, we found facts in accordance with claimant's testimony. Because claimant was willing to continue to work for the employer beyond March 20, 2014 but was not allowed to do so by the employer, the work separation is a discharge.

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) 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. Absence due to illness is not misconduct. OAR 471-030-0038(3)(b).

The employer asserted claimant “abandoned” her position and accordingly did not assert a specific reason for her discharge. It appears that the employer was dissatisfied with claimant’s absence from work since March 3, her failure to complete the leave extension forms and her communication with the employer with regard thereto. Claimant testified that she was “super sick” with mastitis, fever, vomiting and severe pain during that time and had made several phone calls to the head of human resources about her circumstances, those of her children and her confusion over how to complete the forms. Audio Record ~ 16:20 to 19:00. Under OAR 471-030-0038(3)(b), absence due to illness is not misconduct. Claimant’s attempts to communicate with the employer demonstrated that she was not indifferent to the employer’s interest and her apparent confusion regarding the forms demonstrated that her failure to timely return them to the employer was neither willful nor wantonly negligent. Regardless of the employer’s exact motivation for claimant’s discharge, the employer failed to establish that it discharged claimant for willfully or with wanton negligence violating a reasonable employer expectation. Consequently, claimant was discharged, but not for misconduct under ORS 657.176(2)(a), and is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 14-UI-18050 is affirmed.

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

**DATE of Service:** July 7, 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](http://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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