

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1193

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 115300). The employer filed a timely request for hearing. On July 2, 2014, ALJ Wyatt conducted a hearing, and on July 10, 2014, issued Hearing Decision 14-UI-21202, affirming the Department's decision. On July 14, 2014, the employer filed an application for review of Hearing Decision 14-UI-21202 with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Strategic Marketing, Inc. employed claimant as a senior marketing strategist from January 10, 2012 to May 19, 2014.

(2) The employer expected claimant to report for work as scheduled or notify it if he would be absent. Claimant was aware of the employer's expectations.

(3) On or around May 6, 2014, claimant's father suffered a heart attack that he was not expected to survive. Claimant was short of funds and his coworkers contributed to an "office pool" to pay for claimant's air fare to visit his father in Idaho. Transcript at 6. Claimant left for Idaho on May 6 and the employer expected claimant to return to work on May 12, 2014.

(4) In Idaho, claimant contracted pneumonia for which he received medical treatment and due to which he was unable to return to work as scheduled. On May 13, 2014, claimant contacted his supervisor, informed him of his illness and that he had remained in Idaho because of it. The supervisor told

claimant “all I ask...I need you to keep in contact with me or let us know. It's not an everyday thing.” Transcript at 40.

(5) Sometime between May 13 and May 16, the supervisor unsuccessfully attempted to reach claimant by phone and requested a return call. Claimant did not call, but on Friday, May 16, informed the supervisor by text message that he had just returned to Portland, remained seriously ill because his medication was causing complications and he was going to see a doctor, which he did that day at Oregon Health Sciences University (OHSU). Transcript at 40. Claimant was “violently ill [and] bedridden.” Transcript at 40. On Monday May 19, claimant did not report for work or notify the employer he would be absent. Claimant “assumed” he would be able to return to work after his condition improved because his doctor did not want him in a close environment with coworkers and told him he would submit a medical excuse for his absence. Transcript at 33. Claimant’s doctor sent the employer a note, which the employer received on May 20, 2014, that excused claimant from work “through 5/19/14” due to an “acute illness”. Transcript at 40. However, because claimant did not report for work or notify the employer he would be absent on May 19, the employer concluded claimant had abandoned his job, cancelled his health insurance and prepared claimant’s final check.

(6) Claimant did not report for work on May 20 because he remained ill and was not released by his doctor to return to work until May 28, 2014. On May 20, 2014, claimant contacted his supervisor who informed him the employer had concluded claimant quit.

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

The employer asserted at hearing and in written argument that claimant’s employment ended on May 19, 2014 and that he was not terminated, but voluntarily quit. Transcript at 5; Written argument at 1. 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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). There was no dispute that claimant contacted his supervisor on both May 16 and 20 and apprised him of his health status, but that by May 20 the employer had already initiated a work separation, cancelled claimant’s health insurance sent claimant his final check. Because on this record, claimant was willing to continue to work for the employer but was not allowed to do so, under the above cited rules, the work separation was 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. 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. Absence due to illness is not misconduct. OAR 471-030-0038(3)(b).

Viewing the record as a whole, the employer discharged claimant on May 19 because he failed to report for work or contact the employer that day. However, claimant was absent due to verified illness, which is not misconduct, and claimant “assumed” his doctor would send a note to the employer that would excuse his absence, which did in fact occur. Although claimant may have violated the employer’s expectation by failing to clearly apprise it of his health status on May 19 or notify it that his physician was sending the employer a medical excuse for his absence, on this record the employer failed to establish that claimant’s violation of its expectation was either willful or wantonly negligent. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 14-UI-21202 is affirmed.

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

**DATE of Service:** August 13, 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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