

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1246

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83115). Claimant filed a timely request for hearing. On July 8, 2014, ALJ Shoemake conducted a hearing, and on July 14, 2014, issued Hearing Decision 14-UI-21486, concluding the employer discharged claimant, but not for misconduct. On July 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Lane Community College employed claimant as a food service specialist from April 9, 2007 to May 6, 2014.

(2) The employer expected claimant to report for work as scheduled or notify the employer at least two hours in advance that she would be absent. The employer also expected claimant to complete her electronic time sheet accurately, in a timely manner, and in accordance with the instructions she was given. Finally, the employer expected claimant to be honest regarding work-related matters. Claimant was aware of the employer's expectations.

(3) On July 8, 2013, the employer gave claimant a written reprimand for "Inadequate Attendance and Disruptions to Operations" during the spring term for missing work in an amount greater than her accrued leaves, for failing to follow the employer's absence reporting protocol on a number of occasions and for failing to complete her electronic time sheet by published deadlines during several payroll periods. Exhibit 1. On September 24, 2013, the employer gave claimant a second written reprimand, in part, for failing to follow the employer's attendance reporting protocol on one occasion after July 8 and for missing six days of work due to illness after July 8.

(4) From March 17 through 21, 2014, claimant was absent from work due to illness. Each day, she notified the employer at least two hours in advance of her shift that she would be absent because she was ill. On March 18, 2014, claimant's supervisor notified claimant by email that, as of March 15, 2014, her remaining leave balances totaled 22.06 hours. He added,

“You have already called in for the first two days of this payroll cycle. That brings your total available balance to 6.06. This puts you very close being in AWOP [Absence Without Paid Leave] status. That would be in violation of directive 2 of your written reprimand which states:

‘You are directed to avoid the use of unexplained and unapproved AWOP status. Your absences from scheduled work should not exceed the amount of your accrued paid leave except for medical or other extraordinary purposes. Under medical leave circumstances, you should apply to your supervisor for approval of such absences and if required, provide documentation to the College’s Human Resources Department that supports your need for the leave.’

Please let me know if you need any further information or help to remedy this situation.”

Exhibit 1.

(5) On March 19, 2014,<sup>1</sup> claimant called her supervisor and explained that she was still sick. Claimant said she had a doctor’s note that instructed her not to return to work until her symptoms were gone and asked her supervisor what she was to do. The supervisor inquired about claimant’s doctor’s note but otherwise gave her no suggestions. Claimant remained off work through March 21.

(6) When claimant completed her electronic time sheet at the end of the March 16-31 pay period, she did not claim 11.58 hours of AWOP. The employer subsequently concluded that she should have claimed the AWOP hours and modified her time sheet accordingly. Transcript at 6.

(7) On April 4, 2014, the employer gave claimant a “Notice of Termination Recommendation” based on her “continued failure to follow simple reporting-in protocols” during the week of March 17-21, 2014, her failure to enter 11.58 hours of AWOP for that week on her timesheet and her use of “unexplained” AWOP for that week. Exhibit 1. The employer suspended her without pay, gave her a check for “final compensation” and directed her to turn in her employer property pending a termination appeal hearing with the employer’s president. Exhibit 1.

(8) On April 9, 2014, claimant met with the employer’s president regarding the termination recommendation. During the course of their meeting, claimant was asked if she had ever used sick time when she had not been sick. Claimant responded that she had not. After the meeting, claimant recalled that months earlier, her supervisor had authorized her to use sick time for a few hours she had been away from work. She sent the president an email reporting that fact and her supervisor’s authorization. The president concluded claimant had intentionally lied about the issue in their meeting.

(9) On May 6, 2014, the employer discharged claimant for her absence from March 17-21, 2014; for failing to follow the employer’s call in protocol during that week; for failing to accurately complete her timesheet for the March 16-31 pay period; and for being untruthful to the president on April 9, 2014.

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<sup>1</sup> Claimant initially testified that the conversation took place when she was still sick on Wednesday, March 26. Transcript at 25-26. However, claimant also asserted she was absent for one week and did not dispute the employer’s testimony that the week in question was March 17-21. *Id.* Consequently, we inferred the conversation with the supervisor occurred on March 19, 2014.

**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 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant's first-hand testimony about the facts that led to her discharge differed from the testimony of the employer's human resources representative, which was based largely on hearsay. In the absence of evidence demonstrating that claimant was not a credible witness, her first hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer -- has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

The employer discharged claimant for her absence during the week of March 17-21, 2014, for her conduct regarding that absence, and because of a statement she made when she met with the president on April 9, 2014. Consequently, these actions of claimant triggered the employer's decision to discharge her, were its proximate cause and are the proper focus of the misconduct analysis.

The employer discharged claimant, in part, for her absence from March 17-21, 2014. However, it was undisputed that claimant was absent due to illness and absence due to illness is not misconduct under ORS 657.176(2)(a). OAR 471-030-0038(3)(b).

The employer also discharged claimant for allegedly failing to follow the employer's call-in protocol on March 20, 2014. Transcript at 35-36. However, claimant asserted she called in to report her absence each day that week at 5:00 a.m. for her 7:30 a.m. shift and the employer's witness later confirmed that claimant called in sick the entire week and supported the absence with a doctor's note. Transcript at 19. The employer failed to establish by a preponderance of the evidence that claimant violated the employer's call-in protocol on March 20, 2014.

The employer also discharged claimant for inaccurately completing her timesheet for the March 16-31 pay period by failing to include 11.58 hours of AWOP for the week she was absent. However, claimant explained that she was confused about what to do about her absence that week; although she asked her supervisor for help, he ignored her request other than to inquire about a doctor's note and tell her, in his March 18 email, that her leave balances were almost exhausted. Claimant explained, "He never told me about how to fill out AWOP. He never suggested anything. He was just concerned about my doctor's note and that was it." Transcript at 26. Claimant's testimony was undisputed. Under these circumstances, it is likely that claimant did not include AWOP in her time sheet for the week in question because she was confused about what to do, and because she believed that her supervisor would

complete her time sheet in the appropriate manner, as he had done many times before. Claimant's belief that her supervisor would fill out her timesheet for her was also reasonable because she knew, based on his March 18 email, that her supervisor would be carefully examining her timesheet. Exhibit 1. Accordingly, the employer failed to establish by a preponderance of the evidence that claimant consciously, i.e. willfully or with wanton negligence, failed to complete her time sheet in a manner that she knew or should have known would violate the employer's expectation.

Lastly, the employer discharged claimant for "admitt[ing] to inappropriately using sick leave for non-illness related events and misrepresenting those facts during her [April 9] meeting with the College President." Exhibit 1. However, claimant explained that her supervisor gave her express authorization to use the sick leave in question. The employer failed to present any evidence, hearsay or otherwise, refuting claimant's assertion. Moreover, claimant explained that she did not report her conduct at the April 9 meeting because she did not recall it at the time. Claimant's explanation was entirely plausible, given that her subsequent correction regarding the issue was unsolicited. Transcript at 28-29. Here too, the employer failed to establish by a preponderance of the evidence that claimant inappropriately and consciously included sick time on her time sheet for "non-illness related events" and then willfully misrepresented those facts during the April 9 meeting.

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:** Hearing Decision 14-UI-21486 is affirmed.

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

**DATE of Service:** August 29, 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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