

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1364

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 103206). The employer filed a timely request for hearing. On July 28, 2014, ALJ Wipperman conducted a hearing, and on August 5, 2014 issued Hearing Decision 14-UI-22791, affirming the Department's decision. On August 13, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review. However, the employer failed to certify that it provided a copy of its 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 the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB did not consider the employer's written argument when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Lung Clinic employed claimant as a pulmonary function test technician and medical assistant from June 14, 2011 to April 21, 2014.

(2) On October 22, 2012, claimant sustained an injury to her shoulder at work while lifting an obese patient. Claimant had surgery to repair her shoulder. Claimant returned to work, but experienced ongoing difficulty with her shoulder after surgery. Claimant's physician removed her from work. Claimant last performed services for the employer on May 20, 2013.

(3) Claimant underwent an additional surgery and began physical therapy, intending to return to work for the employer when she was physically able to do so. Because of claimant's absence, the employer

had no employee to operate its pulmonary function test equipment, and closed that portion of its business.

(4) On September 24, 2013, the employer mailed claimant a letter, offering to have her return to work as a respiratory therapist. Claimant did not accept the offer due to her medical restrictions, which included lifting no more than five pounds, no overhead reaching, and no pushing or pulling.

(5) The employer expected claimant to return to work, and repeatedly asked her to provide a date on which she would return. Claimant did not return to work because of her shoulder injury. She did not provide a date on which she would return to work because she did not know when she would be physically able to do so. The employer therefore discharged claimant.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she did not return to work for the employer, or provide a date on which she would return to work. However, claimant's absences because of her shoulder injury were due to a physical disability, and therefore not misconduct. Nor was it reasonable for the employer to expect claimant to provide a date on which she would return to work when she did not know when she would be physically able to do so. The employer failed to establish that claimant violated the standards of behavior that of behavior which an employer has the right to expect of an employee, or that her actions amounted to a willful or wantonly negligent disregard of the employer's interest. We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 14-UI-22791 is affirmed.

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

**DATE of Service:** September 16, 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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