

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1699

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 142318). The employer filed a timely request for hearing. On October 1, 2014, ALJ Frank conducted a hearing, and on October 9, 2014, issued Hearing Decision 14-UI-26666, affirming the Department's decision. On October 25, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Consumer Cellular employed claimant as a customer service representative from August 11, 2013 to July 31, 2014.

(2) In June 2014, claimant began suffering episodic unexplained memory lapses at work that led her to believe she might be experiencing seizures. Her primary care provider restricted her from both working and driving pending further testing. Claimant did not return to work after June 24, 2014 and exhausted her Oregon Family Leave Act (OFLA) leave entitlement. Exhibit 1.

(3) After claimant's OFLA leave was exhausted, the employer granted her a personal leave of absence through July 21, 2014, contingent upon her medical provider completing a form to certify that claimant needed accommodation for her condition under the Americans with Disabilities Act (ADA). Exhibit 1. The employer extended claimant's personal leave to July 29 because she was unable to meet with her provider until then. On July 23, 2014, an employer human resources employee notified claimant by email, "Your ADA paperwork will need to [be] handed in to HR no later than 8am on Wed, 7/30/14, so a review can be started."

(4) On July 30 at 9:16 a.m., the HR employee notified claimant by email that claimant had not contacted her by 8:00 a.m. as instructed and that claimant's listed telephone number was not accepting incoming calls. She added the employer was in receipt of the "faxed ADA paperwork from your doctor's office" and requested that claimant call her "by the end of business hours today (5pm)...so we can discuss your situation." Exhibit 1. At 3:43 p.m., claimant, whose phone service had been discontinued during her

unpaid leave, responded by email that she did not have access to a phone until 5:30 p.m. that day and she would try to call the HR employee the next day. She added that she did not know what was included in the ADA paperwork her provider faxed but was “awaiting results and imaging” and asked to be notified regarding “next steps.” Exhibit 1.

(5) On July 31, 2014, the employer terminated claimant’s employment after it concluded the ADA paperwork completed by her medical provider was not sufficiently detailed regarding claimant’s medical diagnosis and prognosis for the employer to extend claimant’s personal leave and excuse her previous and continued absences from work.

**CONCLUSIONS AND REASONS:** We agree with the Department and 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 wantonly negligent disregard of the 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 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).

The employer discharged claimant because it concluded it could not extend her personal leave and excuse her previous absences from work based on the documentation it had received from her provider and claimant’s lack of phone contact with the human resources employee. Claimant was absent from work from June 24 through July 31, 2014. An employer has a right to expect an employee to report for work as scheduled. However, claimant’s absences from work were due to blackouts and possible seizures, the cause of which had not yet been determined by her provider or the neurologist to whom she had been referred. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). Moreover, to the extent the employer discharged claimant due to perceived paperwork or phone contact deficiencies, it failed to establish that claimant was indifferent to the consequences of her provider’s inability to complete the ADA paperwork to the employer’s satisfaction or her inability to contact the human resources by phone by 5:00 p.m. on July 30, 2014. Claimant had no control over her provider’s ADA response, had explained to the employer why she had no phone access and had notified the employer she would attempt to establish phone contact as soon as she was able.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-26666 is affirmed.

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

**DATE of Service: December 15, 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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