

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0273**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 92624). The employer filed a timely request for hearing. On February 23, 2015, ALJ Murdock conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34041, affirming the Department's decision. On March 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but 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). Therefore, we considered the entire record, but did not consider the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Westmont Living, Inc. employed claimant from October 21, 2013 to December 2, 2014 as a caregiver.

(2) The employer expected claimant to report to work on time for scheduled shifts, or to notify her supervisor or director four hours in advance of any absences. Claimant understood she was expected to notify the employer four hours in advance of a scheduled shift if she was going to be absent.

(3) On November 9, 19 and 23, 2014, claimant reported she would be absent to the medication aide on duty for her shifts. The employer did not warn claimant on those occasions that the employer expected her to notify the supervisor or director when she would be absent.

(4) On November 29 and 30, and December 1, 2014, claimant was unable to work because her mother, who was also her childcare provider, was in the hospital, and her secondary childcare provider was unavailable. Four hours before each shift, claimant notified the medication aide scheduled for each shift that she would be absent from work due to lack of childcare.

(5) On December 2, 2014, the employer discharged claimant because she missed three consecutive shifts without informing her supervisor or director that she would miss work.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant, 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 had a right to expect claimant to report for her scheduled shifts or notify the employer that she would be absent. Claimant did not report for work for three consecutive shifts because she did not have childcare due to her childcare providers' illness and unavailability. The issue in this case is whether claimant notified the employer that she would miss work, and if she knew or should have known that her failure to notify the employer's supervisor or director probably violated the employer's expectations. Claimant testified that she notified the medication aide on duty for each shift that she would be absent. The employer testified that claimant knew the employer expected her to notify the employer's supervisor or director because that policy was stated in the employee handbook, and claimant received a copy of the handbook. Audio Record at 10:03 to 10:38. However, claimant had reported absences to a med aide three times before in November 2014, and the employer did not warn claimant she was expected to notify the supervisor or director. Audio Record at 10:39 10:49. The employer failed to show by a preponderance of evidence that claimant knew or should have known she had to notify the supervisor or director, and not a med aide. At worst, the record shows that claimant's conduct was the result of a good faith error in her understanding of the employer's expectations. Good faith errors are not misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-34041 is affirmed.

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

**DATE of Service: April 29, 2015**

**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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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