

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0607**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134934). Claimant filed a timely request for hearing. On April 28, 2015, ALJ Wyatt conducted a hearing, and on May 6, 2015 issued Hearing Decision 15-UI-38007 reversing the Department's decision. On May 26, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Community Vision, Inc. employed claimant as a supportive living companion from May 13, 2013 until November 25, 2015.

(2) The employer expected claimant to report for work as scheduled unless she was ill or had the employer's permission to take time off from work. The employer expected claimant to submit a request for vacation leave at least two weeks before the requested days off, and to have that request approved by her direct supervisor or the director of support programs before she took that time off.

(3) In approximately September or early October 2014, claimant started receiving telephone calls from friends or neighbors of her brother in Ghana, who told her that her brother needed her help. Claimant was originally from Ghana and her brother lived alone in that county. Claimant's brother had a mental disability and his friends or neighbors told claimant that her brother was no longer care for himself. Claimant and her brother were the only living members of their family of origin. Claimant's brother had once had a wife, but she left him years before. Although the brother had a son, the son was not in Ghana and claimant and her brother had lost contact with him. Claimant decided that she needed to travel to Ghana and to stay for a sufficient time to hire a caregiver for her brother and to arrange for him to receive appropriate medical treatment. Based on what claimant had been told by her brother's friends and neighbors, she feared that if she did not go to Ghana, her brother "would die." Audio at ~ 47:22.

(4) On approximately October 19, 2014, claimant submitted a vacation leave request to the employer's director of support programs. In the request, claimant asked to take off from November 17, 2014 through January 16, 2015. The request was submitted four weeks in advance of the first day that claimant requested off. After claimant submitted the request, she understood that her direct supervisor, the house manager, had arranged to cover her shifts on November 14, 15 and 16, 2014 and from November 17, 2014 through January 16, 2015. Claimant's direct supervisor did not tell her that her request for vacation leave had been denied.

(5) A few days before November 10, 2014, claimant purchased and paid for a plane ticket to Ghana since approximately four weeks had passed since she submitted the request for vacation leave and she had not been informed that it was denied. On approximately November 10, 2014, the director of support programs called claimant to discuss her vacation request. The director told claimant that he would have denied her vacation request if he had reviewed it earlier, but he thought that she probably had already made her travel arrangements by this time. Audio at ~27:00, ~28:50, ~33:52, ~38:12. Because claimant had not received a denial of her vacation request, claimant understood the director to mean that he was reluctantly approving the request for vacation time off. Audio at ~38:12.

(6) On November 14, 15 and 16, 2014, claimant did not report for work. On November 17, 2014, claimant travelled to Ghana to make arrangements for the care of her brother and did not report for work on November 21, 22 and 23, 2014. Sometime before November 25, 2014, the employer determined that the director of support programs had denied claimant's written vacation request because it discovered the originally submitted vacation request form in claimant's personnel file on which the director had written that it was denied effective November 1, 2014. Audio at ~ 25:13, ~36:15. Claimant never received a copy of the form on which the director denied her request for vacation leave. Audio at ~43:17, ~51:03.

(7) After claimant did not report for work on November 21, 22 and 23, 2014, the employer did not attempt to contact her to learn why she was not reporting for work or if she was under the impression that her vacation request had been approved. On November 25, 2014, the employer sent claimant a letter notifying her that she was discharged for failing to report for scheduled work on November 21, 22 and 23, 2014.

**CONCLUSIONS AND REASONS:** 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 an employer's interest. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer contended in its written argument that claimant should not have concluded that she had been given permission to take the vacation she requested until she received formal written notice that her request was approved, the employer's witness at hearing did not refer to any basis for such an

expectation or explain why it was not reasonable for claimant to rely on the circumstance that indicated the request had been allowed. Employer's Written Argument at 1. The employer's witness did not dispute at hearing the correctness of claimant's contention that she never received a copy of the denial of the vacation request by the director of support programs, or that claimant had reason to believe that the request had been allowed due to her direct supervisor arranging coverage for her shifts during the two months she had requested off and the statement the director of support programs made to her on November 10, 2014. Audio at ~28:50, ~33:52, ~43:17, ~ 51:03. Under the circumstances, when nearly four weeks had elapsed since claimant submitted the October 19, 2014 vacation request and during those four weeks she was not informed in writing that the request had been denied, it was not unreasonable for her to conclude that, by his statement to her on November 10, 2014, the director of support programs intended to communicate that he was reluctantly and belatedly approving her request in lieu of formally issuing a written approval. Notably, the employer did not rule out that, sometime after writing on the vacation request form on November 1, 2014 that it was denied, the director of support programs reconsidered his decision and on November 10, 2014, orally notified claimant that he was changing it and allowing the vacation request. For those reasons, the employer did not meet its burden to demonstrate that claimant's vacation request for the period of November 17, 2014 through January 16, 2015 was denied, that claimant knew or should have known it had been denied, or that claimant showed a conscious indifference to the employer's standards by taking the time off when she knew that the vacation request had probably been denied. *See* OAR 471-030-0038(1)(c). On this record, the employer did not show, more likely than not, that claimant willfully or with wanton negligence violated the employer's standards when she concluded that her vacation request had been approved and, accordingly, did not report for work on November 21, 22 and 23, 2014.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-38007 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service:** July 15, 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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