

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0842**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 163322). The employer filed a timely request for hearing. On May 11, 2015, the Office of Administrative Hearings (OAH) sent the parties notice of a hearing scheduled May 26, 2015. On May 26, 2015, ALJ Shoemake issued Hearing Decision 15-UI-39046, dismissing the employer's request for hearing for failure to appear. On May 31, 2015, claimant filed a timely request to reopen the hearing. On June 26, 2015, ALJ Seideman conducted a hearing, and on June 29, 2015 issued Hearing Decision 15-UI-40795, granting the employer's request to reopen the hearing, and concluding that the employer discharged claimant, but not for misconduct. On November 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party applied for review of that portion of Hearing Decision 15-UI-40795 granting claimant's request to reopen the hearing, and we therefore limit our review to whether claimant shall be disqualified from the receipt of benefits because of his work separation.

**FINDINGS OF FACT:** (1) JCS Gas N Grub dba Carman Drive Chevron employed claimant from August 27, 2014 to April 2, 2015 as a cashier.

(2) The employer expected claimant to complete his scheduled shifts, absent illness or other exigent circumstances. The employer expected employees to refrain from missing work due to illness if they were not ill.

(3) On March 30, 2015, claimant became ill during his shift and told his supervisor he was sick. The owner gave him permission to leave work halfway through his shift due to illness.

(4) On April 2, 2015, the employer discharged claimant for leaving work early on March 30, 2015 due to illness when he allegedly was not ill.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer's owner testified that the employer discharged claimant for a series of alleged incidents throughout his employment. Audio Record at 24:16 to 26:29, 43:50 to 44:35. However, the employer did not discharge claimant until after the incident that occurred on March 30, 2015, presumably because the employer determined that the prior incidents did not merit discharge. Therefore, the incident which occurred on March 30, 2015 was the proximate cause of the work separation, and the initial focus of the misconduct analysis.<sup>1</sup> Only if the employer meets its burden to show claimant's behavior on March 30, 2015 was willful or wantonly negligent will claimant's prior incidents be at issue in determining whether the employer discharged claimant for misconduct, and not an isolated instance of poor judgment.

The employer discharged claimant because the owner believed claimant left work early on March 30, 2015 to celebrate his birthday, and not because he was ill. Audio Record at 28:24 to 29:06. The employer's owner testified that it believed claimant was untruthful when he reported he was sick on March 30, 2015, because he had arranged his schedule to have March 31 and April 1 off from work to celebrate his birthday, and because claimant allegedly told a coworker he was not sick but said he was sick to get off work early. Audio Record 28:33 to 29:01. A person testifying under oath is presumed to be truthful unless it can be shown otherwise. *See* ORS 44.370. Claimant offered sworn, first-hand testimony that he became sick during his shift and told his supervisor, and the owner told him to go home. Claimant's testimony was consistent and plausible. The statements from the employee to whom claimant allegedly stated he was not sick are hearsay and, absent a reason to disbelieve claimant, are afforded less weight than claimant's sworn statements at hearing. The employer thus failed to meet its burden to show by a preponderance of the evidence that claimant was untruthful about feeling ill, or that his absence from work was due to a reason other than illness. As a result, the preponderance of the evidence shows claimant was truthful and missed work due to illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

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<sup>1</sup> In unemployment insurance benefit cases, the initial determination regarding misconduct is confined to the proximate cause of the discharge, which is usually the final instance of alleged misconduct before the discharge when the record shows the discharge would not likely have occurred but for that final incident. *See Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

Thus, the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-40795 is affirmed.

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

**DATE of Service:** August 24, 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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