

**EMPLOYMENT APPEALS BOARD DECISION**

**2015-EAB-1626**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141056). Claimant filed a timely request for hearing. On December 22, 2014, ALJ S. Lee conducted a hearing, and on December 24, 2014 issued Hearing Decision 14-UI-30954, reversing the Department's decision. On January 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) JC Carpet Cleaning employer claimant as a carpet cleaning technician from September 10, 2013 until September 26, 2014.

(2) The employer expected claimant to notify the employer if he was not able to report for work. Claimant was understood the employer's expectations.

(3) On approximately September 3, 2014, claimant was injured at work and sustained an abdominal hernia. On approximately September 9, 2014, claimant went to a hospital emergency department for treatment. The emergency room physician gave claimant a note that approved his absence from work for three days or until he was able to obtain an appointment with his primary care physician for further evaluation and treatment. On approximately September 12, 2014, claimant saw his primary care physician. At that time, claimant's primary care physician gave him a note approving his absence from work for an additional week to ten days. On September 17, 2014, claimant's primary care physician released him to work, subject to the restriction that he could not lift, push or pull any weight in excess of fifteen pounds.

(4) On approximately September 17, 2014, claimant went to the office of the employer's general manager and delivered to him all of the medical notes approving his absences from work, and the note releasing claimant to work, with restrictions, as of September 17, 2014. At that time, the general manager told claimant that the employer did not have at that time any work available that was within

claimant's medical restrictions. The general manager told claimant that he would do what he could about locating modified work for claimant.

(5) Sometime after September 17, 2014, the general manager consulted with the employer's owner and the owner determined that work in the office could be arranged that met claimant's medical restrictions. On September 23, 2014, the general manager sent a text message to claimant's cell phone informing him that the employer had arranged modified work and expected him to report for this work starting on September 24, 2014. Claimant did not reply to this text message. Claimant did not receive the text message sent to his cell phone because he did not have cell phone service when he was at his home. Claimant had previously informed the employer of this difficulty. At that time, claimant had requested that the employer communicate with him about work-related matters on the landline telephone in his residence if he was likely at home when the employer wanted to reach him. Also at that time, claimant gave the number of the landline telephone in his residence to the employer.

(6) On September 24, 2014, September 25, 2014 and September 26, 2014, claimant not report for work and did not call in or send text messages to report his absences. The general manager did not attempt to contact claimant on the landline telephone in his residence. On September 26, 2014, the general manager sent a text message to claimant, again on his cell phone, asking why he was not reporting for work. Claimant did not receive the second text message. Later in the day on September 26, 2014, the general manager tried to reach claimant on his cell phone to speak directly with him. When he was unable to reach claimant, the general manager could not leave a voicemail message for him. Claimant's voicemail box was full. The general manager again did not attempt to communicate with claimant using claimant's landline telephone.

(7) On September 26, 2014, the employer discharged claimant for failing to report for work on September 24, 25, and 26, 2014 and failing to notify the employer of his absences on those days.

**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 has 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).

At hearing, there was some dispute over whether claimant had given to the employer's general manager the doctor's notes of September 9, 2014 and September 12, 2014 and what those notes did and did not state. However, it is not disputed that the doctor's note of September 17, 2014 released claimant for modified work, and that the employer discharged claimant when he did not report for modified work on and after September 24, 2014. Although the existence and contents of the prior medical notes might have been disputed, that dispute is not relevant to the reason that claimant was discharged.

The employer's general manager contended at hearing that claimant was aware that the employer had scheduled him for work on September 24 through September 26, 2014 because the general manager sent

the September 23, 2014 text message to claimant's cell phone and, when he called claimant's cell phone on September 26, 2014, he testified that he told an unidentified woman who answered it that claimant needed to call him about work. Transcript at 9-10, 13. Claimant challenged the general manager's testimony by stating that he did not receive the September 23, 2014 text message and that his fiancé, the only woman who had access to his cell phone, did not speak with the general manager on September 26, 2014. Transcript at 24, 27. Significantly, the general manager did not dispute claimant's testimony that he often did not have cell phone coverage at his residence and did not dispute that claimant had given his landline phone number for the employer to contact him when he was at home. Transcript at 24, 31. The general manager also did not dispute that, before the employer discharged claimant, neither he nor any other representative of the employer tried to contact claimant on his landline phone to let him know that he had been scheduled for work. Transcript at 32. Although the general manager presented some evidence that claimant might have read the September 26, 2014 text message based on a legend underneath the printed text of the message, the date shown on that legend is not clear and, even if it showed the text was read on September 26, 2014, it does not definitively show that it was read before the employer discharged claimant and it does not show that claimant ever read the September 23, 2014 text message. Exhibit 1 at 8. The evidence on these disputed issues is, at best, of equal weight and there is no reason in the record to believe or disbelieve either party. When the evidence in a discharge case is evenly balanced, the disputed issues must be resolved against the employer, who carried the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). As such, we have resolved our uncertainty on these disputed facts in claimant's favor.

On this record, the employer did not show that claimant was aware, or reasonably should have been aware, that he was scheduled for work on September 24 through September 26, 2014. While claimant knew that his cell phone was unreliable when he was at home, he had taken the reasonable precaution of informing the employer of this problem and had requested that the employer use the landline phone in his residence to communicate with him at times when he reasonably could be expected to be at home. Claimant's behavior did not evince an indifference to the employer's difficulties in communicating with him when he was at home. *See OAR 471-030-0038(1)(c)*. In addition, the general manager testified that he told claimant on September 17, 2014 only that he had no available work for him and did not clearly state that he was going to make any particular efforts to find work for him. Transcript at 31. Based on this testimony, claimant would not have been reasonably aware that the employer was going to try to communicate with him about possible work on September 23 through September 26, 2014, or reasonably aware that he should make special efforts to maintain contact with the employer during those days. The employer's failure to communicate with claimant that he was expected to report to work on September 24, 2014 through September 26, 2014 was not a result of any willful or wantonly negligent behavior on claimant's part. As a result, claimant's failure to report for work on those days, and his failure to call in to report his absences, also was not the result of any willful or wantonly negligent behavior.

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

**DECISION:** Hearing Decision 14-UI-30954 is affirmed.

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

**DATE of Service: February 17, 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 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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