

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0715**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101601). Claimant filed a timely request for hearing. On May 19, 2016, ALJ Shoemake conducted a hearing, and on May 27, 2016 issued Hearing Decision 16-UI-60670, reversing the Department's decision. On June 14, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Because no objections were filed to the ALJ's decision to admit Exhibit 2 into the hearing record, that exhibit remains a part of the record.

The employer submitted a written argument that contained a significant amount of information not offered into evidence during the hearing. The employer did not explain why it was unable to present this information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Sickle Cell Anemia Foundation of Oregon, Inc. employed claimant as a project coordinator from July 14, 2015 until December 3, 2015.

(2) The employer expected claimant to report on time for work and unless she was sick or exigent circumstances prevented her from doing so. The employer also expected that claimant would refrain from insubordinate behavior. Claimant understood the employer's expectations.

(3) At the time she was hired and throughout her employment, claimant was receiving outpatient treatment for breast cancer. Those treatments compromised claimant's immune system and made her more susceptible to infections and viruses. As a result, she frequently became ill. The employer was aware of claimant's condition.

(4) During the approximately four and a half months claimant worked for the employer, she was absent from work, tardy or left work early on approximately twenty-one work days. Many of claimant's absences, tardiness and early departures from work were caused by illness or medical appointments. Exhibit 1 at 4-6.

(5) On November 4, 2015, the employer approved claimant's request to have Friday, November 6, 2015 off from work for personal travel to Seattle, Washington. Exhibit 2 at 35. Claimant did not report for work on November 6<sup>th</sup>. The employer thought claimant was going to attend a church council on that day in Seattle rather than traveling to Seattle to attend one of her son's college football games. Exhibit 1 at 5; Transcript at 18.

(6) On November 23, 2015, claimant called the employer and stated she was going to be absent due to the flu. On November 24, 2015, claimant reported for work but left early due to continuing symptoms from the flu. On November 25, 2015, claimant reported to the employer that she would again be absent due to the flu. Exhibit 1 at 5, 6.

(7) Before November 29, 2015, claimant and the employer's executive director began experiencing what appeared to be an allergic reaction or physical intolerance to some item(s) in or around the director's office. Transcript at 20, 25. With no objection from the executive director, claimant moved two plants that she suspected were causing their difficulties from the executive director's office into an adjacent hallway, just outside from location of claimant's desk. The executive director's symptoms eased but claimant's did not. On November 29, 2015, claimant asked a coworker to move the plants from the hallway into an office away from both claimant and the executive director's desks. When the executive director became aware claimant had asked for the relocation of the plants, she thought claimant was being insubordinate since she had not asked for permission to do so.

(8) On or about November 30, 2015, the executive director tried to reach claimant on the office intercom, but claimant did not respond. Claimant did not answer the intercom because she was on her cell phone discussing modifications to the format of some of the employer's reports with a student intern or a consultant. Shortly after she tried to contact claimant on the intercom, the executive director observed claimant walking away from her desk. The executive director assumed claimant had been at her desk, available to respond when the director tried to reach claimant via the intercom and had purposely ignored her. The executive director concluded claimant had acted insubordinately.

(9) On December 3, 2015, the employer discharged claimant for excessive absences and for insubordinate or disrespectful behavior.

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

The employer did not establish that any of claimant's absences, tardiness or early departures from work were due to claimant's willful or wantonly negligent behavior. The employer did not dispute that many, if not most of these incidents were attributable to claimant's illness or medical treatment. Absences that result from illness are not misconduct. OAR 471-030-0038(3)(b). The employer did not challenge any specific absence of claimant on the ground it was not the result of illness or medical treatment, and did not present any evidence to rebut those conclusions. Absent evidence that claimant's absences were not caused by illness, medical treatment or other exigent circumstances, the employer did not meet its burden to show that claimant willfully or with wanton negligence violated the employer's attendance standards or and that her absences, tardiness or early departures from were the result of misconduct. The employer appeared to contend that claimant misrepresented the reason for her November 6 absence, claiming that she needed that day off to attend a church council and not her son's football games. Exhibit 1 at 5; Transcript at 8-9, 18. Claimant asserted she had requested that day off without specifying the purpose, and did not state she was going to attend a church council. Transcript at 18. Claimant's contention is corroborated by the approval form that the executive director signed on November 4, 2015. Exhibit 1 at 35. In light of claimant's rebuttal, the employer did not demonstrate by a preponderance of the evidence that claimant willfully or with wanton negligence misrepresented the purpose of her absence on November 6, 2015.

With respect to claimant's allegedly insubordinate or disrespectful behavior on November 29 and 30, 2015, the employer also did not prove that claimant violated the employer's standards willfully or wanton negligence. The employer's witness did not persuasively challenge claimant's testimony that on November 29, 2015 she had the executive director's two plants moved from the hallway to another room so that she would not continue to experience allergy-like symptoms from them. If claimant moved the plants for health-related reasons, and absent evidence the executive director had expressly forbidden any moving of the plants, the employer did not show claimant's relocation of the plants was likely undertaken with the willful or wantonly negligent mental state necessary to establish claimant's misconduct. With respect to claimant's failure to answer the intercom on November 30, 2015, the employer also did not establish that it was the result of willful or wantonly negligent behavior. Notably, while the employer's witness generally contended claimant purposefully ignored the intercom communication from the executive director when she readily could have responded, she did not specifically challenge claimant's testimony that she was on her cell phone and occupied in a discussion with a student intern or consultant about proposed changes to the format of some of the employer's reports. Transcript at 16. Absent evidence that claimant was not advancing some interest of the employer by not answering the intercom, or that claimant knew or objectively should have the executive director's intercom communication took precedence over the proposed format changes, the employer did not demonstrate that claimant's failure to answer the intercom was a willful or wantonly negligent violation of the employer's standards.

Although the employer discharged claimant, it did not show that discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-60670 is affirmed.

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

**DATE of Service:** July 26, 2016

**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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