

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0088**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 103546). Claimant filed a timely request for hearing. On January 18, 2017, ALJ Frank conducted a hearing, and on January 20, 2017 issued Hearing Decision 17-UI-75105, concluding the employer discharged claimant, not for misconduct. On January 25, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The City of Pendleton employed claimant from March 24 to May 25, 2016.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer. Claimant understood the employer's expectations.

(3) From May 19 through 25, 2016 claimant was absent from work five consecutive shifts due to an illness he initially believed was influenza, but which worsened and was later determined at a hospital emergency room to be a urinary tract infection. Claimant notified the employer before the start of each shift that he was going to be absent due to illness.

(4) On May 25, 2016, claimant's supervisor sent him a text message stating that claimant was no longer needed, and instructing claimant to pick up his final paycheck. Claimant's supervisor terminated claimant's employment due to claimant's five consecutive absences from May 19 through 25.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, not for misconduct.

The Department concluded that claimant voluntarily left work. However, we agree with the ALJ that the employer discharged claimant. A work separation is a voluntary leaving if the employee could have continued to work for the same employer for an additional period of time. OAR 471-030-0038(2)(a)

(August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). Here, it is undisputed that, as of May 25, 2016, claimant was willing to work for the employer for an additional period of time, but the employer did not allow him to do so. The work separation therefore is a discharge, and not a voluntary leaving.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for five consecutive absences from May 19 through 25, 2016. It is undisputed that claimant complied with the employer's expectation that he notify the employer before the start of each shift that he would be absent. It also is undisputed that claimant's absences were due to an illness he initially believed was influenza, but which worsened and was later determined at a hospital emergency room to be a urinary tract infection. Under OAR 471-030-0038(3)(b), absences due to illness are not misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Hearing Decision 17-UI-75105 is affirmed.

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

**DATE of Service:** February 10, 2017

**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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