

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0192**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 112844). Claimant filed a timely request for hearing. On January 25, 2017, ALJ S. Lee conducted a hearing, and on February 10, 2017, issued Hearing Decision 17-UI-76741, concluding that the employer discharged claimant, but not for misconduct. On February 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Sunrise Medical Consultants employed claimant from November 19, 2007 until November 28, 2016, last as a quality assurance assistant. The employer arranges for and delivers independent medical examinations that are used to evaluate and document an individual's condition when liability is an issue. Claimant's job duties including reviewing reports, assigning voice files to be transcribed, emailing completed reports to physicians for their signatures, preparing quarterly reports for insurance companies, assisting with billing, and some other miscellaneous duties.

(2) Sometime prior to May 2016, claimant began to find that the quantity of work she was expected to complete was excessive. The employer's owner hired an individual who had previously worked for the employer to work part time and assist claimant with her primary duty, which was to provide quality assurance for the employer. Transcript at 26.

(3) In approximately mid-July, doctors in the employer's Washington team complained to the employer's owner about claimant's work; they told the owner that claimant was "hard to approach on the phone in a manner of problem solving." Transcript at 26. Other employees in the employer's home office also complained that claimant was "hard to approach." Transcript at 25. The owner began meeting regularly with claimant, to discuss her attitude toward her job and her workload, which claimant told the owner was heavy. Neither the owner nor claimant's supervisor told claimant that her job was in jeopardy if she did not improve the quality or quantity of her work, however. Transcript at 18.

(4) After July, claimant's ability to complete her assigned tasks continued to be a problem for the employer's owner and her supervisor. In early November, the employer's owner reassigned some of claimant's duties to other employees. Transcript at 17, 26. Claimant asked if she could be permitted to telecommute, believing that this would eliminate her lengthy commute and allow her to work more efficiently. The owner denied claimant's request.

(5) By the end of November, the owner concluded that despite the changes in claimant's work assignment, she was unable to complete her assigned quality assurance work in a timely manner. On November 28, 2016, the employer discharged claimant for her inability to "keep up with" her work. Transcript at 6.

**CONCLUSION AND REASONS:** We agree with the ALJ, and conclude that 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 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because it concluded that she could not timely complete her assigned work. The employer failed to demonstrate, however, that claimant's inability to perform her work to the employer's satisfaction resulted from claimant's deliberate or conscious disregard of the employer's interests. It appears that claimant was very much concerned about the employer's business – she testified that she "wanted the best for my department, for the company," but had difficulty performing her assigned job duties because "sometimes it did get overwhelming..." Transcript at 37. 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). The employer failed to meet its burden to show that claimant's inadequate job performance was the result of anything other than inefficiency or a lack of appropriate job skills, behavior that is not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-76741 is affirmed.

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

**DATE of Service:** March 7, 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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