

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0219**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83959). The employer filed a timely request for hearing. On February 9, 2017, ALJ Turner conducted a hearing, and on February 10, 2017 issued Hearing Decision 17-UI-76672, concluding claimant's discharge was for misconduct. On February 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Scribe X, LLC employed claimant as a medical scribe from March 28, 2016 to October 28, 2016.

(2) The employer scheduled claimant to work from approximately 9:00 a.m. to 5:00 p.m. on Mondays, Tuesdays and Thursdays. The employer had policies requiring that employees text or call the employer by 5:30 a.m. if unable to work, and to provide a doctor's note covering absences of two or more consecutive days. The employer set forth its policies in a manual and provided claimant with limited access to the manual; however, the employer did not enforce the attendance policies.

(3) In September 2016, claimant missed three consecutive days of work due to illness. She notified the employer of each absence by text message, two of which occurred after 5:30 a.m. on the morning of the scheduled shifts. The employer did not tell claimant that she had violated its absence notification policy. After claimant's third absence, the employer's operations manager instructed claimant to provide a doctor's note, and claimant refused. Although the employer initially decided to discharge claimant over the matter, it ultimately did not take any disciplinary action against claimant because of the absences or her failure to provide a doctor's note, and allowed claimant to continue working.

(4) On October 17 and October 18, 2016, the employer scheduled claimant to work. Claimant did not report to work because she was ill. She notified the employer of her illness via emails sent at 7:50 a.m. on October 17 and at 7:45 a.m. on October 18. The employer did not inform claimant it was unacceptable to report her absences by email, and did not tell her she had not provided sufficient notice of her absences by sending the emails after 5:30 a.m. The employer also did not require claimant to provide a doctor's note.

(5) Claimant last worked on October 20, 2016. Thereafter, employer scheduled claimant to work on October 24, October 25 and October 27, 2016. Claimant did not report to work for those shifts because she felt nauseous, vomited, could not walk without vomiting, and could not do more than sit in bed. She notified the employer of her October 24 absence by email at 7:09 a.m., the October 25 absence by email sent at 8:36 a.m., and the October 27 absence by email sent at 3:23 p.m. Claimant had attempted to send an email about her October 27 absence before missing the shift but inadvertently failed to do so.

(6) After receiving claimant's October 27 email, the operations manager contacted claimant and told her to provide a doctor's note "[t]hat day" or she could face disciplinary action. Transcript at 23. Claimant felt too unwell to travel to a doctor's office, did not believe she required medical treatment, and opted not to go to a doctor. Claimant did not understand that she would be discharged unless she saw a doctor on October 27 and obtained a doctor's note for the employer.

(7) By October 27, 2016, claimant had been absent from work ten times, which the employer considered excessive. On October 28, 2016, the employer discharged claimant because of her attendance.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that claimant's discharge was 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). A conscious violation of an unreasonable employer expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

The ALJ concluded that claimant's absences and failures to follow the employer's call-in procedures was not misconduct. Hearing Decision 17-UI-76672 at 3-4. We agree. OAR 471-030-0038(3)(b) provides that absences due to illness are not misconduct; therefore, claimant's absences, although in violation of the employer's attendance policy, were not misconduct. OAR 471-030-0038(3)(b) also provides that good faith errors are not misconduct. Although there is no factual dispute that claimant repeatedly, throughout her entire term of employment, violated the employer's call-in procedures by using emails to notify the employer of her absences and by notifying the employer of her absences well after the employer's 5:30 a.m. deadline, given that the employer never enforced its call-in procedures with respect to claimant it is more likely than not that claimant had no reason to suspect that her practices were wrong or could, if continued, lead to her discharge. It appears she sincerely, if

mistakenly, believed she was providing adequate and acceptable notice of her absences to the employer. Claimant's violations were, therefore, the result of good faith errors on claimant's part.

The ALJ ultimately concluded that claimant's discharge was for misconduct, reasoning that her failure to provide a doctor's note following her final three-day absence was "at a minimum a wantonly negligent violation," and, since it was the second time it happened, amounted to misconduct. Hearing Decision 17-UI-76672 at 4. We disagree. Not only did the employer not enforce its policies with respect to claimant's previous two absences of two or more consecutive shifts, leaving claimant unaware that her failure to provide a note was likely to result in her discharge, OAR 471-030-0038(1)(d)(C) provides that it is not misconduct to refuse to comply with an employer's unreasonable expectation; and while there is no factual dispute that the employer required claimant to obtain a doctor's note, and that claimant refused to do so, we conclude that the employer's expectation she do so was unreasonable.

The employer's requirement was not merely that claimant obtain a doctor's note as a condition of returning to work after her extended illness abated. The employer instructed claimant, on October 27<sup>th</sup> at some point after claimant's 3:23 p.m. email, to go to a doctor on October 27 and get a note for the employer "[t]hat day." As a practical matter, even assuming claimant could get an appointment with her regular physician that allowed claimant, who was so sick she was vomiting or nauseous while not in bed, about 90 minutes to call a doctor, get an appointment, get out of bed and ready to go to the appointment, see a physician, obtain a note, and turn it in to the employer. Assuming the more likely scenario that claimant would not be able to obtain an appointment on such short notice, claimant still would have had to get out of bed, exacerbating her illness, go to a hospital or urgent care center, get triaged, wait for treatment, and suffer the additional costs associated with obtaining emergency or urgent walk-in treatment, when she did not feel that her condition warranted medical treatment, much less emergency treatment, which also assumes that whichever emergency or urgent-care physician she saw would have been willing to provide her with a doctor's note under the circumstances.

We also note that the employer's requirement amounted to an unlawful employment condition. With few exceptions, none of which apply here, Oregon law provides that "[i]t is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate." ORS 659A.306(1). There is nothing in this record suggesting that the employer planned to pay for the cost of the medical examination or certification the employer was requiring claimant to obtain on October 27<sup>th</sup>. It was, therefore, an imposition of an unlawful employment condition. It is not reasonable to expect claimant to comply with an unlawful employment condition. Claimant's conscious decision not to comply with the employer's unreasonable expectation was, therefore, not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-76672 is set aside, as outlined above.<sup>1</sup>

J. S. Cromwell and D. P. Hettle;

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<sup>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.

Susan Rossiter, not participating.

**DATE of Service: March 15, 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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