

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0437**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 80907). Claimant filed a timely request for hearing. On March 29, 2017, ALJ Snyder conducted a hearing, and on April 5, 2017, issued Hearing Decision 17-UI-80368, affirming the administrative decision. On April 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument in reaching this decision.

**FINDINGS OF FACT:** (1) Providence Health and Services employed claimant as a certified nursing assistant II at its Portland Medical Center from March 26, 2001 until January 27, 2017.

(2) The employer granted claimant medical leave from November 16 through 30, 2016. This leave was subsequently extended until December 17, 2016, and claimant understood that the employer expected her to return to work on that date. Transcript at 10.

(3) On November 27, 2016, claimant traveled to Fiji to attend the funeral of a relative. At the time she traveled to Fiji, claimant had a reservation on a return flight to Oregon on December 15, 2016. Transcript at 25.

(4) While in Fiji, claimant became ill. On December 14, 2016, claimant faxed a letter in to a company that served as the employer's third party leave of absence coordinator. The letter stated, in pertinent part:

This is to notify you that I, Mohini Kumar, came to Fiji to attend a funeral of a brother. And I got ill and was seen by a doctor. Please see attached letter from the doctor. I'm still recovering from my sickness and will inform you when I'm ready to travel back home and get back to work..." Transcript at 21.

Attached to claimant's letter was a letter from a physician in Fiji, which described the illness for which the doctor had been treating claimant, and stated that claimant would be able to return to work on January 6, 2017. Transcript at 23.

(5) Claimant's supervisor at Providence Medical Center never received a copy of the letter claimant faxed to the employer's third party leave of absence coordinator. After claimant failed to report for shifts she was scheduled to work on December 17 and December 18, 2016, the supervisor took claimant off the work schedule on December 20, 2016. Transcript at 7.

(6) Although claimant was well enough to travel to Oregon on January 6, 2017, she was unable to obtain a reservation on a flight to return to Oregon until January 16, 2017. She was also unable to contact her employer from Fiji, because her telephone and computer were "not working." Transcript at 24.

(7) On January 17, 2017, after she had arrived in Oregon, claimant spoke to her supervisor and explained to the supervisor that she had become ill in Fiji. The supervisor requested additional medical documentation to justify claimant's absence. Claimant faxed a form to her niece in Fiji. The niece then took the form to the doctor who had treated claimant while she was in Fiji. The doctor filled out the form and also provided a letter in which he stated that claimant had been ill but was able to return to work on January 18, 2017. Transcript at 5.

(8) On January 27, 2017, the employer discharged claimant because it believed she had falsified the date of her return to work on her medical leave documents, and because she failed to report for scheduled shifts on December 17 and 18, 2016 and did not contact the employer to report that she would be absent.

**CONCLUSION AND REASONS:** We disagree 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, and absences due to illness are not misconduct. OAR 471-030-0038(3)(b). 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 discharged claimant because it believed that she falsified the date of her return to work on her medical leave documents, and because she failed to report for shifts she was scheduled to work on December 17, and 18, 2017. We examine each of the reasons for claimant's discharge to determine if the employer met its burden to demonstrate that either or both constituted misconduct.

In regard to claimant's absences on December 17 and 18, 2016, claimant provided un rebutted evidence that she notified the employer's third party leave coordinator that she was ill and unable to work on those dates, and provided a letter from her physician in support of her request. The record shows that claimant had been on medical leave since November 16, 2016, leave which was apparently arranged through the employer's third party leave of absence coordinator. As a result, claimant reasonably believed that she needed to notify the third party coordinator of the need to extend her leave. At most, claimant's failure to notify the employer about her absence was an error made in good faith; good faith errors are not misconduct. To the extent that the employer discharged claimant because she was did not work on December 17 and 18, the employer also did not demonstrate misconduct – absences due to illness are not misconduct.

In regard to claimant's alleged falsification of medical documents concerning her return to work date, claimant's supervisor testified that it appeared that the date on which the doctor had released claimant to return to work had been written in pen, rather than typed. Transcript at 6. The supervisor also testified that claimant admitted to her that she had written in the return to work date on the documents she submitted in support of her request for medical leave. Transcript at 5. Claimant, however, denied that she ever admitted to writing in her return to work date on the documents she submitted. Transcript at 18. She explained that the doctor had written the return to work date in pen because he received and prepared the materials at his home. *Id.* Based on this record, we find that the evidence regarding claimant's alleged falsification of documents is no more than equally balanced. As the party with the burden of persuasion, the employer therefore failed to meet its burden to demonstrate that claimant deliberately falsified documents submitted to the employer in support of her leave request.

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

**DECISION:** Hearing Decision 17-UI-80368 is set aside, as outlined above.

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

**DATE of Service:** May 8, 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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