

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0047**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145318). Claimant filed a timely request for hearing. On January 8, 2018, ALJ Seideman conducted a hearing, and on January 9, 2018, issued Hearing Decision 18-UI-100463, affirming the Department's decision. On January 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant submitted a written argument. However, she failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's argument or any information not received into evidence at the hearing when reaching this decision.

The employer also submitted written argument to EAB. The deadline for parties to file written argument in this case was February 6, 2018. *See* OAR 471-041-0080 (October 29, 2006). The employer's written argument was received on February 12, 2018, and was late. The employer's argument also contained information that was not part of the hearing record, and it failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Paulina Peak Family Healthcare, Inc. employed claimant as a part-time medical assistant from September 21, 2015 to October 31, 2017. Claimant's work hours averaged 18 hours per week.

(2) On May 1, 2017, ownership of the employer was transferred to LU, a nurse practitioner and the employer's primary caregiver. Beginning in April 2017, the employer's office manager was SB.

(3) The employer expected its employees to be respectful to supervisors and professional to patients and coworkers while performing their jobs. Claimant was aware of and understood the employer's expectations.

(4) On August 3, 2017, the employer gave claimant an "initial performance evaluation" covering the period from May 1 through August 1, 2017. Her evaluations in most categories were good to excellent but the employer commented that it would like claimant "to use more professionalism in all circumstances." Exhibit 3 at 14.

(5) In August 2017 claimant notified the employer that she would undergo a surgery on October 24, 2017 and that her recovery period would be one week.

(6) On September 9, 2017, claimant notified the employer that she would not be at work for a scheduled work day during an upcoming holiday because she was traveling to the Midwest to see family and had already purchased airline tickets for the trip. The employer's owner thought claimant's notification was disrespectful because she had not requested the time off and the employer was a small business with few employees. The employer had also been unhappy with claimant's failure to take responsibility for her mistakes and use of foul language with certain patients, for example, when learning a patient had not been taking their medication as instructed.

(7) On September 12, 2017, the employer gave claimant a "second performance warning," specifying that it was important for claimant to be "professional as well as courteous" while working, take responsibility for her mistakes and demonstrate "respect for [her] superiors." Exhibit 3 at 7. The warning specified that claimant would be on probation for 90 days and that if she did not show improvement she could be terminated.

(8) On October 24, 2017, claimant had her scheduled surgery but in her discharge instructions her physician ordered "no work for two weeks." Exhibit 1 at 8. Claimant immediately texted the owner and notified her that her provider told her "two weeks off." Exhibit 1 at 7. The owner became upset because she thought claimant could have given her more notice.

(9) On October 25, 2017, the day after claimant's surgery, SB texted claimant about new clinic hours that were being instituted, on what days the clinic would need her and inquiring about other days she wanted to work. Claimant responded that she would "talk later when I'm not on drugs and feel like I'm being pushed out." After SB responded, "just want to get this figured out," claimant texted, "We'll talk later. I'm sedated and emotional." Exhibit 1 at 9-12.

(10) On October 25, 2017, claimant texted SB about getting her son in for a flu shot. SB agreed and texted, "We can talk then." Exhibit 1 at 13.

(11) On October 31, 2017, claimant brought her son into the clinic for a flu shot. While claimant was waiting for her son's flu shot, SB called claimant into her office to discuss her work hours. Claimant expressed her dissatisfaction with her new hours and commented that she wished she had been consulted

for they were determined. While the discussion was still proceeding, LU called claimant to bring her son in for the flu shot. Claimant left SB's office before the discussion regarding hours was over, which upset SB. While with LU, claimant began discussing her new hours which upset LU because she wanted claimant to resolve the issue with SB. SB asked claimant to return that day to finish the hours discussion. When claimant returned and met with LU and SB, she was handed a termination notice, stating, "We have based our decision of your termination as we feel that it's just not working out with this company and your employment here." When claimant asked why, she was told that it was because she told LU "she was taking a day off." Audio Record ~ 26:00 to 28:00.

(12) The employer discharged claimant for demonstrating a lack of professionalism and respect for her superiors while discussing her work hours after coming to the office on October 31, 2017, while on sick leave, to have a flu shot administered to her son.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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. 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would violate the employer's expectation.

As a preliminary matter, the ALJ found as fact, that the employer discharged claimant because "claimant had caused various problems for the employer, including making decisions on her actions without checking with the employer" which constituted misconduct under ORS 657.176(2)(a). Hearing Decision 18-UI-100463 at 3-4. However, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. At hearing, after SB first stated that they had already decided, prior to that day, that we were going to dismiss her in two weeks, both employer witnesses stated that claimant's conduct on October 31, 2017 regarding her new work hours was "the final straw" that caused her termination that day. Audio Record ~ 12:00 to 14:00; 20:00 to 21:30. Moreover, the employer twice communicated to the Department that it was claimant's October 31 conduct that caused her termination on that day. Exhibit 3 at 2-4 and 8-9. Therefore, it is that conduct that was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to demonstrate professionalism in the office and respect for her superiors as it had discussed those issues with her on August 3 and September 12, 2017. SB asserted to the Department that claimant had violated both expectations on the day in question when she “walked out of my office...as I was explaining the new schedule...” Exhibit 3 at 8-9. However, claimant explained that she left the office at that time because LU had called to her to bring her son to LU for his flu shot and she did not intend to be rude or disrespectful to SB by doing so. Audio Record ~ 26:00 to 28:00. Neither SB nor LU disputed that LU had called to claimant about her son. LU did assert that claimant was disruptive to patients that day when she followed LU around the office attempting to discuss her new hours but the employer’s Form 220 indicated that claimant had been disruptive to “employees” rather than patients, which neither witness confirmed at hearing. Moreover, SB admitted that at the time of their office meeting, “[she] realize[d] that [claimant] wasn’t feeling very well.” Audio Record ~ 11:20 to 12:00. Given her text messages to SB a few days earlier that she was “on drugs” and “sedated” following her surgery, we infer that she probably was taking medication that day as well since she was still on medical leave.

Accordingly, the evidence regarding whether claimant was consciously disrespectful or unprofessional toward SB, LU or anyone else at the employer’s clinic that day was no more than equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. The employer failed to establish that on October 31 claimant was consciously unprofessional or disrespectful to anyone at the employer’s clinic, and without either willful or wanton negligence, i.e. conscious conduct, misconduct has not been shown. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 18-UI-100463 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service: February 15, 2018**

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