

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0172**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 29, 2107, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151235). Claimant filed a timely request for hearing. On January 31, 2018, ALJ Janzen conducted a hearing at which the employer did not appear, and on February 1, 2018 issued Hearing Decision 18-UI-102218, reversing the Department's decision. On February 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

In a letter submitted to EAB, the employer asked for another hearing so it could appear and present evidence on its own behalf, explaining that it failed to appear at the February 1, 2018 hearing because it "misplaced" the notice scheduling that hearing. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Because human error of the sort that caused the employer to miss the hearing, misplacing the notice of it, is considered to be within a party's reasonable control to avoid, the employer's request to have EAB consider its additional evidence must be denied.

**FINDINGS OF FACT:** (1) GK Machine, Inc. employed claimant painting farm equipment from November 27, 2014 until December 12, 2017.

(2) The employer expected employees to report for work as scheduled, and to notify the employer if they were going to be absent. If an employee was absent three or more consecutive days, the employer expected the employee to provide a note from a doctor explaining the absence. Claimant understood the employer's expectations.

(3) Beginning in November 2017, claimant developed a series of kidney stones. The kidney stones were painful and claimant took strong medications to control the pain. The pain and the medications did not

allow claimant to work. Claimant was absent from work due to kidney stones for at least 21 days in November 2017. Claimant called in and notified the employer on each day that he was absent. Claimant obtained and turned in to the employer doctor's notes for his absences between November 13 and 27, 2017.

(4) Sometime after November 27, 2017, claimant informed the employer that he was going to return to work on Monday, December 11, 2017. On Thursday, December 7, 2017, the employer sent claimant an email informing him that he needed to have his doctor complete some paperwork that was attached to the email and that authorized his absences from work from November 28 through December 10, 2017 under the Family Medical Leave Act (FMLA). The employer did not give claimant a deadline for when that paperwork needed to be returned to it. Claimant faxed the FMLA paperwork that the employer had sent to him to his doctor on December 7, 2017.

(5) On December 11, 2017, claimant reported for work and worked his full shift. On that day, claimant asked the employer's human resources representative if the employer had received the FMLA paperwork from his doctor. The representative told claimant the employer had not, but that claimant should not "worry about it" because "we'll get everything taken care of." Audio at ~14:08. Later on that day, claimant called his doctor's office and was told that they had sent the completed FMLA paperwork to the employer on December 8, 2017.

(6) On December 12, 2017, claimant was again absent from work due to kidney stones. That day, the employer notified claimant that he was discharged for failing to provide the completed FMLA paperwork to the employer as the employer had requested.

**CONCLUSIONS AND REASONS:** 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. 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).

On this record, there is insufficient evidence to show that claimant engaged in misconduct. Accepting claimant's testimony that the employer discharged him for failing to provide the completed FMLA paperwork by December 12, 2017, the record does not establish that the employer had not received it as of that date. Claimant's testimony that his doctor's office confirmed for him on December 11, 2017 that it had sent the completed paperwork to the employer on December 8, 2017 undercuts the likelihood that the employer had not received it as of the time it discharged claimant. As well, whether or not the employer had actually received the FMLA paperwork by December 12, 2017, claimant acted reasonably in connection with it. Claimant very promptly provided the FMLA paperwork to his doctor on December 7, 2017, the same day that the employer sent it to him. Once claimant became aware that the human resources representative thought the employer had not received the FMLA paperwork from the doctor by December 11, 2017, claimant took the reasonable step of contacting the doctor's office about the paperwork and was told that the doctor's office had sent it to the employer on December 8, 2017.

While the employer might not yet have received the FMLA paperwork when it discharged claimant, the evidence does not show that its non-receipt was attributable to willful or wantonly negligent behavior on claimant's part. On the facts in this record, the evidence is insufficient to show claimant's behavior with respect to the FMLA paperwork and complying with the employer's expectations in connection with it amounted to a willful or wantonly negligent disregard of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 18-UI-102218 is affirmed.

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

**DATE of Service:** March 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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