

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0755**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105228). Claimant filed a timely request for hearing. On July 11, 2018, ALJ Wyatt conducted a hearing, and on July 13, 2018 issued Order No. 18-UI-113103, reversing the Department's decision. On August 1, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of the argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). For that reason, EAB did not consider the employer's written argument when reaching his decision.

Claimant submitted a written argument which contained information not presented during the hearing. Claimant did not explain why she did not offer this information at the hearing and otherwise failed to show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For that reason, EAB did not consider the new information that claimant sought to present for the first time on review.

**FINDINGS OF FACT:** (1) Safeway Stores Inc. employed claimant as a barista from March 12, 2016 until April 24, 2018.

(2) The employer expected claimant to submit all required paperwork for a requested leave of absence before it would consider approving the leave. The employer also expected claimant to follow its instructions. Claimant understood the employer's expectation as a matter of common sense.

(3) Sometime around February 14, 2018, claimant requested a medical leave starting on February 18, 2018 due to pregnancy. Claimant did not report for work after February 14. On February 16, 2018, the employer sent claimant a letter asking her to submit a completed certification of healthcare provider

form within 15 days to complete the leave request process. A copy of the certification of healthcare provider form was enclosed with the letter. The letter gave claimant contact information for the employer's leave administrator if she had any questions. A packet of materials that the employer provided to claimant gave her two alternate fax numbers to transmit the completed certification of healthcare provider form to the employer.

(4) Sometime around February 16, 2018, claimant received a statement of disability claim form from her union that would allow her to claim certain union benefits while on leave. The disability form had a section titled "physician's statement of disability" which also was to be completed by claimant's healthcare provider. Exhibit 2 at 12. Sometime before or around February 22, 2018, claimant gave the physician's statement of disability form to her physician's office for completion.

(5) On around February 23, 2018, claimant sent the certification of healthcare provider in support of her medical leave to her physician's office. Claimant expected the physician's office to fax the certification directly to the employer. On March 1, 2018, claimant contacted the employer about her leave and learned that the employer had not received the certification of healthcare provider form from her physician. Shortly after, claimant contacted her physician's office and learned that the office had been unable to fax the certification to the employer because neither fax number provided by the employer to submit the certification had worked. Claimant then contacted the employer, learned the correct fax number to transmit the certification to the employer and provided the correct number to the physician's office. Claimant expected that the physician's office to transmit the completed certification form directly to the employer.

(6) On March 18, 2018, the employer sent claimant a letter stating that her leave request could not be evaluated because the employer had not received a completed certification of healthcare provider or other medical documentation. The letter gave claimant contact information for the employer's leave administrator if she had any questions. Around this time, claimant began calling the employer's human resources department and the employer's corporate office for information about her leave, but was not able to reach a live person and left voicemail messages. None of claimant's messages were answered.

(7) Around or before April 4, 2018, claimant's physician's office emailed to her the statement of disability claim form on which the physician had completed and signed the physician's statement of disability section. The physician's office did not provide to claimant the completed certification of healthcare provider required for her leave. Claimant was in contact with the physician's office and was told that since the information needed from the physician was the same on both forms, the physician's statement of disability section on the statement of disability claim form would satisfy the requirement of a certification of healthcare provider for claimant's leave.

(8) On April 4, 2018, claimant visited the store and met with the store director. During that visit, the store manager thought "there was some confusion" on claimant's part about what paperwork was needed "on the leave of absence form" and mentioned to claimant that she could contact the human resources department for more information. Audio at ~20:20. However, the store director completed and signed the statement of disability claim form in a section where an employer certification was necessary. After signing it, the store director then faxed the fully completed disability claim form somewhere. Claimant thought it was being faxed to the employer and would be used to satisfy the certification of healthcare provider form required for her leave. After faxing the disability claim form, the store manager told

claimant that “everything was completed and done,” which claimant interpreted to mean that all of the paperwork necessary for the leave had been transmitted to the employer. Audio at ~ 31:00.

(9) By separate letters dated April 9 and 10, 2018, the employer notified claimant that it had not received the certification of healthcare provider that it needed to authorize her leave. The letters stated that claimant needed to contact the leave administrator and a particular human resources representative, respectively within 10 days to discuss the requested leave and the status of her employment since she was on an unapproved leave of absence. Exhibit 2 at 5, 12. The April 10, 2018 letter stated that if claimant did not contact the employer in that time, the employer might consider her to have resigned her position. Exhibit 2 at 5. Both letters contained contact information for the employer’s leave administrator and human resources representative. In response, claimant attempted to contact employer representatives by phone, but was unsuccessful in reaching them directly. On April 13, 2018, not having been able to reach an employer representative, claimant called her union. Claimant explained her situation as she understood it and a union representative reassured her that “[her] job was not being threatened.” Audio at ~43:00.

(10) After approximately April 10, 2018, claimant was in contact with her supervisor every day. In response to claimant’s concerns about her job and the leave, the supervisor told claimant that “everything would be fine.” Audio at ~43:54. By letter dated April 20, 2018, an employer human resources representative informed claimant that it was “vital” that she contact the representative in three days or the employer would consider her to have resigned her position. Exhibit 2 at 3. Claimant did not try to contact the human resources representative in response to the April 20 letter because she had previously never been able to successfully reach the representative, the union had reassured her that she would not lose her job, her supervisor had told her everything would be fine and she believed that the physician’s statement of disability form had been faxed to the employer and, based on what she had been told by her physician’s office, that it would be considered an acceptable substitute for the certification of healthcare provider form required for the approval of her leave.

(11) On April 24, 2018, the employer discharged claimant for failing to contact the employer with three days as instructed in the April 20, 2018 letter.

**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) (January 11, 2018) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to prove claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although a human resources representative and the leave administrator sent claimant letters on April 9, 10 and 20, 2018 informing claimant that she still needed to submit a certification of healthcare provider form to enable the employer to evaluate her request for leave and that her job was in jeopardy as a result, claimant's physician's office had informed her that the physician's statement of disability form would suffice to supply the information that the employer sought in the certification of healthcare provider form. Claimant thought that the store director had faxed the physician's statement of disability form to the employer on April 4 and, based on what her physician's office had told her, that it was an adequate substitute for the certification of healthcare provider form. While the store director testified that there was "some confusion" on claimant's part on April 4 as to what paperwork she still needed to fax to the employer in support of her leave request, the director did not testify that she told claimant that the physician's statement of disability form would not satisfy the employer's request for a certification of healthcare provider form or that she was not, in fact, faxing the physician's statement of disability form to the employer. Audio at ~19:50, ~20:20. The store director's statements to claimant after she faxed the statement of disability as well as her failure to clarify that claimant still needed to submit additional paperwork reasonably reassured claimant that the needed paperwork for her leave had been faxed to the employer on April 4 and that the employer's later-sent letters of April 9, 10 and 20 were in error.

In addition, during the time period of April 9 through April 20, claimant tried unsuccessfully to reach the employer's human resources department and its corporate office to determine if she had submitted all paperwork needed to approve the leave, which shows that she was not indifferent to the employer's requirements and its requests. During this same period, claimant was also in regular contact with her immediate supervisor who told her that "everything would be fine," which she reasonably interpreted as indicating the employer letters she had received were in error, that her job was not in jeopardy and that she had submitted all required paperwork in support of her requested leave. Audio at ~43:54. Further, when claimant was not able to reach an employer human resources representative during the period of April 9 through April 20, she contacted her union, which gave her information that reasonably reassured her that the letters she had received from the employer were in error and that she was not in non-compliance with the employer's expectations. Given these facts, claimant's failure to make additional efforts to arrange for the submission of the certification of healthcare provider form to the employer or to contact employer representatives in response to the letters of April 9, 10 and 20 was not a willful disregard of the employer's instructions and standards and did not exhibit a conscious indifference to the employer's requirements under circumstances where she reasonably knew or should have known that her failure to do so would probably violate the employer's standards. Moreover and in the alternative, to the extent that claimant should have known that her behavior was in violation of the employer's standards, she appears to have sincerely believed that she was in compliance with the employer's standards and that the letters of April 9, 10 and 20 were in error based on the statements of her physician's office, the statements and actions of the store director and the statements of her immediate supervisor and a representative of her union. The preponderance of the evidence in the record does not show that claimant had any reason to doubt the sources on which she was relying or that she needed to investigate further before relying on them. At worst, claimant's behavior was a good faith error and was not misconduct. *See* OAR 471-030-0038(3)(b).

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

**DECISION:** Order No. 18-UI-113103 is affirmed.

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

**DATE of Service: September 5, 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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