

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0305

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2013, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding that the employer suspended claimant but not for misconduct from October 19, 2013 until October 25, 2013 (decision # 150127) and the second concluding that the employer discharged claimant but not for misconduct on October 30, 2013 (decision # 142921). The employer filed timely requests for hearing on both administrative decisions. On January 30, 2014, ALJ Hatfield conducted a consolidated hearing, and on February 5, 2014 issued Hearing Decision 14-UI-09915, affirming decision #142921 and on February 6, 2014 issued Hearing Decision 14-UI-09997, affirming decision # 150127. On February 24, 2014, the employer filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-09915 and 14-UI-09997. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0304 and 2014-EAB-0305).

FINDINGS OF FACT: (1) Coast Rehabilitation Services employed claimant as a direct support professional beginning on January 4, 2012. On October 19, 2013, the employer suspended claimant until October 25, 2013. On October 29, 2013, the employer discharged claimant.

(2) The employer expected claimant to report for work when scheduled and to notify the employer at least two hours before the start of his shift if he was going to be absent. The employer's attendance policy only excused absences due to an employee's illness. The employer had a progressive disciplinary policy, which stated that discharge was the next disciplinary sanction after an employee had already been suspended for violating the employer's policies. Claimant was aware of the employer's expectations and its disciplinary policy.

(3) In August 2013, claimant moved from his home on the Oregon coast to Salem, Oregon. On approximately August 11, 2013, claimant transferred to the employer's Multnomah County division. From his home in Salem, claimant drove himself 60 miles to report for work.

(4) On September 5, 2013, there was a severe rainstorm in and around Salem. Beginning at least two hours before his shift started, claimant called the employer and tried to reach his manager to inform her that he was not going to be able to come to work because of the inclement weather. Claimant finally reached the manager less than two hours before his shift started. The manager told claimant that poor weather was not an excuse for a failure to report for work and claimant told the manager he would try to report for his shift. Approximately an hour and a half before his shift started, claimant tried to drive to work. However, the windshield wipers on claimant's car were not able to keep up with the heavy rainfall and his visibility while driving was seriously impaired. After traveling a short distance, claimant returned home and called his manager to tell her the rainstorm was too severe for him to make it safely to work.

(5) On October 12, 2013, claimant called the employer to report his absence less than two hours before his shift started. Claimant told his manager that he was unable to drive to work because his car lacked fuel and he thought someone had siphoned gasoline from its tank.

(6) On October 15, 2013, claimant was not scheduled to work a shift, but was expected to attend a monthly mandatory staff meeting between 2:00 p.m. and 4:00 p.m. Claimant did not attend that staff meeting or call in to report his absence because he had either forgotten about the meeting or did not have enough money to purchase the gasoline needed to drive to work.

(7) On October 17, 2013, claimant called the employer less than two hours before his shift started and told his manager that his car was out of fuel and something appeared wrong with its fuel tank. Claimant told the manager that he thought there was a hole in the fuel tank. Claimant told the manager that his car was not drivable in its present condition and he needed to fix the fuel tank before he could drive it. Although claimant's manager told him transportation problems were not an excuse to miss work, he did not come in that day. On October 18, 2013, claimant called the employer more than two hours before his shift started and told his manager his car was still not repaired and he was not going to make it for his scheduled shift. The manager asked claimant to come in to the workplace to discuss his recent work attendance problems. Claimant told her he was not able to do that because he could not drive his car. On October 18, 2013, claimant made special arrangements with a neighbor, and paid the neighbor \$30, to drive him to the employer's workplace to pick up his paycheck. Claimant needed the paycheck to obtain the money to fix his car.

(8) On October 19, 2013, the employer suspended claimant until October 25, 2013 for the number and frequency of his prior absences. The suspension was required under the employer's progressive disciplinary policy as the next disciplinary step for claimant's alleged violations of the employer's policies. For some period of days after October 19, 2013, claimant tried to repair his car himself and also tried with the assistance of friends and family members. Claimant ultimately determined he was not able to fix the car himself and took it to a dealership for repairs sometime before October 26, 2013.

(9) On October 26, 2013, claimant's first scheduled day of work after his suspension, claimant called the employer and told his manager he was not able to report for work because, although his car was in the dealer's shop, the repairs had not yet been completed. Claimant called his manager more than two hours before the scheduled start of his shift. Claimant had called the dealership repeatedly during the time it had his car in an effort to speed up the repairs.

(10) On October 29, 2013, the employer's associate director called claimant on the phone to discuss claimant's work attendance. In that conversation, claimant stated that his recent absences had been caused by events he was not able to control, including the weather and the condition of his car. The associate director thought claimant was not taking "ownership" for his past absences and that he could no longer rely on claimant to report regularly to work. Transcript at 6, 12, 15. Because claimant had already been suspended for absences under the employer's progressive disciplinary policies and had not been able to come in to the office to discuss his absences with his managers, the associate director discharged claimant for his absences. The associate director concluded discharge was the next step available to him under the progressive disciplinary policy to discipline claimant.

CONCLUSIONS AND REASONS: The employer suspended and later discharged claimant but not for misconduct.

ORS 657.176(2)(a) and 2(b) require a disqualification from unemployment insurance benefits if the employer discharged or suspended claimant for misconduct. 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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer contended both at hearing and in its written argument that it suspended and later discharged claimant under its progressive disciplinary policy for his multiple absences from work. Transcript at 6, 7, 16; Written Argument at 1. However, even though an employer asserts that it has discharged or suspended a claimant for multiple attendance violations under a progressive disciplinary policy, EAB customarily focuses on the last violation to determine whether the employer has met its burden to demonstrate claimant's misconduct under OAR 471-030-0038(3)(a). *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under progressive attendance policy, the last occurrence that allegedly violated the policy is considered the reason for the discharge). In line with established practice, we confine our review of claimant's suspension to his absence on October 18, 2013 and our review of claimant's discharge to his absence on October 26, 2013 and his failure to come to the workplace to discuss his absences with his supervisors between October 18, 2013 and October 26, 2013.

With respect to claimant's suspension, the employer did not dispute that claimant's absence on October 18, 2013 was caused by the breakdown of his car and that the car was not drivable at that time. The employer also did not dispute that claimant complied with its policy and called in to report his absence at least two hours before his shift started on October 18, 2013. Given that claimant was not aware of this problem until October 17, 2013, it was not unreasonable for claimant not to have arranged for completed repairs by the next day. Although the employer's attendance policy might not have excused

an absence due to a transportation breakdown, the issue for purposes of determining whether claimant is disqualified from unemployment benefits is whether claimant's failure to report for work on October 18, 2013 was due to claimant's willful or wantonly negligent behavior. An unforeseen transportation problem is not the result of wanton negligence, nor, without more, is the failure to have a car in operating condition within only one day necessarily the result of wanton negligence. The employer did not meet its burden to establish it suspended claimant for willful or wantonly negligent behavior.

With respect to claimant's discharge, the employer did not dispute that claimant's absence on October 26, 2013 was caused by the dealership's failure to have claimant's car repaired by that day. The employer also did not dispute that claimant called in to report his absence at least two hours before his shift started on October 26, 2013. As above, we conclude the initial breakdown of claimant's vehicle was not due to any willful or wanton negligence on the part of claimant. Moreover, since the employer suspended claimant from October 19 through October 25, 2013, and he would have had no need to commute during that work week, it was not unreasonable for claimant to first try to repair his car himself. However, sometime before October 26, 2013, claimant had the car taken to a dealership to make the repairs when he concluded the repairs were beyond him. Absent some evidence that claimant delayed unreasonably in arranging for a professional repair of his car, there are no grounds to conclude that claimant's failure to have the car repaired by October 26, 2013 was caused by his wantonly negligent behavior. There is no such evidence in the record. The employer did not meet its burden to demonstrate that claimant's failure to report to work on October 26, 2013 was caused by claimant's willful or wantonly negligent behavior.

The employer also appeared to contend that claimant's refusal to agree to meet his managers to discuss his absences from work was a reason that it discharged claimant. Transcript at 10, 14, 29. Claimant's testimony that he did not meet with his managers between October 18 and October 26, 2013 because his car was not yet fixed was not rebutted by the employer. Transcript at 38-39. Moreover, the employer did not provide specific evidence that claimant ever refused to meet with his managers when exigent circumstances did not interfere with his ability to attend such a meeting. On this record, given claimant's rebuttal, the employer did not demonstrate that claimant ever willfully or with wanton negligence refused to meet with his managers to discuss his attendance difficulties. The employer did not meet its burden to demonstrate, more likely than not, that claimant's failure to meet with his managers was misconduct.

The employer suspended and discharged claimant for reasons other than misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decisions 14-UI-09915 and 14-UI-09997 are affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: March 20, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.