EO: 200
BYE: 201445

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

483
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0548

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 6, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83737). Claimant filed a timely request for hearing. On February, 26, 2014 ALJ K. Monroe conducted a hearing, and on March 17, 2014 issued Hearing Decision 14-UI-12633, reversing the Department's decision. On April 4, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant as a dish machine operator from June 12, 2012 until November 4, 2013.

(2) The employer expected claimant to report for work when scheduled. The employer had an attendance policy which stated that an employee was subject to discharge if the employee accrued fourteen unscheduled absences, regardless the reasons for the absences, within a rolling twelve month period. The employer's policy also stated that an employee was subject to discharge if the employee had two unscheduled absences within a rolling twelve month period for which the employee did not call in to notify the employer of the absence. Claimant was aware of the employer's expectations and the point-based attendance policy.

(3) On October 6, 2013, claimant's supervisor sent claimant home during his shift, and claimant accrued his second unscheduled absence in twelve months. On October 7, 2013, claimant called in and notified the employer that he was going to be absent for his scheduled shift because of a family emergency. Claimant accrued his third unscheduled absence. On October 8, 2013, claimant called in and notified the employer that he was going to be absent for his scheduled shift because he needed to stay home to care for his wife, who had Parkinson's disease. Claimant accrued his fourth unscheduled absence. At

that time, the employer's administrative supervisor advised claimant to seek a leave under the federal Family Medical Leave Act (FMLA) that would excuse claimant's future absences to care for his wife from counting as unscheduled absences under the employer's attendance policy. The administrator gave claimant the name and contact information for the employer's FMLA administrator.

(4) From October 9, 2013 until October 17, 2013, claimant was away from work on personal time off. On October 18, 2013, claimant was scheduled to work, but called to notify the employer that he was not going to report because he was ill. Claimant accrued his fifth unscheduled absence during a twelve month period. From October 19, 2013 through October 28, 2013, claimant called in on each day that he was scheduled to work and notified the employer that he was unable to work as a result of flu-like symptoms, including dizziness, vomiting and diarrhea. Claimant did not contact a physician about his condition because he had called a friend who was a nurse, and claimant attributed his condition to a virus, for which a physician could offer little assistance. On October 20, 2013, the employer's administrative supervisor called claimant and again advised claimant to request a leave under FMLA. By October 28, 2013, claimant had accrued his thirteenth unscheduled absence during a twelve month period.

(5) On October 28, 2013, when claimant called in to report his absence, the administrative supervisor told him that he had accrued the thirteen unscheduled absences allowed under the employer's attendance policy and that he would be discharged if he missed another scheduled day of work. The administrative supervisor again advised claimant to seek a leave under FMLA. The administrative supervisor asked claimant if he was going to report for his scheduled work shift on October 29, 2013. Claimant told the supervisor that he was still ill and was not going to report for work on October 29, 2013. Claimant was absent from work on October 29, 2013, but did not call in that day to report his absence because he had told the supervisor the day before that he was going to be absent and thought he did not need to provide any additional notice. On October 29, 2013, claimant accrued his fourteenth unscheduled absence within a twelve month period.

(6) On November 4, 2013, the employer discharged claimant for exceeding the maximum number of unscheduled absences within a rolling twelve month period.

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. 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness testified that the employer discharged claimant for "excessive" unscheduled absences, or exceeding the number of unscheduled absences allowed under the employer's attendance policy. Transcript at 6, 35, 36. When a claimant is discharged for the number of absences

accumulated under an employer's attendance policy, the incident in which the final absence was accrued is the proper focus of the inquiry to determine whether claimant is disqualified from benefits. *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 a point-based attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, we focus on claimant's absence on October 29, 2013 to assess whether it involved claimant's misconduct.

The employer's witness did not dispute at hearing claimant's testimony that his absence on October 29, 2013 was caused by illness, and the witness further testified that claimant had notified the employer's administrative supervisor several times between October 18, 2013 and October 29, 2013 that he was ill when he called in to report his absences. Transcript at 7, 33, 34. OAR 471-030-0038(3)(b) clearly states that absences due to illness are not misconduct. Given the clear language of the regulation and the undisputed evidence about the reason for claimant's absence, the employer did not meet its burden to establish that claimant's absence on October 29, 2013 was caused by misconduct.

In its written argument, the employer conceded the point that the fact of claimant's absence on October 29, 2013 did not support a finding of misconduct, but contended that claimant also engaged in misconduct because he did not call in on October 29, 2013 to report that he was going to be absent. Despite the fact that the employer's witness did not cite at hearing that claimant's failure to call in was a reason for claimant's discharge, this new contention does not support a finding of misconduct. The employer's witness did not dispute claimant's testimony at hearing that he told the administrative supervisor on October 28, 2013 that he was not going to be able to report for work on October 29, 2013 and that, for this reason, he thought that he did not need to call in again on October 29, 2013 to report his absence. Transcript at 25, 26. Because, more likely than not, claimant reported to the administrative supervisor on October 28, 2013 that he was not going to be at work on October 29, 2013, it was neither willful nor wantonly negligent for claimant not to again inform the employer or the administrative supervisor of his absence on October 29, 2013.

The employer also contended in its witness's testimony at hearing that claimant should be disqualified from benefits because he might have pursued the option of obtaining a leave under FMLA that would have excused his absences under the employer's attendance policy and averted his discharge on October 29, 2013. Transcript at 6, 35. Claimant testified at hearing that he did not pursue a FMLA leave because, when it was proposed for his own condition as opposed to his wife's, he was too ill to think about it. Transcript at 27, 31. The issue here is not whether claimant might have taken steps to forestall the application of the employer's attendance policy to his unscheduled absences, but whether claimant's actual conduct was a willful or wantonly negligent violation of the employer's standards. The employer did not meet its burden to establish that claimant's failure to pursue a leave after being notified of the possibility of seeking one on October 20, 2013 and October 28, 2013 was wantonly negligent. Moreover, the employer failed to present evidence that a leave for temporary condition, like the one claimant apparently had, even qualified under FMLA or that the employer would have approved any leave that claimant might have requested. Transcript at 7. Absent such evidence, the employer has not demonstrated, more likely than not, that a FMLA leave would have averted the situation that led to claimant's discharge.

The employer's witness also contended at hearing that the employer discharged claimant, in part, for his failure to return phone calls from the employer during the period October 18, 2013 through October 28,

2013. Transcript at 6, 8, 35. Although the employer's witness generally asserted that the employer tried unsuccessfully to contact claimant several times during this period, the witness also testified that claimant called in every day in that period to report his absences. Transcript at 33. Claimant testified that he did not receive some of the phone calls from the employer because his phone was unreliable and sometimes did not record messages. Transcript at 22. Based on this testimony, it does not appear, more likely than not, that claimant was wantonly negligent in maintaining contact with the employer and, while it might have been more convenient if claimant had promptly received the messages from the employer's representatives, nothing prevented those representatives from arranging to speak with claimant when he called in to each day to report his absences. On these facts, the employer did not meet its burden to show claimant's misconduct.

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

DECISION: Hearing Decision 14-UI-12633 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: <u>May 6, 2014</u>

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.