

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0627

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 31, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #10930). The employer filed a timely request for hearing. On March 26, 2014, ALJ Seideman conducted a hearing, and on April 3, 2014 issued Hearing Decision 14-UI-14247, affirming the Department's decision. On April 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. We considered the entire hearing record and the employer's argument.

Hearing Decision 14-UI-14247 refers to Exhibits 1, 2, 3 and 4, which the ALJ did not mark, but did identify and admit into evidence without objection at hearing. Audio Record ~ 2:22 to 3:43, Transcript at 38. Accordingly, the October 7, 2013 Release to Return to Work, October 15, 2013 human resources letter to claimant, October 22, 2013 human resources letter to claimant, and corrective action policy were marked as EAB Exhibits 1, 2, 3 and 4, respectively. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the information will remain in the record as EAB Exhibits 1, 2, 3 and 4.

FINDINGS OF FACT: (1) National Flora an FTD.com Company employed claimant from October 8, 2001 to October 22, 2013 as a workforce analyst.

(2) From July 26, 2013 to October 8, 2013, claimant was approved for FMLA leave and was off work due to a serious health condition. After October 8, 2013, claimant was no longer eligible for FMLA.

(3) Claimant's primary care provider retired and did not treat claimant after September 26, 2013. Claimant obtained a new primary care provider.

(4) Claimant's new primary care provider released claimant to work effective October 8, 2013. On October 9, 2013, claimant worked for the employer.

(5) On October 10, 2013, claimant was unable to work due to illness preventing her from moving her arms, driving, typing, or holding a telephone.

(6) Claimant's symptoms persisted until after her employment ended. Claimant reported to the employer before each shift from October 10 to October 22, 2013 that she was unable to work due to illness.

(7) On October 10, 2013, claimant went to the emergency room, where the hospital performed diagnostic tests, but was unable to diagnose claimant's medical condition. The hospital was unable to provide claimant with medical certification showing the cause for her absence from work because it was unable to diagnose her condition. The emergency room recommended claimant seek further medical attention from her primary care provider.

(8) On October 14, 2013, claimant met with her primary care provider, who was unable to diagnose claimant's medical condition, and referred her to see a neurologist. Claimant's primary care provider was unwilling to provide claimant with a release from work because she was unable to diagnose claimant's condition.

(9) Claimant provided the employer with verification of her need to miss work on October 15 to October 18, 2013 for diagnostic testing.

(10) On October 15, 2013, claimant requested a personal leave of absence from the employer until December 31, 2013 due to her health condition. The employer denied claimant's request for personal leave for October 10, 11 and 14, 2013 because claimant did not provide medical documentation showing a medical reason for missing work for those days. The employer informed claimant that it required claimant to provide medical documentation for all absences after October 9, 2013. EAB Exhibit 2.

(11) On October 18, 2013, claimant informed the employer that her doctor was unable to diagnose claimant's medical condition, and had referred claimant to a neurologist.

(12) On approximately October 18, 2013, claimant set an appointment with her neurologist for approximately three weeks later. Claimant was unable to meet with the neurologist before her employment ended.

(13) On October 21, 2013, claimant told a human resources representative that she was unable to work due to illness, and that she had an upcoming appointment with a neurologist.

(14) On October 22, 2013, the employer discharged claimant for failing to provide medical documentation for her need to miss work due to illness.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant, 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. 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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). 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 discharged claimant on October 22, 2013 for failing to provide a medical certification for a leave of absence from October 9, 2013 to October 22, 2013. The employer reasonably expected employees to provide medical certification for extended absences from work. We are persuaded that claimant understood the employer's expectation. On October 15, 2013, the employer informed claimant that she must submit medical certification for her absences.

Claimant tried to comply with the employer's request. She requested medical verification of her health condition from the emergency room and her primary care doctor. Neither medical provider was able to provide her with medical certification for a leave of absence because they were unable to diagnose the cause of her symptoms. On October 14, 2013, claimant's doctor referred her to a neurologist. Claimant had additional diagnostic testing on October 15 to 18, 2013. On October 18, 2013, claimant informed the employer of her attempts to obtain medical verification and that she was going to see a neurologist for further assessment. Claimant did not comply with the employer's request that she provide medical certification for her absences after October 9, 2013. However, the record shows that, during the two weeks following her unsuccessful return to work, claimant was suffering from a debilitating medical condition and was unable to obtain a diagnosis from her medical providers because they were unable to diagnose her. Claimant had set an appointment with a neurologist for diagnosis and further treatment, but was unable to meet with the doctor before the employer discharged claimant. The doctors' inability to diagnose claimant, and claimant's inability to meet with the neurologist before October 22, 2013, cannot be attributed to claimant as an intentional or conscious disregard of the employer's requirement that she provide medical verification of her need for a personal leave of absence. Consequently, the employer failed to prove claimant acted willfully or with wanton disregard of the employer's expectation regarding leaves of absence.

We conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14247 is affirmed.

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

DATE of Service: May 16, 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.