

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0540**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150412). Claimant filed a timely request for hearing. On April 27, 2015, ALJ Clink conducted a hearing, and on May 4, 2015 issued Hearing Decision 15-UI-37917, reversing the Department's decision. On May 8, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Seven Feathers Hotel & Casino Resort employed claimant as a banquet server from February 20, 2006 until February 11, 2015.

(2) The employer expected claimant to report for work as scheduled. The employer had an attendance policy in which one point was accrued for each absence from work, regardless of the reason, unless the absence was authorized under the Family Medical Leave Act (FMLA). The policy stated that an employee who accrued eight absence points in a rolling year period was discharged. Claimant was aware of the employer's expectations and the employer's point-based attendance policy.

(3) As of February 9, 2015, claimant had accrued seven absence points. On February 9, 2015, late in the evening, claimant's husband was notified by his sister that his father was near death because his father had contracted a staphylococcal blood infection that was complicated by pre-existing diabetes. The sister told claimant's husband that his father was not expected to survive. Claimant and her husband discussed the matter and decided that, if possible, they would drive to Oklahoma with their children to see the husband's father, whom claimant and the children had never met. Claimant's husband also wanted to visit with his father in the event he succumbed to the blood infection.

(4) Around midnight on February 9, 2015, claimant called her work supervisor, the banquet manager, at home. Claimant explained to the manager that her father-in-law was gravely ill in Oklahoma and she, her husband and their children wanted to visit him and needed to leave immediately. Claimant expressed concern about whether her absence from work to visit her ill father-in-law would be excused

under the employer's attendance policy. The banquet manager did not advise claimant that it would not, or inform claimant she would be discharged under the attendance policy for accruing another absence. The manager told claimant "to go [to Oklahoma] and she would handle everything" by arranging for claimant to have a FMLA leave, which would excuse claimant's absence. Audio at ~25:52, ~31:13. Claimant told the manager she did not want to place her job in jeopardy and the manager replied, "I'll take care of it [obtaining the FMLA leave]." Audio at ~25:50, ~31:13. At approximately 1:00 a.m. on February 10, 2015, claimant and her family began the drive to Oklahoma. Claimant would not have gone with her family if she had been informed that her absence was not excused from the operation of employer's attendance policy under FMLA.

(5) On February 10, 2015, the banquet manager went to the employer's human resources department to try to arrange a FMLA leave for claimant. The manager was told that claimant's absence was not excusable under FMLA because the father-in-law was not considered a member of claimant's immediate family. Claimant did not report for work on February 10, 2015 because she was en route to Oklahoma. As a result of her unexcused absence from work, claimant accrued an eighth point under the employer's attendance policy.

(6) On February 11, 2015, the banquet manager discussed the circumstances of claimant's absence with the employer's director because a FMLA leave was not available to claimant. That day, claimant sent a text message to the banquet manager letting her know that she was travelling through Arizona, and inquiring whether the FMLA leave had been arranged. The banquet manager replied to claimant's text message and told claimant that she was discharged because she had been unable to have claimant's absence excused under FMLA and claimant had accrued her eighth absence point by not reporting for work on February 10, 2015.

**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. 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. 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 because, by her unexcused absence on February 10, 2015, she had exceeded the allowable number of absence points under the employer's attendance policy. Audio at ~20:53. However, even when a claimant was discharged because of the total number absences accrued under an attendance policy, EAB limits its evaluation to whether the circumstances surrounding the final

absence constituted disqualifying misconduct. *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, claimant's absence on February 10, 2015 and the circumstances surrounding it are the proper focus of the misconduct analysis.

Claimant did not willfully violate the employers' attendance policy, nor was she indifferent to the consequences of her behavior under circumstances where she should have known that her conduct would probably violate the employer's attendance policy. Claimant's late-night call to her supervisor on February 9, 2015 is evidence that she was concerned about any absences from work resulting from her father-in-law's illness. Notably the manager did not tell claimant that her absence would not be excused under the employer's attendance policy, nor does it appear that the manager told claimant that she was uncertain if the human resources department would authorize the FMLA leave necessary to excuse claimant's absences. There was nothing in this record that reasonably should have caused claimant to doubt that her absences occasioned by the emergency that confronted her and her family would be excused, and not counted under the employer's attendance policy. Claimant needed to promptly begin the three day trip to Oklahoma in the event the father-in-law's conditions worsened. Under these exigent circumstances, it was not unreasonable for claimant to rely on the implicit assurance of her manager that the necessary leave would be forthcoming, and to have begun her trip before she verified that she qualified for a FMLA leave. Claimant's testimony that she would not have departed for Oklahoma unless she thought it was assured that her absences would not accrue attendance points under the employer's policy was sincere and credible. On this record, the employer did not demonstrate that claimant's conduct in violating the employer's attendance policy was accompanied by the willful or wantonly negligent mental state required to establish misconduct.

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

**DECISION:** Hearing Decision 15-UI-37917 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service:** June 30, 2015

**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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