

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0984

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115052). Claimant filed a timely request for hearing. On August 6, 2015, ALJ Frank conducted a hearing, and on August 14, 2015, issued Hearing Decision 15-UI-43001, affirming the Department's decision. On August 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) La Clinica Del Valle Family Health, employed claimant as a member of its office staff from June 1, 2014 to June 1, 2015.

(2) The employer expected its employees to report for work as scheduled or provide timely notification to the employee's supervisor if the employee would be absent. The employer's written policy defined "timely notification" as "calling on day of absence or providing advance notification when anticipated." Audio Record ~ 11:00 to 12:30. Claimant read the employer's policy and was aware of the employer's expectations regarding attendance.

(3) On Wednesday May 20, 2015, claimant notified the employer that she had been seen at the emergency room for back pain and would be unable to work for one to three days. The employer requested a doctor's note that confirmed that she needed to be off work. On Wednesday May 27, claimant texted her supervisor that she had just left the doctor's office and had received a note that excused her from work from May 20 through 27. The employer's human resources office received the note in question written by a doctor at the employer's clinic.

(4) On May 28, 2015, claimant did not report for work as scheduled but notified her supervisor by phone later that morning that she would not be at work that day or May 29 due to her back pain. The supervisor told claimant to contact a medical assistant for the employer's doctor and request a written extension of her leave. Claimant did so and an assistant told her she would talk to the doctor and "not to worry about it." Audio Record ~ 19:00 to 20:00. Claimant did not report for work on May 29 or June 1.

On June 1, pursuant to direction from her supervisor, claimant left a voicemail for an employee, Regina, in the employer's HR office notifying her she would be absent from work that day due to her back pain and the prescription pain medication she was taking for her condition.

(5) At the close of business on June 1, the employer had not received the requested note excusing claimant's continued absence after May 27 and was not aware claimant had notified her supervisor and the HR employee that she would be absent on May 29 and June 1. The employer discharged claimant that day for failing to report for work as scheduled or notify the employer she would be absent on May 29 or June 1. Audio Record ~ 14:00 to 16:00.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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(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. Absence due to illness or injury, isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, we agree with the ALJ's implied conclusion that to the extent the employer discharged claimant for her absence on May 28, May 29, and June 1, 2015, due to her back condition, her discharge was not for misconduct as under OAR 471-030-0038(3)(b), absence due to injury is not misconduct. However, in Hearing Decision 15-UI-43001, after finding that claimant also failed to notify the employer she would be absent on May 29 and June 1, 2015, the ALJ concluded that claimant's conduct in that regard constituted misconduct because it demonstrated a wantonly negligent disregard of the employer's interest and was neither isolated nor the result of a good faith error in her understanding of the employer's expectation.¹ The ALJ reasoned,

At hearing, claimant did not challenge the employer's contention that she had failed to provide notice of absences from work on May 29 and June 1, 2015. Rather, she maintained that onsite medical personnel had authorized additional time off work following the excused leave ending May 27, 2015...[E]ven if claimant had secured authorization for additional time loss, it would not have exempted her from the requirement at she provide notice of absences until the employer's receipt of another written excuse. Her failure to do so constituted a wantonly negligent disregard of the employer's interest.

¹ Hearing Decision 15-UI-430011 at 2-4.

Hearing Decision 15-UI-43001 at 3-4. However, claimant asserted at hearing that on May 28, 2015, she told her supervisor she would be absent on May 29 and after her supervisor directed her to contact “HR” concerning additional time off, she left voicemails for an HR employee on June 1, 2, and 3 notifying the employee she would be absent. Audio Record ~ 19:20 to 21:20. The employer did not offer testimony from claimant’s supervisor or the HR employee, before or after the ALJ inquired about the supervisor’s availability as a witness, even though she still worked for the employer. Audio Record ~ 26:00 to 26:15. On this record, we find no reason to doubt the credibility of claimant or the employer’s witness and the evidence regarding whether claimant notified the employer she would be absent from work on May 29 and June 1 is no more than evenly balanced. Where the evidence is evenly balanced, we resolve facts in dispute against the party with the burden of proof. In a discharge case, that burden is on the employer. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer failed to show by a preponderance of the evidence that claimant failed to notify the employer that she would be absent on May 29 and June 1, 2015 in violation of its attendance policy, much less that she did so willfully or with conscious indifference to the employer’s interests.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-43001 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 2, 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. 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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