

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1345

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132217). Claimant filed a timely request for hearing. On October 19, 2015, ALJ Holmes-Swanson conducted a hearing, and on October 26, 2015, issued Hearing Decision 15-UI-46534, affirming the Department's decision. On November 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Neuromusculoskeletal Center of the Cascades employed claimant, last as a medical assistant, from June 10, 2013 to July 15, 2015.

(2) The employer allowed employees to request personal leaves of absence without pay for "extenuating circumstances." Transcript at 30. The employer expected its employees to be truthful when offering the reason for a requested personal leave. The employer's leave policy and expectation regarding honesty were contained in its employee handbook a copy of which claimant received while employed.

(3) The employer desired its medical assistants to take their vacations at the same time the physician with whom they worked took his or her vacation. The physician with whom claimant worked planned to take a two week vacation from approximately July 6 to July 20, 2015. Claimant planned to take vacation during that same period.

(4) Claimant's father resided in a nursing home out of state and suffered from several serious medical conditions including Alzheimer's Disease, "brain bleed" and "bowel leakage", for which surgery was planned "after the brain bleed cleared up." Transcript at 13-14. Claimant's siblings wanted claimant to assist with their father's personal care to the extent possible and to help with clearing out their father's home to prepare for sale. Claimant requested family medical leave from the employer during her planned two week vacation period to travel out of state and assist in her father's personal care and support. The employer's human resources director asked claimant to complete OFLA (Oregon Family Medical Leave Act) paperwork, which included a certification of need for a serious health condition of a

family member from her father's physician, to see if her father's circumstances qualified her for medical leave.

(5) Claimant was prosecuted for a crime and in early 2015 sentenced to complete a 20 day jail sentence sometime before the end of the summer; the employer was unaware of these circumstances. On or about July 2, 2015, claimant received back from her father's physician the family medical leave documents and the employer's human resources director asked claimant to review them with her. On that day, the director informed claimant she did not qualify for protected medical leave because her father did not need "around-the-clock" care based on his nursing home residence but offered her an unpaid personal leave instead. Transcript at 12-13. Because she was going to receive personal leave, claimant went to the employer's physician with whom she worked to authorize additional time off beyond the two weeks, not only care for her father but to take care of "some personal issues" she had. Transcript at 13. Claimant did not specify to the physician what her personal issues were because she did not believe she had to for a personal leave. She received the physician's approval and provided the same information to the employer's director. The director then granted claimant unpaid personal leave from July 6 to August 7, 2015.

(6) Claimant immediately made arrangements to begin her jail sentence the next day, on July 3, an employer granted day off for the July 4th holiday, intending to travel out of state to assist with her father after her jail sentence was completed. However, while in custody, a coworker informed the employer that claimant was in jail. The employer checked the jail records, confirmed she was in custody, and on July 15, 2015, sent her a letter which stated,

"You requested a leave of absence from July 6th to August 7th based on your need and desire to care for your father in another state. Your request did not meet OFLA's guidelines but you were granted a personal leave of absence. It has come to our attention you became an inmate at the Deschutes County Jail on July 3rd, 2015 and are scheduled for release on July 30th. Your leave of absence was granted under false pretenses and based on that, your employment with the center has been terminated."

Transcript at 7-8.

(7) On July 15, 2015, the employer discharged claimant for providing false information in support of her request for a leave of absence. Claimant had not received any previous discipline from the employer.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-46534, the ALJ found that the employer discharged claimant for providing false information regarding a leave of absence which the ALJ concluded constituted disqualifying misconduct, reasoning,

When claimant completed her request for unpaid leave, she indicated that this was medical leave to provide care for her ailing father. After the time was approved for this purpose, though not as protected medical leave, the claimant changed her plan and used the time to serve a jail sentence. The claimant did not tell the employer about this change. The claimant's conduct was willful.

Hearing Decision 15-UI-46534 at 1-3. However, claimant testified that she told both the physician for whom she worked and the human resources director on July 2 that she wanted additional time for her personal leave to take care of "some personal issues" she had as well as her father. She testified, "When they changed it to personal leave, I thought it was just that and asked my physician for additional time off to not only take care of my father but also take care of some personal issues that I had." Transcript at 13, 22-23. She also asserted she provided that same information to the human resources director on July 2 and never intended to be "dishonest." Transcript at 14. The employer did not rebut with direct evidence claimant's assertions about her discussion with the physician with whom she worked and the human resources director only asserted that she "[did not] remember" any discussion with claimant about also taking care of some personal business while on her leave. Transcript at 27. On this record, the evidence regarding whether claimant informed the employer that she also intended to take care of "personal issues" while on leave is no more than equally balanced. Accordingly, the employer failed to meet its burden to establish that claimant willfully or with wanton negligence violated the employer's expectation regarding honestly providing the reasons for her requested leave.

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-46534 is set aside, as outlined above.¹

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 31, 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

¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

‘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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