

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0175

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 30, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110056). Claimant filed a timely request for hearing. On January 28, 2016, ALJ Vincent conducted a hearing, and on January 29, 2016 issued Hearing Decision 16-UI-51993, reversing the Department's decision. On February 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Jeld-Wen, Inc, employed claimant as a screen builder from August 10, 2015 until November 5, 2015.

(2) The employer expected claimant to notify it when he was going to be absent from work by calling the employee attendance phone line before his shift was scheduled to begin. Claimant understood the employer's expectation.

(3) On September 3, 2015, the employer issued a warning to claimant advising him that he had accrued three and one-half absences under its attendance policy during the first thirty days of his employment.

(4) On November 2, 2015, claimant was at work when the group manager observed that he appeared to be having serious vision problems. The manager approached claimant, spoke to him, and concluded that claimant should not remain at work. The manager told claimant to call someone to come to the workplace to transport him home. The manager then escorted claimant to the breakroom and arranged for another employee to wait with claimant until his transportation arrived.

(5) After claimant left work on November 2, 2015, his vision deteriorated and he became blind. Claimant proceeded to the emergency department of a hospital. At the hospital, claimant learned he was

likely having a stroke. The emergency department referred claimant to an ophthalmologist for a comprehensive examination of his vision, which was scheduled for November 3, 2015.

(6) On November 3, 2015, claimant did not report for work and did not call in to notify the employer of his absence. It did not occur to claimant that the employer expected him to call to report his absence. Claimant was still blind at the time, and could not see to dial the phone. Claimant's wife was out of town and not available to assist him. On November 3, 2015, claimant was evaluated by the ophthalmologist. The ophthalmologist diagnosed claimant as likely having had a stroke.

(7) On November 4, 2015, claimant did not report for work and did not call in to notify the employer of his absence. It still did not occur to claimant that he was expected to notify the employer, and his vision was still substantially impaired. On November 4, 2015, claimant was evaluated by his primary care physician, who referred him to a neurologist. The primary care physician gave claimant a note excusing him from work through November 9, 2015.

(8) By November 5, 2015, claimant's vision was improving. On that day, claimant did not report for work and did not call in to notify the employer of his absence or tell the employer that he had a physician's excuse for his absences. Claimant was distracted by his health issues, and it still did not occur to him that he was required to call the employer to report his absences.

(9) On November 5, 2015, the employer discharged claimant for not reporting for work and not calling in to notify it that he was absent for three consecutive days, November 3, 4 and 5, 2015. Before those three days, claimant had never before failed to call the employer when he was absent.

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(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).

Claimant readily agreed that he should have called the employer to report his absences from work on November 3, 4 and 5, 2015. Audio at ~25:28, ~29:25. Claimant testified that the requirements of the employer's attendance policy did not occur to him during those days because he was "having a hard enough time getting through life" and managing the health issues arising from the stroke. Audio at ~25:18, ~28:54. Claimant's explanation for his failure to consider the employer's requirements and to call the employer was plausible. One of the commonly experienced symptoms of a stroke is mental confusion and an inability to understand behavioral expectations. <http://www.mayoclinic.org/diseases-conditions/stroke/symptoms-causes/dxc-20117265>; <http://www.nhlbi.nih.gov/health/health->

[topics/topics/stroke/signs](#). The employer did not present evidence showing claimant was capable of comprehending at the time that failing to call in his absences was a violation of the employer's standards. In light of the stroke and the absence of any evidence that claimant was conscious of the implications of his behavior when he violated the employer's standards by not calling in, the employer did not demonstrate that claimant had the requisite mental state to engage in a willful or wantonly negligent violation of those standards. *See* OAR 471-030-0038(1)(c). On this record, the employer did meet its burden to show claimant's misconduct by a preponderance of the evidence.

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

DECISION: Hearing Decision 16-UI-51993 is affirmed.

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

DATE of Service: March 7, 2016

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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