

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0254

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113548). Claimant filed a timely request for hearing. On February 9, 2016, ALJ Shoemake conducted a hearing, and on February 16, 2016 issued Hearing Decision 16-UI-52976, reversing the Department's decision. On March 7, 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) Canron Western Constructors, Inc. employed claimant as a structural steel fabrication apprentice from February 9, 2012 until October 20, 2015

(2) The employer expected claimant to report for work each day and, if he was going to be absent, to phone the employer's attendance line every day of his absences and on every fourth consecutive day of absence to call and speak personally with either the human resources manager or the plant superintendent. Claimant understood the employer's expectations.

(3) The employer had an attendance policy which stated that if an employee accrued 80 work hours of unexcused absences in a calendar year, the employer was subject to discharge. Employee absences were excused if the employee provided a note for the absence from a health care professional. Claimant was understood the employer's attendance policy.

(4) On June 6, 2015, the employer issued a written warning to claimant because he had accrued 60 work hours of unexcused absences. Claimant was warned that if he accumulated 80 hours of unexcused absences he would be discharged.

(5) On August 25, 2015, the employer issued another written warning to claimant for the hours of unexcused absences he had accrued. After this warning, claimant brought in information from a health care professional that reduced his hours of unexcused absences to 60 as of the end of August.

(6) On September 28 and 29, 2015, claimant missed work because he had broken his eyeglasses, and he had to have them repaired to correct his sight to the point where he could work. Claimant called the attendance line to report his absence on each of those days. Claimant did not call to personally speak with the human resources representative or the plant superintendent because he was not absent for four consecutive days.

(7) On September 30 through October 2, 2015, claimant was absent from work because of varicose veins in his legs, and he saw his doctor for evaluation, treatment and follow-up. On each of the days that he was absent, claimant called the attendance line. On October 1, 2015, claimant's fourth consecutive day of absence, he forgot he needed to call and speak personally with the human resources manager until 4:30 p.m. When he remembered, claimant tried to reach the manager but the plant was closed for the day and he left a voicemail message for the manager.

(8) October 3 and 4, 2015, were weekend days when claimant was not scheduled to work. On October 5, 2015, claimant was absent from work and called the attendance line. He did not call to speak personally with either the human resources manager or the plant superintendent because it was not a fourth consecutive work day of absence since he tried to reach the human resources manager on the last work day, which was October 1, 2015.

(9) On October 6, 2015, claimant was absent from work and called the attendance line. That day, claimant called the plant superintendent to speak personally with him, but the superintendent was not at his desk and claimant left a voicemail message for him. In his message, claimant stated he had been feeling depressed and had been having suicidal thoughts that prevented him from reporting for work. Claimant forgot to leave his phone number for the superintendent in his message. The superintendent tried to return claimant's call by using a phone number he obtained from the employer's records, but that number was no longer in service. The superintendent might have mis-dialed that number.

(10) On October 7 through 9, 2015, claimant was absent from work. He called the attendance line on each of the days he was absent. He did not try to reach the plant superintendent or the human resources manager on these days because four work days had not passed since he tried to reach the plant superintendent on October 6, 2015. Around this time, claimant consulted with an advice nurse at his health care provider's office about his emotional state, and she gave him some contact information for support groups.

(10) On October 12 through 16, 2015, claimant was absent from work and called the attendance line on each of these days. On approximately October 12, 2015, claimant called the plant manager because he had then been absent for four consecutive work days since he last called in and left a message. Claimant reached the manager, and told him that he had been feeling depressed and suicidal. Claimant was "all over the place" during his conversation with the manager. Transcript at 37. The manager recommended that claimant see a health care professional and told claimant he could seek help through the employer's employee assistance program. The manager reminded claimant that he was accruing

unexcused absences under the attendance policy and he could have them excused by bringing in a note from a health care professional. The manager told claimant to keep calling in to report his absences. Around this time, claimant attended two support groups for depression.

(11) On Friday, October 16, 2015, claimant called in and spoke personally with either the human resources manager or the plant superintendent, which was within the four work days of absence required for a personal contact since claimant had spoken with the plant superintendent on October 12, 2015. Claimant was told in this call to bring in medical documents to excuse his absences. Whomever claimant spoke with told him that a time was being arranged for him to meet with employer representatives the next week.

(12) On Monday, October 19, 2015, claimant was absent from work and called the employer's attendance line. Claimant was not required to speak personally either with the human resources manager or the plant superintendent that day because four work days had not elapsed since his October 16, 2015 phone call to the workplace. Later that day, the plant manager called claimant and told him to come in to the workplace to meet with employer representatives on October 20, 2015.

(13) On October 20, 2015, claimant reported to the workplace as instructed. An employer representative told claimant he was discharged for excessive absences.

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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer's witness stated at hearing that the employer discharged claimant because by October 20, 2015 he accrued more than the number of unexcused absences allowed under its attendance policy, EAB's traditional approach is to evaluate whether the final absence preceding the discharge was for reasons that constituted misconduct. Transcript at 5; *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, the focus of the misconduct analysis is claimant's absence from work on October 19, 2015.

On October 19, 2015, it was not disputed that claimant called the attendance line to report his absence. Nor was it disputed that he did not need to call the workplace that day and speak personally with either the human resources manager or the plant superintendent. Claimant testified that he was ill and did not report for work on October 19, 2015 because he was depressed, and the employer's witnesses did not challenge his explanation for the absence. Because claimant complied with the employer's requirements for absences that day, and there was no evidence that he was not ill, claimant does not appear to have violated any employer standards either willfully or with wanton negligent.

In the employer's written argument, its representative contended that the employer discharged claimant under its attendance policy because he failed to present the medical documents to excuse some or all of the accrued unexcused absences. Employer's Written Argument. However, the employer presented no evidence that it required medical documents to justify absences in general or that it was a dischargeable offense, in and of itself, if an employee failed to produce medical documents after an absence of any particular length. What the employer appears to be contending is that, because it was within claimant's control to produce medical documents that would have reduced his total number of hours of unexcused absences under its attendance policy to less than that required for discharge, EAB must consider all unexcused absences in determining whether the employer discharged claimant for misconduct. However, as discussed above, that is not the approach EAB uses when a claimant is discharged for exceeding the number of absences allowed under an employer's attendance policy. Moreover, showing merely that claimant had a particular number of absences under an attendance policy cannot and does not substitute for a showing that one or more of these absences was due to claimant's willful or wantonly negligent behavior, which is the requirement that must be met to disqualify claimant from benefits. Absent such evidence, the employer has not met its burden to show it discharged claimant for misconduct.

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

DECISION: Hearing Decision 16-UI-52976 is affirmed.

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

DATE of Service: April 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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