

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0432

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100424). Claimant filed a timely request for hearing. On March 17, 2016, ALJ Triana conducted a hearing, and on March 25, 2016 issued Hearing Decision 16-UI-55759, affirming the Department's decision. On April 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) SAIF Corporation employed claimant as a human resources generalist from February 9, 2015 until January 13, 2016.

(2) The employer expected claimant to report for work as scheduled unless she had permission for an absence or the absence was excused. Claimant was aware of the employer's expectation.

(3) Sometime before early December, 2015, claimant gave birth to a daughter. Shortly after, claimant began to experience unusually heavy and lengthy monthly menstrual flows. Claimant also was experiencing depression. During early December 2015, these conditions caused claimant to miss a significant amount work.

(4) On December 14, 2015, claimant consulted with her physician about her condition. Claimant's physician prescribed medicine to treat her menstrual irregularity and depression, and referred claimant to a therapist for a mental health evaluation and counseling. The physician restricted claimant from working until she was evaluated by the therapist to determine an appropriate work schedule for her. Claimant's physician submitted to the employer a health care provider's certification authorizing a leave for claimant under the Oregon Medical Leave Act (OFLA) from December 1, 2015 through January 31, 2016, with claimant restricted from all work during the period December 1, 2015 through December 22, 2015.

(5) On December 22, 2015, claimant had an appointment with the therapist to whom she was referred. The therapist told claimant she recommended that claimant return to work on a reduced or modified schedule and that, while claimant remained on the modified work schedule, she recommended that an intermittent leave be put in place that would allow claimant to miss a few days each month when her menstrual flow was heaviest. She also suggested claimant pursue the option of working on a telecommuting basis when her menstrual flow prevented her from comfortably working in the office. That day, claimant called her physician to inform the physician of the therapist's recommendations. The physician was not available and claimant left a message for her. On December 23, 2015, claimant again called the physician and left another message for her. Sometime around December 23, 2015, claimant contacted the employer and notified the employer that she was not ready to return to work and was in the process of obtaining updated medical information and an updated return to work date from her physician.

(6) Sometime shortly before December 28, 2015, claimant realized she had not worked enough hours to for the employer to pay the health insurance premiums to cover herself and her daughter and she would be required to pay them out-of-pocket unless she performed some work for the employer. On December 28, 2015, claimant's physician was out of town and claimant spoke with the physician's nurse. Claimant explained her situation to the nurse and asked for a temporary release that would allow her to work "for the next couple of days until the doctor gets back" and she could discuss the therapist's recommendations with the physician at that time. Transcript at 31. The nurse told claimant she would do so.

(7) After claimant's conversation with the nurse on December 28, 2015, the physician's office sent an updated release to the employer stating that claimant was authorized to work five days per week for five hours. Claimant did not see the release. Subsequently, claimant and her supervisor agreed that claimant would return to work on December 29, 2015 and work for five hours.

(8) On December 29, 2015, claimant reported for work. Claimant worked 2.75 hours that day and, with her supervisor's permission left work early so she could keep an appointment with her therapist. On December 30, 2015, claimant called the employer to notify it she was unable to work that day due to her menstrual flow. On December 31, 2015 and January 1, 2016, claimant did not report to work for the same reason, and she notified the employer of those absences. Claimant also did not report for work on January 4 and 5 and 6, 2016 and notified the employer. On January 6, 2016, the employer authorized an OFLA leave to excuse claimant's absences from December 10, 2015 through December 28, 2015 and authorized the modified work schedule that the doctor's office submitted on December 28, 2015 during the period of December 29, 2015 through March 15, 2016. On approximately that same day, the employer informed claimant by email that since she had been unable to work under the modified schedule between December 30, 2015 and January 6, 2016, she would need to obtain an updated authorization from her physician to excuse those absences under OFLA. The employer asked claimant to arrange for her physician to submit any updated authorization before January 13, 2016.

(9) On January 6, 2016, claimant had an appointment with her physician and they were finally able to discuss the therapist's December 22, 2015 recommendations about an appropriate schedule under which claimant returned to work. The physician told claimant she was going to update the release to include telecommuting after claimant told the physician she was not comfortable being in the workplace when her menses were heavy. The physician did not tell claimant the date she intended to release claimant to

return to work or that the release the nurse had sent to the employer was going to remain in effect and was not temporary. During that appointment, the physician changed the medicines she had prescribed for claimant.

(10) After claimant met with her physician, claimant concluded she was not ready to return to work even on a modified schedule. On January 7, 2016, claimant notified the employer she was not able to work that day. Claimant thought a short visit to Florida, where her family resided and a former therapist or spiritual healer practiced would be of benefit. Claimant thought she would be ready to return to work on January 18, 2016. On January 8, 2016, claimant called her physician's office and spoke to the physician's nurse. Claimant told the nurse she wanted to visit Florida before she expected she would be able to return to work on January 18, 2016. The nurse told claimant, "That's great" and that the physician would speak to claimant when she returned. Transcript at 29, 31. The nurse did not tell claimant she was already released to work, and under that existing release should be at work at that time and during the week she planned to be in Florida. Claimant interpreted the nurse's comment, and failure to raise any objections to the trip, as expressing approval for the trip and of a return to work date of January 18, 2016, and indicating that the physician would provide a modified work release to that effect.

(11) Also on January 8, 2016, claimant sent an email to the employer informing it she was going to be absent for work. In that email claimant told the employer she had recently seen her physician, that an updated medical release would be forthcoming and that she was going to return to work on January 18, 2016. The employer did not respond to claimant's email that day. On January 8, 2016, claimant purchased a round-trip plane ticket to travel to Florida on January 9, 2016 and a return date of January 16, 2016. Claimant left for Florida on January 9, 2016.

(12) Sometime after January 8, 2016, the employer contacted claimant's physician's office for an updated medical release setting forth a return to work date of January 18, 2016 for claimant. On January 11, 2016, the physician's nurse called the employer to clarify what the employer needed from the physician's office. At that time, the nurse told the employer that the physician believed claimant was able to return to work, and the physician was not going to change the medical release that was currently in effect.

(13) On January 11, 2016 at 4:34 p.m., the employer sent an email to claimant stating that she needed to return to work the following day, on January 12, 2016, or "action would be taken." Transcript at 34. The email stated that the physician's office had not provided an updated release, but had confirmed there would be no changes to the existing release. The email also stated that, in view of the physician's position, claimant's absences after December 31, 2016 were all unexcused and not protected under FMLA. Claimant replied to the employer's email stating she was not physically able to return to work on January 12, 2016 and intended to return on January 18, 2016 as stated in the email of January 8, 2016. When these mails were exchanged, claimant was in Florida.

(14) On January 12, 2016, the employer called the physician's office to determine if there had been some miscommunication between claimant and the physician about claimant's return to work date. The employer spoke to the same nurse as before, who gave the same information as before.

(15) On January 12, 2016, the employer sent an email to claimant, who was still in Florida, stating that based on communications with the physician's office, claimant needed to provide an updated release

from the physician by the close of business on January 12, 2016 or her absences would be unexcused after December 29, 2015. Claimant replied to this email stating that she had not seen any of the medical releases provided to the employer, but they were “supposed to be different” from what the employer had represented. Transcript at 38. Claimant went on to state that she “didn’t know what was going on” and she would try to contact her physician, although it often took several days for her to reach the physician after she made initial contact with the physician’s office. Claimant also stated “I or the doctor will be in touch with you [the employer] after we [claimant and the physician] have touched base.” Transcript at 38. In response, the employer sent copy of the existing release to claimant. Still on January 12, 2016, claimant replied stating she was trying to contact her physician but had not heard back and she would contact the employer when she did.

(16) On January 12, 2016, the employer called claimant notifying her she would be discharged if she did not submit that day an updated release excusing her absences. Claimant was unable to reach the physician that day.

(17) On January 13, 2016, the employer discharged claimant for not providing an updated medical release to the employer.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

In Hearing Decision 16-UI-55795, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned claimant knew or should have known as of January 11, 2016 that the employer expected her to report for work on January 12, 2016, since the release that was in effect at that time stated she was able to work five hours per day five days per week. Hearing Decision 16-UI-55795 at 4. The ALJ implicitly concluded that claimant should not have relied on the nurse’s apparent approval of her trip to Florida before she left Oregon and became physically report for work on January 12, 2016 as the employer instructed. We disagree that claimant’s failure to report for work on January 12, 2016 was a wantonly negligent violation of the employer’s instruction.

In her analysis, the ALJ neglected to consider whether claimant was aware or reasonably aware that the release the nurse sent to the employer on December 29, 2015 was more than a temporary one. It was not challenged at hearing that claimant did not receive a copy of that release until the employer sent it to her on January 12, 2016, well after she had left Oregon for Florida. Nor was it disputed that, as of the date claimant left for Florida, she sincerely believed that her return to work date under the modified schedule was January 18, 2016. Since no evidence supports that claimant knew she was expected to work on January 12, 2016 under the release then in effect, it is difficult to conclude that her trip to Florida, which made it impossible for her to report for work on January 12, 2016, was a wantonly negligent violation of

the employer's standards. Notably, claimant intended to and did return to Oregon from Florida in sufficient time to allow her to report for work on January 18, 2016, the return to work date she thought the physician was going to or had authorized.

Fairly construed, his record shows that there was substantial confusion between what claimant thought she and the physician's office had agreed on as her return to work date and what the physician's office communicated to the employer. From the contents of claimant's emails to the employer beginning on January 8, 2016, it is apparent that she was under an impression about her return to work date that was markedly different from that which the physician's office was communicating to the employer. Given that claimant saw her physician on January 6, 2016 to discuss her return to work and on January 8, 2016, when claimant told the nurse she wanted to travel for a short visit to Florida and would be back in time to return to work on January 18, 2016, the nurse did not express disapproval or object that claimant was required to be at work during the work week beginning January 10, 2016, it is plausible claimant believed the physician's office had already communicated or intended to communicate a January 18, 2016 return to work date to the employer. While, based on the communications to it from the physician's office, the employer's expectation that she was going to be at work during the week including January 12, 2016 was reasonable, the issue is not what the employer reasonably believed but whether claimant's failure to report for work was a wantonly negligent violation of the employer's expectations. On the record as it exists, it is most likely that claimant sincerely believed that her physician's office had already or would update claimant's medical release to authorize her absence from until January 18, 2016, which excused the time she was in Florida. Although claimant might have been wrong in believing that she was excused from work, good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer did not meet its burden to show claimant's failure to report for work on and after January 12, 2016 was misconduct.

Although the employer discharged claimant, it did not show that this discharge was based on unexcused misconduct. Claimant is not disqualified from receiving unemployment benefits

DECISION: Hearing Decision 16-UI-55795 is set aside, as outlined above.

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

DATE of Service: May 18, 2016

NOTE: 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.

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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