

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0604

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 94756). Claimant filed a timely request for hearing. On May 5, 2016, ALJ M. Davis conducted a hearing, and on May 9, 2016 issued Hearing Decision 16-UI-59215, concluding the employer discharged claimant for misconduct. On May 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a pharmacy technician until shortly before August 22, 2015. On August 22, 2015, the employer reinstated claimant to her position until she was discharged effective March 2, 2016.

(2) The employer expected claimant to report for work as scheduled and, if she was unable to work for an extended period, to provide an explanation to the employer for the absences. Claimant understood the employer's expectations.

(3) In 2012, claimant was diagnosed with anxiety. Beginning around November 2015, claimant's anxiety became severe and she did not report for work after approximately November 15, 2015. During the time she was absent from work, claimant received treatment from a physician. From November 18, 2015 through November 25, 2015, the employer approved a leave for claimant under the federal Family Medical Leave Act (FMLA). Sometime after December 14, 2015, claimant requested another FMLA leave to cover her absences from November 27, 2015 through December 14, 2015. That leave was denied. On January 8, 2016, claimant requested a FMLA leave of absence from December 15, 2015 through January 10, 2016. Although claimant requested that her physician provide the necessary certification for the leave she had requested, the physician did not deliver the necessary paperwork to the employer. Claimant's third requested leave was denied. The pharmacy manager gave claimant a list of reasons that would support her request for further leave, but the employer did not receive additional paperwork from claimant or her physician.

(4) Throughout January and February 2016, claimant was not thinking or communicating clearly or acting responsibly as a consequence of her mental health issues. On January 8, 2016, claimant told the pharmacy manager she was going to return to work on January 11, 2016. On January 11, 2016, claimant notified her manager she had problems with her car and would not absent from work that day, but would report for work on January 12, 2016. Thereafter, claimant promised the pharmacy manager she was coming to work on several successive days, but on each day would notify the pharmacy manager she was unable to report for work, often without providing a reason. Claimant's behavior continued through February 2016.

(5) On February 12, 2016, the employer notified claimant by letter that the employer's benefit administrator had denied one of claimant's most recently requested FMLA leave requests, and that all of her absences after January 26, 2016, the last day she had promised she would return to work, were unprotected absences. The employer's letter informed claimant she needed to contact the employer on or before February 19, 2016 to provide a firm return to work date and, in advance of that return date, to provide a release from her physician allowing her to work. On February 18, 2016, claimant informed the pharmacy manager that she would return to work on February 22, 2016. On February 22, 2016, claimant did not return to work and did not notify the employer that she was going to absent or give a reason for that absence.

(6) On February 29, 2016, the employer notified claimant by letter that if she did not report for work on March 2, 2016, she would be discharged. Sometime before March 2, 2016, claimant's union representative contacted the employer, told it claimant was not able to return to work on March 2, 2016 and wanted to resign in lieu of termination. The employer agreed to meet with claimant on March 2, 2016 to discuss her resignation.

(7) On March 2, 2016, claimant met with the pharmacy manager and a human resources representative. Those employer representatives presented claimant with a separation agreement for signature and told her she would be permitted to resign if she returned that agreement within a week with her own and her union representative's signatures. If not, they told claimant she would be discharged effective March 2, 2016.

(8) By March 9, 2016, claimant had not returned the signed separation agreement to the employer. On that day, the employer discharged claimant effective March 2, 2016 for job abandonment by excessive unprotect 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. 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. Absences due to illness or other physical and mental disabilities 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-59215, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant's failure to report for 55 scheduled shifts when her absences were not protected by a leave and her inconsistencies in telling the pharmacy manager she was going to be at work and then failing to report to work, were wantonly negligent since they demonstrated an indifference to the employer's standards of behavior. Hearing Decision 16-UI-59215 at 4. We disagree.

Here, although the employer had business reasons to discharge claimant for 55 unexcused absences in less than three months, to disqualify her from unemployment benefits, it must show that those absences were attributable to claimant's willful or wantonly negligent behavior. The employer did not dispute at hearing that the majority of claimant's absences from work were attributable to her mental health condition and illness. Absences due to illness are expressly not misconduct or wantonly negligent behavior, and the applicable regulation does not require that the absences be protected by a leave in order not to constitute misconduct. *See* OAR 471-030-0038(3)(b). While indifference to the consequences one's actions is part of the standard for showing wantonly negligent behavior, the ALJ neglected to mention that the indifference must be accompanied by consciously aware mental state to establish the state of mind required for wantonly negligent behavior. *See* OAR 471-030-0038(1)(c). As a matter of logic, if claimant did not act in reasonable compliance with the employer's standards, did not provide explanations for her absences to the employer and was inconsistent in promising to return to work due to her mental state she likely did not have the conscious awareness of her behavior for it to have been wantonly negligent behavior. In view of claimant's mental health issues, a likely explanation for her inconsistent behaviors surrounding her failures to report for work was listlessness and apathy attributable to her emotional state. On these facts, to the extent claimant did not act reasonably in meeting the employer's expectations that she would explain her absences, her behavior likely was not wantonly negligent since it was based on an underlying illness and not within her control. Absent evidence from the employer to rebut claimant's testimony about her state of mind, the employer did not demonstrate claimant's absences or her behavior surrounding those absences was wantonly negligent or was misconduct.

Although the employer discharged claimant, it did not show claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-59215 is set aside, as outlined above.

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

DATE of Service: July 6, 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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