

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0926

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 95433). The employer filed a timely request for hearing. On July 14, 2016, ALJ Menegat conducted a hearing, and on July 15, 2016 issued Hearing Decision 16-UI-63820, affirming the Department's decision. On August 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Walmart Associates, Inc. employed claimant as an electronics department sales floor technician from July 5, 2012 to May 12, 2016.

(2) The employer expected employees to report to work for their scheduled shifts. The employer assigned points for each attendance incident, and discharged employees if they accrued nine points within a rolling six-month period. Claimant understood the employer's expectations.

(3) The employer had a leave of absence policy under which employees unable to attend work for certain reasons could request and receive time off work without accruing attendance points. In order for an individual to qualify, however, the individual had to notify the employer of the reason for the leave.

(4) On May 8, 2016, the employer scheduled claimant to work. Claimant was aware he was scheduled to work and planned to attend. While claimant was preparing for work, his mother called and told him that his father was going to the hospital because of a medical condition. Claimant was alarmed and began to suffer a panic attack. He called the employer and asked to speak with a manager to report that he was going to be absent from work, but the store operator dropped the call while transferring claimant to a manager. Claimant tried to call again but was unable to get through to anyone. Claimant's May 8, 2016 absence resulted in claimant exceeding nine points in the rolling six-month period.

(5) On May 8, 2016, claimant traveled to the hospital to meet his parents, but by the time he arrived his father had received treatment and been discharged home. Claimant then traveled to his parents' home and remained there for three days. During the three day period, claimant's panic attack worsened and he was unable to function for several days. He missed another shift of work on May 11, 2016.

(6) On May 12, 2016, claimant reported to the workplace. The employer notified claimant that was discharged because missing work on May 8, 2016 caused him to exceed the employer's attendance point limits.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 exigent circumstances are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant missed a scheduled shift on May 11th, the employer had determined at the time of May 8th absence that claimant had accrued enough attendance points to warrant discharge. It appears, therefore, that regardless whether claimant reported to work or was absent on May 11th, the employer would have discharged him based on the May 8th absence. Therefore, the proximate cause of claimant's discharge was his May 8th absence, and claimant's conduct related to that absence is the focus of the misconduct analysis in this case.

The employer had the right to expect claimant to report to work as scheduled, and claimant understood the expectation. He violated the employer's expectation on May 8, 2016 when he failed to report to work for a scheduled shift. However, for claimant's violation to be considered disqualifying misconduct for purposes of unemployment insurance, the employer must establish that his violation was done willfully or with wanton negligence. The employer in this case did not meet its burden.

Claimant's absence from work was not willful or wantonly negligent. The absence was due to his father's sudden serious illness. Absences due to illness of the individual are not misconduct, and we have, customarily, extended that exception to include absences due to the illness or disability of individuals' immediate family members. Even if we did not extend the exception in this case, the outcome would remain the same. Claimant did not act on May 8th with the intent of missing work, he acted with the intent of being with his seriously ill father. Missing work was not the intent of claimant's conduct, it was the result. Therefore, he did not willfully violate the employer's expectations on May 8th. Nor was his violation wantonly negligent, because his attempts to call in and

notify a manager of his absence until his own panic attacks prevented him from making further efforts demonstrated that he was not consciously indifferent to the employer's expectation that he report to work.

This record shows that the employer might have excused claimant's absences had claimant successfully reported his absence on May 8th, or had he not been prevented by reason of his panic attack from making contact with the employer that day or shortly thereafter to explain the reasons for his absence and request leave. Absent evidence that claimant acted willfully or with wanton negligence with respect to his absence, however, the fact that claimant might somehow have avoided discharge after-the-fact is immaterial to the misconduct analysis. Put another way, the employer did not discharge claimant for failing to request a leave of absence, it discharged him for missing work, and, therefore, the focus of the misconduct analysis is appropriately placed on claimant's conduct related to the absence rather than his failure to request a leave of absence.

For those reasons we conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-63820 is affirmed.

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

DATE of Service: August 26, 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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