

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0933

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 124436). The employer filed a timely request for hearing. On July 20, 2016, ALJ Wyatt conducted a hearing at which claimant did not appear, and on July 27, 2016 issued Hearing Decision 16-UI-64552, affirming the Department's decision. On August 10, 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) Nature Bake employed claimant until February 3, 2016, last as a building maintenance technician.

(2) On February 26, 2016, the employer approved an intermittent leave for claimant under the Family Medical Leave Act (FMLA) to enable him to care for his ill father.

(3) The employer expected claimant to notify his supervisor before his shift began if he was unable to report for work, even if the absence was excused under FMLA. The employer had an attendance policy that allowed an employee to accrue a certain number occurrence points in a rolling twelve month period before the employee was subject to discharge. Claimant understood the employer's expectations and attendance policy.

(4) On Tuesday, January 26, 2016, the beginning of claimant's work week, claimant did not call his supervisor in advance of his shift and did not report for work. Exhibit 1 at 4. On January 27, 2016, claimant notified his supervisor by text message that he would not be reporting for work because he was at the hospital with his father. *Id.* On January 28 and 29, 2016, claimant did not report for work and did not call to notify the employer in advance of his shift. Sometime after his shift began on January 28, 2016, claimant sent a text message to his supervisor that he was absent that day for FMLA-related reasons. Both claimant's supervisor and the employer's human resources representative attempted to

contact claimant, but could not leave messages because his voice mail box was full and not accepting any new messages. The human resources representative also sent claimant a text message stating that she wanted to speak with him. *Id.*; Audio at ~17:24. Saturday, January 30, 2016 was the end of claimant's work week. On that day, claimant did not report for work or notify the employer that he was going to be absent.

(5) On February 2, 2016, claimant's next work day, claimant did not report for work and did not notify the employer he was going to be absent. On that day, claimant sent a text message to the human resources representative stating that he did not receive the text message she sent him on January 29th because he had dropped his phone in the toilet. In that message, claimant asked to meet with the representative. In response, the human resources representative left a voicemail message on claimant's phone telling him she would meet with him at 10:00 a.m. on February 3, 2016.

(6) On February 3, 2016, claimant sent a text message to the human resources representative before 10:00 a.m. to inform her that he was at the hospital and was not going to be able to meet with her that day. Audio at ~16:31. As of February 3, 2016, claimant had accrued sufficient attendance occurrence points to allow the employer to discharge him under its attendance policy. On that day, the employer notified claimant by letter that he was discharged for violations of the attendance policy. Exhibit 1 at 2. However, the employer would not have discharged claimant if he had appeared for February 3, 2016 meeting, if he had contacted the employer and more fully explained the reasons he was unable to attend the meeting or if he had proposed an alternate date and time for the meeting. Audio at ~22:53, ~24:30.

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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's written argument stated that claimant was discharged for his failures to notify the employer of his absences on January 26 and 30, 2016 and had nothing to do with missing the meeting scheduled for February 3, 2016, the employer's witness at hearing stated with certainty that the employer would not have discharged claimant for any alleged violations of the employer's attendance policy if he had appeared to attend the February 3, 2016 meeting, if he had more fully explained his inability to attend that meeting or if he had tried to re-schedule the meeting. Employer's Written Argument at 2; Audio at ~22:53, ~24:30. Since any of those actions would have averted claimant's discharge, it can only be concluded that the employer expected him to take at least one of them and claimant's failure to do so was the proximate cause of his discharge.

Claimant notified the employer's human resources representative in advance of the meeting on February 3, 2016 that he was unable to attend it because he was at the hospital. In light of claimant's communications near in time to February 3, 2016, it was not unreasonable for claimant to think that by mentioning his presence at the hospital he was sufficiently explaining that his father's condition

necessitated his absence. It also was not unreasonable for claimant to think that by contacting the human resources representative before the time scheduled for the meeting he was giving adequate advance notice of his inability to attend the meeting, and he was complying with any applicable notification standards the employer might have. There was no indication in the record that any employer representative told claimant it was imperative that he attend the meeting and there were no circumstances which would justify his non-attendance, or that if he was unable to attend the employer might discharge him if he did offer a more detailed explanation than he had already provided for his absence or if he did not propose an alternate meeting time or offer to meet at another time. There was no basis for claimant to know or reasonably understand that his inability to attend the meeting would not be excused as a FMLA-related absence or otherwise, or that his job would be in jeopardy if his communications with the employer about his inability to attend did not contain certain contents. Because claimant was not reasonably on notice of the employer's expectations underlying the proximate cause of his discharge, claimant's failure to comply with those expectations was not willful or wantonly negligent, and was not misconduct. The employer did not meet its burden to show that it discharged claimant for disqualifying misconduct.

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

DECISION: Hearing Decision 16-UI-64552 is affirmed.

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

DATE of Service: September 13, 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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