

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0420

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72054). Claimant filed a timely request for hearing. On March 28, 2017, ALJ Lohr conducted a hearing and on issued Hearing Decision 17-UI-79785, concluding the employer discharged claimant, but not for misconduct. On April 6, 2017, 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) David S. Woodson employed claimant as a housecleaner on a cleaning crew from August 9, 2016 until December 5, 2016. The employer cleaned clients' homes.

(2) The employer expected claimant to report for work on time and to provide reasonable notice if she was going to be absent. Claimant understood the employer's expectations as a matter of common sense.

(3) On November 29, 2016, claimant called the employer to report that she was unable to work her scheduled shift that day because she had a migraine headache. As of November 29, 2016, the employer considered that claimant had been absent or tardy to work excessively.

(4) On December 5, 2016, the employer discharged claimant for her absence on November 29, 2016.

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 connected with work. 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden show claimant's

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

At hearing, and after being specifically questioned about the reasons it discharged claimant, the employer's witness, who was a co-owner, testified that the employer did so because of claimant's "poor attendance" "absenteeism" and "poor performance," and that the event that precipitated the discharge was claimant's failure to report for work on November 29, 2016 due to a migraine headache. Audio at ~10:35, ~11:21, ~19:23, ~45:26. Since claimant's absence on November 29th was the proximate cause of claimant's discharge, it is the proper focus of the discharge analysis. For that reason, we do not consider the other dissatisfactions the employer raised at hearing about claimant, including excessive absenteeism and tardiness on unspecified dates, failure to have reliable transportation to work, entry into areas in houses which did not require cleaning, and suspicions of theft that the employer conceded it could not prove. Audio at ~15:04, ~18:40, ~19:45, ~24:26, ~44:03. The employer did not dispute that the reason for claimant's absence on November 29, 2016 was that she was experiencing a migraine headache. However, OAR 471-030-0038(3)(b) plainly states that absences due to illness, like the migraine headache that claimant had, are not misconduct. On this record, the employer did not show that it discharged claimant for engaging in misconduct.

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

DECISION: Hearing Decision 17-UI-79785 is affirmed.

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

DATE of Service: May 1, 2017

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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