

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0438

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 75551). The employer filed a timely request for hearing. On April 3, 2017, ALJ Snyder conducted a hearing, and on April 7, 2017 issued Hearing Decision 17-UI-80604, affirming the Department's decision. On April 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Roni Trautman employed claimant as a private caregiver until October 20, 2016.

(2) The employer expected claimant to report to work when scheduled. During the five and one-half months preceding October 19, 2016, claimant missed approximately 100 shifts for reasons including family obligations and illness, among other things. Although claimant either covered her missed shifts or pre-arranged planned absences, the employer considered claimant's absences excessive and reprimanded her on numerous occasions. The employer also thought claimant provided inadequate notice of some unplanned absences, coerced newer employees into covering some of her shifts, and had an unsatisfactory work performance.

(3) Between October 11, 2016 and October 16, 2016, claimant experienced ill health. She went to the emergency room and was hospitalized on two occasions. She was prescribed heavy antibiotics and narcotic pain medication.

(4) On October 19, 2016, the employer scheduled claimant to work. Claimant was still ill, experienced severe pain that left her unable to walk, and took prescription medications that affected her ability to work. Claimant contacted the employer prior to her shift and notified the employer that she would be absent from work.

(5) On October 20, 2016, the employer discharged claimant for excessive absenteeism.

CONCLUSIONS AND REASONS: We agree with the Department and 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 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 had serious ongoing concerns about claimant's work performance and absenteeism, but did not decide to discharge claimant until she missed work on October 19, 2016. Because that absence was the proximate cause of her discharge, it is the initial focus of the misconduct analysis. Only if we determine that claimant's absence on that occasion was the result of willful or wantonly negligent conduct on claimant's part would we then analyze the employer's other allegations of misconduct.

On October 19, 2016, claimant was too ill to work. She notified the employer in advance that she was going to be absent, then missed her scheduled shift. Although the absence was intentional and violated the employer's expectations, because the absence was due to illness it was not misconduct for purposes of unemployment insurance benefits. Because claimant's discharge was not for misconduct, she is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-80604 is affirmed.

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

DATE of Service: May 2, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.