EO: 200
BYE: 201752

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0515

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 120757). Claimant filed a timely request for hearing. On April 21, 2017, ALJ Amesbury conducted a hearing, and on April 27, 2017, issued Hearing Decision 17-UI-81948, reversing the administrative decision and concluding that the employer discharged claimant, but not for misconduct. On May 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument consisted of new information that was not offered into evidence at the hearing. The employer failed to demonstrate that any circumstances beyond its reasonable control prevented it from presenting this information at the hearing, as required by OAR 471-041-0090(2) (October 29, 2006). We therefore considered only information received into evidence at the hearing in reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Betty Lou's employed claimant as a packaging worker from August 18, 2014 until February 28, 2017.

(2) The employer's attendance policy specified that employees were limited to five occurrences or 15 days of absence per year. An occurrence was defined as an absence, no matter how long. For example, if an employee was ill and unable to work on two successive days, the employee would accrue one occurrence and two days of absence. The employer considered an incident of tardiness to be an occurrence. Exhibit 1. Employees received 40 hours of paid time (PTO), and this PTO could be used to excuse their absences. The employer utilized a policy of progressive discipline in regard to employee violations of its attendance policy. After accruing a third occurrence under the policy, an employee received a coaching. After the fourth occurrence, an employee received a written warning; after the fifth occurrence, a final warning. After accruing a sixth occurrence under the policy, the employee was discharged. Transcript at 13. Claimant knew about and understood the employer's policy.

(3) During 2016, claimant accrued at least five occurrences. On October 24, 2016, the employer gave claimant a final warning regarding his violations of the attendance policy.

(4) From January 3 through February 24, 2017, claimant was absent from work at total of 22 times. On ten of these days, claimant was absent because was ill, attending medical appointments, or at the hospital.[1] On nine of these days, claimant was absent because adverse weather conditions prevented him from getting to work.[2] On January 20 and 21, claimant was absent because his car would not start. On January 30, claimant was absent because he was attending a funeral. The employer excused 11 of these absences.

(5) On February 27, 2017, claimant contacted his employer and explained that he could not report for work because icy road conditions prevented him from safely traveling to the workplace. Also on February 27, the employer discharged claimant for violating its attendance policy by accruing excessive absences.

CONCLUSION 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 standard**s** 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).

On February 27, 2017, the employer discharged claimant it determined that claimant had accrued enough absences or occurrences under its attendance policy to warrant discharge. Claimant's February 27 absence was the proximate cause of his discharge and will therefore be the focus of our misconduct analysis.

Claimant knew about and understood the employer's attendance policy which required him to report for his scheduled shifts, and which subjected him to discipline up to and including discharge if he accrued excessive absences. By failing to report for work on February 27, 2017, claimant violated this policy. For claimant's violation to be considered misconduct that disqualifies him from the receipt of unemployment benefits, the employer must establish that the violation resulted from claimant's willful or wantonly negligent behavior. The employer failed to meet its burden. Claimant was unable to report for work on February 27 because of adverse weather conditions. "Exigent" is defined as "pressing;

[1] Claimant was absent for medical reasons on: January 20 and 31; and February 2, 8, 9, and 13-17.
[2] Claimant was absent due to adverse weather conditions on: January 3-5, 11-12, and 19; and February 3, 6, and 24.

demanding."[3] Claimant's inability to work on February 27 resulted from the "demanding" or "pressing" circumstances icy roads that made travel to his job unsafe. Absences due to exigent circumstances are not misconduct.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-81948 is affirmed.

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

DATE of Service: May 24, 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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[3] https://en.oxforddictionaries.com/definition/exigent.