

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0553

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 73554). The employer filed a timely request for hearing. On May 1, 2017 ALJ S. Lee conducted a hearing at which claimant failed to appear, and on May 4, 2017 issued Hearing Decision 17-UI-82614, affirming the Department's decision. On May 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sunrise Enterprises of Roseburg, Inc. employed claimant from October 21, 2015 until October 25, 2016, last as a direct support professional. Claimant worked for the employer part-time.

(2) At the time claimant was hired, she had medical issues involving her knee and her hip. Sometime before September 23, 2016, claimant began to experience severe knee pain. She wore a brace to try to ease the pain enough to allow her to work. Claimant was absent from scheduled work due to her knee on September 24, 26, 29, 30 and October 1 and 3, 2016. The employer approved claimant's absences on those days as personal leave. Sometime before October 10, 2016, claimant went to an urgent care clinic for her pain and was restricted from working for two weeks.

(3) As of October 8, 2016, claimant had exhausted all personal leave that was available to her. However, claimant was still unable to return to work at that time due to her knee and hip. On October 8, 2016, claimant called the employer's human resources director to determine what options were available to her since she was not able to work. The director told claimant that since she did not have any remaining personal leave that she could use and did not qualify for a protected leave under federal or state laws, the only alternative remaining for her was to request a permissive leave from the employer's administrative team. Although the administrative team had the discretion to approve any such leave, it also had the discretion to deny it.

(4) On October 11, 2016, the employer received a letter dated October 10, 2016 from claimant requesting a permissive leave due to her medical condition and her inability to work. In the letter, claimant stated that she was asking for a leave until “the problem was taken care of,” that she did not know how long it would take to resolve her condition, that she was preliminarily asking for a 30 day leave and that she would keep the employer informed as to her medical status and when she could return to work. Exhibit 1 at 7.

(5) On October 24, 2016, the employer’s human resources director responded by letter to claimant’s request for a leave of absence. The letter informed claimant that the administrative team had declined to allow her a leave of absence, but that she could apply for any positions that the employer had open when she was able to return to work. The letter also enclosed an “administrative termination of [claimant’s] employment” since claimant was “not currently available to work and [did] not fall under any protected employment status.” Exhibit 1 at 8.

(6) On October 24, 2016, by its letter, the employer discharged claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Although the nature of claimant’s work separation was not directly raised during the hearing, the employer’s form of “administrative termination” stated that claimant was not discharged and that the reason for the work separation was “Other – Not available for work.” Exhibit 1 at 10. However, OAR 471-030-0038(2)(a) (August 3, 2011) only allows for two types of separation classifications: discharges or voluntary leavings. Therefore, the first issue this case presents is the nature of claimant’s work separation, if any. If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation is a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although claimant was not able to work, her October 10, 2016 letter shows that she was not willing to give up her employment or to leave it despite her inability to work at that time. However, the employer’s October 24, 2016 letter to claimant shows that it was unwilling to continue to employ claimant because she was not able to work at that time. Because the willingness or unwillingness to continue the employment relationship is a central consideration in characterizing the nature of the work separation, and the employer was the party that was unwilling to continue that relationship as of October 24, 2016, claimant’s separation was a discharge on October 24, 2016, the date of the notification letter.

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) 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 physical disabilities are not misconduct. OAR 471-030-0038(3)(b). The

employer carries the burden to show claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer did not dispute at hearing that claimant was legitimately physically unable to work at the time it discharged her. That claimant was not able to work was not a volitional circumstance, and reporting for work was not a matter within her reasonable control. While the employer's witness at hearing contended, in essence, that the employer had no choice other than to discharge claimant since it needed a person working in her position, the issue for purposes of determining whether claimant is disqualified from benefits is not whether the employer was justified in discharging claimant, but whether a willful or wantonly negligent violation of the employer's standards led to claimant's discharge. An inability to work due to illness or physical disabilities is not the result of a claimant's willful or wantonly negligent violation of the employer's standards and is not misconduct. On this record, the employer did not meet its burden to show that it discharged claimant for misconduct.

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

DECISION: Hearing Decision 17-UI-82614 is affirmed.

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

DATE of Service: June 6, 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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