

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1190

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103135). The employer filed a timely request for hearing. On September 29, 2017, ALJ S. Lee conducted a hearing, and on October 10, 2017 issued Hearing Decision 17-UI-94164, affirming the Department's decision. On October 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Freres Lumber Co. Inc. employed claimant as a spotter from June 8, 2009 to May 30, 2017.

(2) The employer expected employees to report to work as scheduled. The employer prohibited excessive absenteeism but its policy did not specify what excessive absenteeism was and left the decision about whether absenteeism was excessive to the plant manager's discretion. The employer's attendance policy required one hour advance notice to a particular phone number if an employee was not going to report to work as scheduled, and required employees to provide a doctor's note excusing absences lasting three or more consecutive days. Claimant understood the employer's expectations with respect to attendance and absenteeism notifications.

(3) Claimant had absences due to one injury in 2015 and another in late 2016. The employer considered claimant's absences excessive. On April 11, 2017, the employer's plant manager gave claimant a final warning for attendance.

(4) On May 24, 2017, claimant left work before the end of his shift because he felt ill. On May 25, 2017, claimant was still ill and notified the employer of his absence from work at least one hour prior to his shift. On May 26, 2017, claimant obtained a doctor's note excusing him from those days of work.

(5) The employer had scheduled claimant to work the graveyard shift on May 26, 2017. Prior to his shift, claimant notified the graveyard shift supervisor that he was ill and would not be able to report to

work. On May 27, 2017, claimant was again scheduled to work. He was too ill to work, and too ill to report his absence to the employer. He missed work without notifying the employer of his absence.

(6) Claimant subsequently obtained a doctor's note excusing him from work on May 26, 2017 and May 27, 2017. On May 29, 2017, claimant gave that doctor's note to the graveyard shift supervisor.

(7) On May 30, 2017, the employer's plant manager discharged claimant for excessive absenteeism and for failing to notify the employer of his May 27, 2017 absence from work.

CONCLUSIONS 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 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. 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 are not misconduct. OAR 471-030-0038(3)(b).

The employer expected claimant to report to work as scheduled, avoid excessive absenteeism, and notify the employer of any absences an hour before his scheduled shifts. Claimant understood the employer's expectations and violated each of them. For claimant's violations to be considered misconduct, however, the violations must have been the result of willful or wantonly negligent conduct on claimant's part, and must not be excusable under Employment Department law.

To the extent the employer discharged claimant for excessive absenteeism, it appears the proximate cause of the discharge was claimant's absence from work between May 24, 2017 and May 27, 2017. Each of claimant's absences during that period was the result of illness that rendered him unable to work. Under the Department's rules, absences due to illness are not misconduct. Therefore, even though claimant was repeatedly absent, and the employer determined his absences violated its policies and expectations, his discharge based on those absences was not disqualifying misconduct.

To the extent the employer also discharged claimant for failing to report his May 27th absence to the employer as required, claimant's discharge was also not for disqualifying misconduct. Although claimant violated the employer's expectation that he notify the employer of his absence at least an hour before his scheduled shift, the violation was not intentional or the result of his conscious indifference to the employer's expectation that he notify the employer that he was going to be absent from work; rather, it occurred because claimant was, at the time, too ill to comply with the employer's expectation that he do so. Conduct that occurs as the result of illness, even if it violates the employer's otherwise reasonable expectations, is not considered misconduct for purposes of unemployment insurance benefits.

For the foregoing reasons, claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-94164 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 14, 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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