

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1401

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 135628). The employer filed a timely request for hearing. On November 15, 2017, ALJ Lease conducted a hearing, and on November 16, 2017 issued Hearing Decision 17-UI-97089, affirming the Department's decision. On December 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching his decision.

FINDINGS OF FACT: (1) Spirit Mountain Gaming employed claimant as a cage cashier and a main banker from August 7, 2001 until July 3, 2017.

(2) The employer had an attendance policy under which an employee would be discharged if the employee accumulated more than 13 unscheduled absences during a rolling 12 month period. Scheduled absences were not counted as absences for purposes of accumulating absences under the employer's policy. Scheduled absences included absences covered under an employer-approved personal leave or an approved leave under the Family Medical Leave Act (FMLA). Claimant understood the employer's attendance policy and the number of unscheduled absences she was allowed to accumulate during a twelve month period before being discharged.

(3) On June 29 and July 1, 2017, claimant accumulated her 12th and 13th unscheduled absences under the employer's attendance policy. On July 2, 2017, claimant was absent from work due to issues relating gallstones and depression and stress. Claimant had been treated for depression for several years. Claimant recent stress was so severe that she was losing her hair and was not able to sleep. When claimant called the employer on July 2, 2017 to notify it that she was going to be absent, claimant

acknowledged that this was going to be her 14th unscheduled absence in 12 months and that she probably would be discharged as a result. Claimant did not disclose the reasons for her absence on July 2, 2017 to the employer because she was embarrassed by them. Claimant did not seek a FMLA leave or a personal leave to cover that final absence because an employer representative had previously told her when at 12 or 13 unscheduled absences that the employer would not approve a leave of absence when her unscheduled absences were so numerous.

(4) On July 3, 2017, the employer discharged claimant under its attendance policy for having accumulated on July 2, 2017 a 14th unscheduled absence during a rolling 12 month period.

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 or physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At the outset, while the employer discharged claimant for having accumulated an excessive number of absences under its attendance policy, EAB customarily evaluates only the final absence to determine if claimant engaged in misconduct for which the employer discharged her. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, claimant's absence on July 2, 2017 is the initial focus of the misconduct analysis.

It was not disputed that claimant's absence on July 2, 2017 was due to illness, specifically to gallstones, a physical condition, and to depression, a mental health condition. Such absences are specifically exempted from constituting misconduct under OAR 471-030-0038(3)(b). Regardless of the implications of OAR 471-030-0038(3)(b) to claimant's discharge, the employer took the position at hearing and in its written argument that it was justified in discharging claimant for accruing a 14th absence even if that absence was caused by physical or mental illness because claimant should have protected herself against the application of the employer's attendance policy to that absence by seeking a leave that would have exempted it from the employer's policy. However, the issue is not whether the employer's policy was or should have been applicable to claimant's final absence on July 2, 2017 or whether claimant could have taken steps to avoid the application of the policy, but whether that absence on July 2, 2017 was due to willful or wantonly negligent misconduct that would disqualify claimant from benefits. Since the reasons underlying that absence are exempted from constituting misconduct, the employer did not meet its burden to show that it discharged claimant for disqualifying misconduct.

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

DECISION: Hearing Decision 17-UI-97089 is affirmed.

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

DATE of Service: January 10, 2018

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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