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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0100

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On October 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143929). Claimant filed a timely request for hearing. On November 13, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 27, 2017. On November 27, 2017, ALJ Scott conducted a hearing at which the employer failed to appear, and issued Hearing Decision 17-UI-97589 concluding claimant's discharge was not for misconduct. On December 6, 2017, the employer filed a timely request to reopen the hearing. On January 11, 2017 and January 17, 2018, ALJ Scott conducted a hearing, and on January 19, 2018 issued Hearing Decision 18-UI-101233, allowing the employer's request to reopen and concluding that claimant's discharge was not for misconduct. On January 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and the employer's written argument. On *de novo* review and pursuant to ORS 657.275(2), we **adopt** the ALJ's findings of fact, analysis and conclusions regarding the request to reopen issue. The remainder of this decision focuses solely on whether claimant's work separation was disqualifying.

FINDINGS OF FACT: (1) Cascadia Behavioral Healthcare employed claimant as a counselor III from January 11, 2016 to September 19, 2017.

(2) The employer expected employees to report to work as scheduled. The employer's policy excused absences protected by sick leave, FMLA or domestic violence leave, but provided that employees were eligible to be written up if they had more than three occurrences of unprotected absences in a rolling six-month period. Prior to 2017, claimant had chronic attendance problems. On November 16, 2016, the employer gave her a written warning for excessive unprotected absences.

(3) Claimant's attendance problems continued in 2017, during which claimant's supervisor discussed claimant's attendance with her thirteen times. Claimant attempted to improve her attendance, but exhausted her protected leave accruals prior to April 2017. In February and March 2017, the employer's human resources department sent claimant instructions on "how to protect her time using FMLA." January 11, 2018 hearing, Transcript at 14. Claimant did not apply for FMLA.

(4) On April 11, 2017, April 25, 2017, May 8, 2017 and May 9, 2017, claimant reported to work late. On June 16, 2017, claimant was absent from work. On June 26, 2017, claimant reported late to work. On July 7, 2017, claimant had an unplanned absence. On July 12, 2017, July 13, 2017 and July 14, 2017, claimant was off work. On July 12, 2017 and 14, 2017, the employer gave claimant a written warning for failing to adhere to the attendance policy and some information about how to protect her time using FMLA.

(5) On July 25, 2017, claimant reported late to work. On August 7, 2017, claimant left work early. On August 9, 2017, the employer gave claimant another written warning and information about FMLA. The employer decided "if this happens again, we'll . . . consider separation." January 11, 2018 hearing, Transcript at 17. All of claimant's absences were due to illness, injury, disability, domestic violence, or unforeseen problems with her vehicle, the weather, or her family. The employer's warnings all advised claimant that being out of compliance with the attendance policy could lead to further discipline up to and including termination but did not state that claimant would be discharged because of her attendance unless she applied for FMLA.

(6) On August 21, 2017, claimant reported late to work. On August 25, 2017, claimant left work early. On August 31, 2017 and September 1, 2017 claimant did not attend work because she had a slipped disk in her back and was unable to work. On September 5, 2017, claimant turned in a doctor's note excusing her from work due to her injury. The employer informed claimant that the note did not protect her absences.

(7) On September 8, 2017, the employer's human resources department sent claimant an email stating that claimant's FMLA certification had been due on August 31, 2017, but the employer could give claimant until September 15, 2017 to submit her certification and healthcare provider form. Claimant sent a reply declining to apply for FMLA. The human resources person replied to claimant "if you don't want this to count towards the attendance policy then you should apply to protect those absences." January 11, 2018 hearing, Transcript at 34. Claimant understood that if her recent absences were not covered by FMLA the employer would dock her pay. She felt prepared to accept a pay deduction for unprotected absences, and did not reply to the human resources person.

(8) On September 18, 2017, the employer decided to discharge claimant for excessive unprotected absenteeism. On September 19, 2017, the employer discharged claimant.

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 or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, for violating the attendance policy. The final absences that caused the employer to discharge claimant when it did occurred on August 31, 2017 and September 1, 2017, when claimant missed two days of work because she had a slipped disk. Those two absences were unprotected by sick leave, FMLA or domestic violence leave, and, when considered with claimant's attendance history, violated the employer's policy prohibiting more than three unprotected absences in a rolling six-month period. However, Oregon Employment law provides that absences due to illness or other physical disabilities are not misconduct. Therefore, regardless of the fact that the absences violated the employer's attendance policy, the absences are not misconduct, and to the extent the discharge was based on the absences, the discharge was not for misconduct.

The employer also discharged claimant, in part, for refusing to complete FMLA paperwork. Although the employer warned claimant that failing to improve her attendance could result in further discipline including termination, the employer described its attendance and protected leave policy as "if an employee has more than three occurrences of unplanned and unprotected absences in a six-month period they're out of compliance with the policy and eligible to be written up." *Compare* January 11, 2018 hearing, Transcript at 16; January 27, 2018 hearing, Transcript at 22, 26. The record is therefore not clear as to whether the employer's policy prohibited employees from refusing to complete FMLA paperwork to protect their absences, or what were the consequences for refusal. The employer cannot reasonably expect employees to conform their behavior to unclear policies or expectations.

That claimant did not reasonably understand the employer's policies or expectations with regard to applying for FMLA to protect her absences was further illustrated by claimant's testimony that she did not understand what the consequences of failing to complete FMLA paperwork would be, because "[n]obody ever told me if you don't fill out the paperwork you're going to be fired. Had someone said that to me I would have filled out the paperwork." January 17, 2018 hearing, Transcript at 12, 16. Claimant testified that she was told "direct specifically if you don't fill out the paperwork your pay is going to be docked from the times that we told you it was protected. That's all they said. And I said okay. I'm fine with that. I do not wish to apply for – for the leave." January 17, 2018 hearing, Transcript at 24-25. Given that claimant failed to understand and was not told that she was required to complete FMLA paperwork as a condition of continuing employment, her refusal to complete the paperwork did not amount to insubordination or an intentional or conscious deviation from the standards of behavior the employer had the right to expect of her. Her refusal to do so was, therefore, not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 18-UI-101233 is affirmed.

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

DATE of Service: March 5, 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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