

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0475

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 73926). Claimant filed a timely request for hearing. On May 2, 2018, ALJ Wymer conducted a hearing, and on May 3, 2018 issued Order No. 18-UI-108568, concluding the employer discharged claimant, but not for misconduct. On May 7, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Lower Umpqua Hospital employed claimant from June 2012 until February 7, 2018, last as a patient accounts representative.

(2) Claimant's surgeon recommended claimant have shoulder surgery and told her it would take eight to 16 weeks for her to recover and return to work. On November 13, 2017, claimant met with a representative from the employer's human resources department and discussed her medical leave to have surgery on November 14 and to recover from surgery. The employer expected claimant to request an extension of her medical leave of absence if she was unable to return to work by February 7, 2018. Claimant did not understand based on the verbal instructions she received from the employer that the employer expected her to submit a request for an extension to human resources by February 6, 2018.

(3) The Employer's Family Medical Leave Notice to Employee (Exhibit 2 at 19-27) refers to a request for an extension, but it did not state that claimant was required to submit a request for an extension to the employer's human resource department before February 7, 2018 to extend her medical leave. The employer's family and medical leave policy stated that "the employee shall advise Administration as soon as practicable if dates of leave change or are extended" The policy also stated that, "if circumstances change during the leave and the leave period differs from the original request, the employee must notify Administration within three business days." Exhibit 2 at 24.

(4) On November 14, 2018, claimant had shoulder surgery. From November 14 until February 5, 2018, claimant sent her manager a text message each time claimant met with her doctor to update her manager about her recovery progress. After each doctor appointment, claimant's doctor sent human resources a medical release form regarding claimant's ability to return to work.

(5) On February 2, 2018, claimant met with her doctor. He told claimant she should miss two more weeks of work and attend additional physical therapy during that time. The doctor sent human resources a form stating claimant's next appointment would be March 1, 2018 and that she was not released to work yet on February 2 with a "possible release [on March 15, 2018]." Exhibit 1 at 29.

(6) On February 5, 2018, claimant sent her manager a text message stating, "I was surprised when [my doctor] said I am not ready to come back. I am sorry. I have had some complication in the healing. And have had some problems such as a cabinet fell on me and my shoulder. I am working at [physical therapy] though and will ask him again to let me come back. . . . I want to come back very much." Exhibit 1 at 25. Claimant did not receive any telephone calls or messages from the employer's human resources during her medical leave of absence.

(7) On February 7, 2018, at 3:44 p.m., claimant's manager sent claimant a text message stating, "HR has left u several messages and we haven't heard back from u. We sent u a letter to the Seal Rock address. HR would like to talk to u as soon as possible please call." Exhibit 1 at 26. At 4:50 p.m., claimant responded, "I just tried to call her. I left her a message. I won't get any letter sent to Seal Rock. There is no mail receptacle there. . . . I will [definitely] call [human resources] first thing tomorrow." Exhibit 1 at 26.

(8) During her employment, claimant never failed to report to work when she was scheduled to work or notify the employer that she would be unable to work.

(9) On February 7, 2018, the employer sent claimant a letter stating it was discharging claimant because it had not received an oral or written request to extend claimant's medical leave and the "vacant position continues to cause a hardship" for the employer and "cannot be sustained any longer." Exhibit 1 at 32.

(10) On February 8, 2018, claimant's manager hand-delivered a copy of the February 7 discharge letter to claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant not for misconduct.

It was undisputed in the record that the employer discharged claimant on February 7, 2018 when claimant failed to request an extension of her medical leave from the employer's human resources. 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)

Claimant testified that she did not know the employer expected her to call or submit a form to human resources requesting an extension of her medical leave of absence by February 6, and that she would have done so had she known the requirement. Transcript at 7, 10. Claimant's testimony is credible, especially given her regular contact with the employer during her medical leave and the absence of clear instruction in the written documents from the employer of its expectation that she request an extension by February 6, 2018. On February 7, claimant was unable to return to work because she was still recovering from her shoulder surgery and her doctor had not yet released her to work. She told her employer that her doctor recommended she have two additional weeks of physical therapy before returning to work. Claimant's doctor informed human resources that she was not yet released to return to work. Although the employer elected to discharge claimant, it failed to show by a preponderance of the evidence that claimant knew or should have known that the employer expected her to do more than notify the employer of her status and have her doctor notify human resources. Claimant's failure to request an extension of her leave of absence with human resources by February 6 therefore was not misconduct. Moreover, to the extent the employer discharged claimant because her prolonged absence due to a physical disability was a "hardship" for the employer, that is not attributable to claimant as misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 18-UI-108568 is affirmed.

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

DATE of Service: June 7, 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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