

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0554**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 150313). The employer filed a timely request for hearing. On May 15, 2018, ALJ Seideman conducted a hearing at which claimant did not appear, and issued Order 18-UI-109389, reversing the Department's decision. On May 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wal Mart Associates Inc. employed claimant as a non-conveyable order filler from August 7, 2017 until March 14, 2018.

(2) The employer had an attendance policy that prohibited employees from accruing 110 or more work hours of unexcused absences in a rolling six month period. If an employee accrued 110 or more hours of unexcused absences, the employee would be discharged. Claimant was aware of the employer's policy.

(3) On August 27, 2017, September 24, 2017, October 28, 2017 and January 6, 2018, claimant was absent from work and accrued hours of unexcused absence. Sometime after January 6, 2018, claimant requested a leave of absence from the employer starting on January 7, 2018 due to wrist pain. If allowed, the leave of absence would excuse all absences it covered. After January 6, 2018, claimant did not report for work and was continuously absent. Some of claimant's absences after January 6, 2018 were excused under the Oregon sick leave law, ORS 653.606(1)(a).

(4) On February 26, 2018, claimant accrued 110 hours of unexcused absences in a six month period. Unless some of the absences that were included in the 110 hours were excused under some authority other than the Oregon sick leave law, claimant would be discharged under the employer's attendance policy for her absences as of February 26, 2018. On February 28, 2018, the employer's third party benefit administrator denied claimant's request for a leave of absence beginning on January 7, 2018.

(5) Shortly after the February 28, 2018 denial of her leave of absence request, claimant filed a worker's compensation claim for having sustained a work-related injury to her wrist. If allowed, the worker's compensation claim would excuse claimant's absences related to the wrist injury. On March 12, 2018, claimant's worker's compensation claim was denied.

(6) On March 14, 2018, the employer discharged claimant under its attendance policy because as of February 26, 2018 she had exceeded the 110 hours of absence allowed and, since her both her requested leave of absence and worker's compensation claim had been denied, none of those hours of absence were excused.

**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) (January 11, 2018) 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 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).

In Order No. 18-UI-109389, the ALJ concluded that the employer proved that it discharged claimant for misconduct on March 14, 2018. While the ALJ acknowledged that it would not have been misconduct if claimant had been absent from work due to a medical condition, he reasoned that “[c]laimant has not shown that her medical condition was such that she was unable to work and that she would be entitled to more medical leave time or an adjustment of her duties. Claimant's failure to provide those were [sic] a wantonly negligent disregard of the employer's interest, and constituted misconduct.” Order No. 18-UI-109389 at 3. We disagree and conclude that the ALJ impermissibly shifted the burden of persuasion to claimant. Notably, ORS 471-030-0038(3)(b) does not require a claimant to affirmatively show that she was entitled to a medical leave or an adjustment of her duties before her absences arising from illness or physical disabilities will be considered not to have constituted misconduct.

While the employer discharged claimant for having exceeded the maximum hours of absence allowed under its attendance policy, it still must show that claimant engaged in misconduct or a willful or wantonly negligent violation of its standards before claimant may be disqualified her from benefits. EAB customarily focuses on the final absence that caused the discharge to assess whether the behavior for which the employer discharged claimant constituted misconduct. *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 and must be analyzed for purposes of determining if the employer discharged claimant for misconduct). Based on the testimony of the employer's witness, it appears that the employer discharged claimant as a result of her absence of February 26, 2018, which caused her to exceed the maximum hours of absence allowable under its attendance policy. Audio at ~13:25. Accordingly, claimant's absence on February 26, 2018 is the focus of the discharge analysis.

Although claimant did not participate at the hearing, the testimony of the employer's witness gave rise to the inference that, by seeking a leave of absence and filing a worker's compensation claim, claimant sought to excuse some of her accrued absences based on wrist pain or a wrist injury. Audio at ~15:09, ~15:57. The mere fact that both the leave of absence and the worker's compensation claimant were denied does not, without more, establish that a wrist injury did not prevent claimant from working on February 26, 2018, which would be an absence due to physical disability that does not constitute misconduct. Because there was evidence in this record suggesting that claimant likely missed work due to wrist pain or the effects of a wrist injury on February 26, 2018, the employer did not meet its burden to show that claimant's absence on February 26, 2018 was due to willful or wantonly negligent behavior in violation of the employer's standards.

The employer did not prove that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-109389 is set aside, as outlined above.

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

**DATE of Service:** June 26, 2018

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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](http://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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