

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0749

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 21, 2018 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105535). Claimant filed a timely request for hearing. On July 16, 2018, ALJ Murdock conducted a hearing, and on July 24, 2018 issued Order No. 18-UI-113691, affirming the Department's decision. On July 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular Inc. employed claimant as a customer account advisor at its call center in Redmond, Oregon from July 23, 2017 until May 29, 2018.

(2) The employer had point-based attendance policy. The attendance policy provided that employees accrued one attendance point for each absence of up to three consecutive days. The policy further provided that employees were subject to discharge if they accrued more than three attendance points in a rolling 90 day period. Claimant understood the employer's attendance policy.

(3) On April 23 and 24, 2018, claimant was absent from work due to illness and accrued one attendance point.

(4) On May 18, 2018, during her work shift, claimant was notified that her fiancé's brother's heart had stopped and he was being transported to Oregon Health Sciences University (OHSU) Hospital in Portland, Oregon. The brother had heart failure and was not expected to survive. Claimant left work, and she and her fiancé traveled to OHSU to "take shifts" at the brother's bedside with other of her fiancé's family members. Audio at ~11:30. Claimant's fiancé's brother was mostly unconscious while at OHSU, but claimant wanted to be available to "relieve" the family members who had gathered at OHSU. Audio at ~7:35. To reach OHSU from claimant's home in Prineville, Oregon required approximately three and half to four hours of travel time.

(5) On May 19 and 21, 2018, claimant missed work to remain with her fiancé's other family members at the brother's bedside at OHSU. As result of her failure to work a full shift on May 18 and absences from work on May 19 and 21, claimant accrued one attendance point.

(6) On May 22, 2018, a scheduled work day for claimant, claimant continued to be absent from work. On May 24, 2018, claimant sent an email to her supervisor letting the supervisor know she was missing work due to the medical condition of her fiancé's brother. Claimant asked her supervisor if she had been discharged under the attendance policy for her absences from work. Claimant's absence from work continued on her next scheduled work day of May 25, 2018.

(7) On May 25, 2018, claimant's supervisor called claimant in response to her May 24 email. The supervisor told claimant that claimant would not exceed the three allowable attendance points unless she did not report for work on her scheduled workday of May 29, 2018. The supervisor also informed claimant that her fiancé's brother's medical condition did not qualify her for a leave of absence under the Oregon Family Leave Act (OFLA) or the Family Medical Leave Act (FMLA) and, as a result, the employer would not excuse claimant's absences due to the brother's medical condition. Later in the day on May 25, the supervisor left claimant a detailed phone message confirming her earlier statements.

(8) On May 26, 2018, claimant was again absent from work. As a result of claimant's absences on the consecutive work days of May 22, 25 and 26, claimant accrued one attendance point. On May 26, claimant had accrued her third attendance point within 90 days and was subject to discharge for any additional absences within 90 days.

(9) On May 28, 2018, claimant and her fiancé planned to return to Prineville so claimant could avoid discharge by reporting for work on May 29. However, claimant's fiancé's brother had a "severe event" that day and required emergency surgery. Audio at ~11:48. It was again uncertain whether the brother would survive, but the brother survived the surgery and was out of surgery at around 11:00 p.m. Claimant did not attempt to return to Prineville that night because she thought it was not safe for her and her fiancé to drive that distance when they were tired and it was late.

(10) On May 29, 2018, claimant did not report for work. She did not attempt that day or after to contact the employer and to request that her absence on May 29 be excused due to the exigency of her fiancé's brother's emergency surgery and the impracticality of driving to Prineville in time to report for work on May 29 after the surgery was completed. As a result of this absence, claimant accrued a fourth attendance point within 90 days. On May 29, 2018, the employer discharged claimant for having exceeded the maximum number of attendance points under its attendance policy.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. 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). A discharge for compelling family reasons when an individual has made the attempt to maintain the employer-employee relationship is not misconduct. OAR 471-030-0038(3)(d). "Compelling family reasons" means, among other things, the illness or disability of a member of the individual's immediate family necessitates care by another and the employer does not accommodate the individual's request for time off. OAR 471-030-0038(1)(e)(B). "A member of the individual's immediate family" includes spouses, domestic partners, parents, and minor children under the age of 18, including a foster child, stepchild or adopted child. OAR 471-010-0038(1)(f).

The illness of claimant's fiancé's brother, or of a brother-in-law-to-be, is not a status that falls squarely within the terms of OAR 471-030-0038(3)(d) and under a strict interpretation would not constitute a compelling family reason for claimant's absences. *See* OAR 471-030-0038(1)(e)(B) and (1)(f). With respect to the applicability of OAR 471-030-0038(3)(b) to claimant's situation, the illness for purposes of determining whether claimant's absences constituted misconduct was not that of claimant but of her future brother-in-law. We do not decide for purposes of this decision that neither regulatory provision could ever be applied, directly or by analogy, to a claimant's absences due to the illness of a brother-in-law-to-be. However, the circumstances underlying this claimant's absences do not appear to be sufficiently urgent or compelling under either of these provisions or under the more general standard of OAR 471-030-0038(1)(c) and (3)(a) to conclude that claimant's absences were in the nature of absences that were beyond her reasonable control and should not be considered to constitute misconduct. Claimant was not absent from work to provide actual care for the ill brother of her fiancé, but to hold vigil with his immediate family members while he was unconscious and likely would not know she was present at his bedside, as well as to take the place of family members when they could not be in attendance. It does not appear that exigent circumstances attending the illness of the future brother-in-law, his care or any needs or expressed preferences of the future brother-in-law made it unreasonable to expect claimant to remain working as scheduled in Redmond and standing vigil in Portland during the days she had off each week. The phone call claimant made to her supervisor on May 24, in which she inquired whether she had yet been discharged, shows that she likely was aware that her absences probably violated the employer's attendance standards. Claimant's behavior in missing work on May 18, 19, 21, 22, 25 and 26 was wantonly negligent.

However, the employer discharged claimant for exceeding the maximum points allowed under its attendance policy by her absence on May 29, 2018. That claimant accrued more attendance points than was permissible is insufficient to establish that the employer discharged her for willful or wantonly negligent behavior. *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). To evaluate whether claimant is disqualified from benefits, EAB must consider whether claimant's absence on May 29 was the result of willful or wantonly negligent behavior.

Claimant likely did not foresee in advance that the emergency that the future-brother-in-law underwent on May 28, 2018 would effectively prevent her from returning to work on May 29, 2018. However, that

she remained at OHSU through the surgery and did not attempt to contact the employer to try to preserve her job when she knew not only that she would not be able to report for work on May 29 but that her inability would result in discharge demonstrated that she was consciously indifferent to the consequences of her conduct in violating the employer's standards. Claimant's absence from work on May 29 was at least the result of wantonly negligent behavior.

Claimant's absence on May 29 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be an "isolated instance of poor judgment," however, the behavior of claimant that is at issue must have been, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant was absent due to wantonly negligent behavior not only on May 29 but also on May 18, 19, 21, 22, 25 and 26. Because claimant's wantonly negligent violations of the employer's standards were neither single nor infrequent, they may not be excused as isolated instances of poor judgment.

Nor may claimant's absence on May 29 be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that her absence on May 29 was the result of misunderstanding the employer's attendance policy and such a contention would have been implausible in light of the clarity of the supervisor's May 25 statements to her about the consequences of missing work on May 29. Nor did claimant believe in good faith that the employer had excused her absence from work that day. There is insufficient evidence in this record to find that claimant's behavior on May 29 was the result of good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-113691 is affirmed.

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

DATE of Service: August 30, 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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