

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0834

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91225). Claimant filed a timely request for hearing. On July 18, 2018, ALJ Murdock conducted a hearing, and on July 26, 2018, issued Order No. 18-UI-113861, affirming the Department's decision. On August 14, 2018, ALJ Murdock issued Amended Order No. 18-UI-114922, modifying the Department's decision only by changing the effective date of claimant's disqualification. On August 23, 2018, claimant filed an application for review of Order No. 18-UI-114922 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Walmart Associates, Inc. employed claimant as a maintenance worker from at least November 2017 to May 3, 2018.

(2) The employer expected its employees to report for work as scheduled. The employer had an occurrence-based attendance policy, under which the employer assessed partial occurrence points for tardiness based on the number of minutes late, a full occurrence point for an absence with notice, and three occurrence points for an absence without notice. Exhibit 1. The employer imposed discipline, up to and including discharge, based on the occurrence points assessed. If an employee accrued nine or more occurrence points during a six month rolling period, the employee was subject to discharge. Absences could be excused if the employer authorized a leave of absence (LOA) or the use of paid time off (PTO) for the absences. Claimant was aware of the employer's attendance expectations and occurrence-based attendance policy.

(3) Between February 2, 2018 and April 13, 2018, claimant accrued 4.5 occurrence points for two absences from work with notice and five late arrivals to work. Between April 22 and May 1, 2018, claimant accrued 8 occurrence points for 8 absences with notice. With regard to the last five of those absences on April 27, 28, 29, 30 and May 1, claimant reported the absences to the employer as being caused by "illness/injury." Exhibit 1. After those absences, the employer's personnel coordinator attempted to contact claimant to discuss whether he wanted to request a leave of absence or use paid

time off for the absences but she was unable to reach him because his phone number on file with the employer was no longer in service.

(4) Shortly thereafter, on May 3, 2018, the employer discharged claimant for “Excessive Absences and/or Tardies” because as of that date he had accrued 14 unauthorized attendance occurrence points. Exhibit 1; Audio Record ~ 7:00 to 8:15.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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. Under OAR 471-030-0038(3)(b), absences due to illness or other physical or mental disabilities are not misconduct. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-114922, after finding that the employer discharged claimant for “excessive absenteeism,” the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that claimant’s failures communicate with the employer about possibly obtaining a leave of absence or using personal time off to excuse his absences, or even update the employer with a valid phone number to enable it to contact him when necessary, constituted willful or wantonly negligent violations of the employer’s reasonable expectations. The ALJ further reasoned that the violations were neither isolated nor excusable as the result of a good faith belief that the employer would “condone” him exceeding his allowable occurrence points. Order No. 18-UI-114922 at 3. We disagree, because as the ALJ found, the employer discharged claimant for excessive absenteeism, and not for failing to communicate with it about obtaining a LOA or utilizing PTO with regard to his absences.

Barring illness or other exigent circumstances, the employer had the right to expect claimant to report to work as scheduled. Although the employer discharged claimant on May 3, 2018 for excessive absenteeism and tardiness under its occurrence point based attendance policy, the record shows that the immediate or “but-for” cause of the discharge was claimant’s final absences from April 27 through May 1, which triggered the employer’s decision to terminate his employment two days later. Accordingly, the proper focus of the misconduct analysis is those five days of absenteeism. *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). Here, the employer’s own records show that claimant’s absence on each of those days was reported by claimant as being caused by “illness/injury”, and under OAR 471-030-0038(3)(b), absences due to illness or other physical or mental disabilities are not 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 his work separation.

DECISION: Order No. 18-UI-114922 is set aside, as outlined above.¹

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

DATE of Service: September 27, 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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¹ 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.