

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0886

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160359). Claimant filed a timely request for hearing. On August 29, 2018, ALJ Snyder conducted a hearing, and on September 6, 2018, issued Order No. 18-UI-116140, affirming the Department's decision. On September 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Walmart employed claimant as an overnight stocker from June 17, 2017 to July 16, 2018.

(2) The employer expected its employees to report for work as scheduled. The employer had an absence-based attendance policy, under which the employer assessed a full absence point against an employee for any unauthorized absence. The employer imposed discipline, up to and including discharge, based on the number of unauthorized absences assessed. If an employee who had been employed for more than six months accrued nine unauthorized absence points during a six month rolling period, the employee was subject to discharge. However, the employer allowed unauthorized absence hours to be offset by accumulated personal time off (PTO) hours to reduce the number of unauthorized absence points under its attendance policy. Claimant was aware of the employer's attendance policy.

(3) In early 2018, the employer assigned claimant to work on certain days of the week under a new shift supervisor. The shift supervisor often yelled at claimant and otherwise treated him in ways claimant considered “hostile,” which caused him extreme stress and anxiety to the extent it often produced physical symptoms such as stomach problems. Audio Record ~ 25:00 to 25:40. The stress and physical symptoms it produced eventually became “overwhelming” to claimant and caused him to call out and miss work on June 12, 13 and 26, and July 3, 4 and 5 of 2018. Audio Record ~ 24:30 to 25:30. In early July, a senior supervisor warned claimant about his accumulating absences under the employer’s attendance policy. Claimant explained that his absences were being caused by the stress he was experiencing under his shift supervisor, described her treatment of him and its effects, and requested a change in work days to avoid having to work with her. The senior supervisor did not want to have to discharge claimant so authorized some of his absences and told him he would work on changing his work days.

(4) On July 8, 9 and 10, 2018, claimant again called out from work. On July 11, 2018, claimant experienced severe stomach pain and called out from work “sick.” Audio Record ~ 17:20 to 17:50.

(5) Claimant was scheduled to work on both July 15 and 16, 2018 at his normal 10:00 p.m. to 7:00 a.m. shift. On July 15, 2018, claimant reported for work as scheduled and worked his scheduled shift. However, on July 16, 2018, when claimant reported for work as scheduled, he was told that the employer “had to let [him] go” and was discharged for “excessive absences” under the employer’s attendance policy. Audio Record ~ 24:00 to 24:30; 7:00 to 7:45. Before leaving the employer’s premises on July 16, claimant completed his discharge paperwork.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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. 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). Absences from work due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In Order No. 18-UI-116140, the ALJ concluded that the employer discharged claimant for misconduct, reasoning,

Claimant was aware of...and reminded of the policy in early July when he was told by his manager that he had accumulated a large amount of absences and was close to hitting the nine absence limit...[but] continued to call out for shifts he was scheduled to work with a supervisor he did not like. ... Because claimant knew that continuing to call out... would result in a violation of the employer’s attendance policy...[and]...claimant was willful in continuing to callout...[his conduct] amounts to misconduct and...claimant is disqualified.

Order No. 18-UI-116140 at 3. We disagree and conclude the employer failed to meet its burden of to prove that claimant's discharge was for misconduct.

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 for "excessive absences" under its attendance policy, the immediate or "but-for" cause of the discharge was claimant's absence on July 11, 2018, which apparently resulted in his accrual of unauthorized absence points to a total of nine. Accordingly, the proper focus of the misconduct analysis is his July 11 absence from work. *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).

On July 11, 2018, claimant did not report for work as scheduled because, as he described at hearing, his stress and anxiety became "overwhelming" and caused him severe stomach pain. Audio Record ~ 24:30 to 25:30. His primary supervisor verified that he called out "sick" prior to the start of his shift that day and did not dispute claimant's testimony regarding his reason for doing so. Accordingly, on this record, claimant's July 11, 2018 absence was due to illness or other physical or mental disability, and under OAR 471-030-0038(3)(b), an absence from work for that reason is 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 this work separation.

DECISION: Order No. 18-UI-116140 is set aside, as outlined above.¹

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

DATE of Service: October 17, 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 a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.