

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0931

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75234). Claimant filed a timely request for hearing. On September 5, 2018, ALJ G. Wyatt conducted a hearing, and on September 13, 2018, issued Order No. 18-UI-116531, concluding the employer discharged claimant, but not for misconduct. On September 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted written argument in which it offered new information for EAB's consideration that it did not offer into evidence at the hearing. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information only if the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering that information at the hearing. In its written argument, the employer stated that, "[a]t the time of the hearing it became apparent that the State didn't share any supporting documentation for the dismissal of [claimant]. The [order] made was based on a verbal discussion with incomplete information." Employer's Written Argument at 4.

However, the Notice of Hearing, mailed to the employer on August 22, 2018, plainly stated that the ALJ would make a decision based only on the evidence presented during the hearing, and also stated in two separate places that the only documents that ALJ would consider when reaching his decision were those documents, if any, that were enclosed with the Notice of Hearing or were provided to the ALJ and the other parties in advance of the hearing. Notice of Hearing at 1, 6. It was within the employer's reasonable control to have carefully read the Notice of Hearing and, based on its language, should have understood that the ALJ would not consider documents simply because the employer had provided them to the Department. For this reason, the employer did not show that its failure to present the new information submitted with its written argument was caused by a circumstance beyond its reasonable control. The employer's request for EAB to consider its new information therefore is denied.

However, EAB did consider the employer's written argument, to the extent it was based on the hearing record, in reaching this decision.

FINDINGS OF FACT: (1) Richard J. Hikade DDS PC employed claimant until June 30, 2018 as a dental assistant.

(2) The employer expected claimant to notify the employer if she was unable to work, and to provide a note from her medical provider regarding her ability to work if she was absent for medical reasons.

(3) The employer's office was open Monday through Thursday each week. The employer's office manager was claimant's direct supervisor. On Sunday, May 27, 2018, the office manager received a text message from claimant stating that she had been in an automobile accident. From May 28, 2018 through May 30, 2018, claimant communicated with the office manager that she was ill and unable to work due to the accident.

(4) On Thursday, May 31, 2018, claimant reported to work and told the office manager she was sore, but able to work. The office manager told claimant she could leave work if she began to feel ill.

(5) On Monday, June 4, 2018, claimant reported to work but was in too much pain to work. The dentist, who was the owner, dismissed claimant from work and recommended that she go to the emergency room. From June 5 through June 7, 2018, claimant communicated with the office manager that she was ill and unable to work. Claimant told the office manager she was scheduled for surgery on June 8, 2018.

(6) On June 8, 2018, claimant had surgery. From June 8 through June 10, 2018, the office was closed. On June 11, 12, 13 and 14, 2018, claimant was in the hospital and did not report to work or contact the employer. On Sunday, June 17, 2018, the office manager contacted claimant. Claimant stated that she was improving post surgery, and was hoping to return to work. The office manager asked claimant for a doctor's note.

(7) On June 18, 2018, claimant gave the office manager a letter from her doctor stating that claimant was released to return to work without restrictions.

(8) On June 19, 2018, claimant reported to work and worked her full shift. On June 20, 2018, claimant reported to work but became ill, and had to leave work early.

(9) On Thursday, June 21, 2018, claimant sent the office manager a text message stating that she was ill and that she was scheduled for another surgery on June 22, 2018. On June 22, 2018, claimant spent the day in the hospital, but her medical providers decided against the surgery. The medical providers advised claimant to rest in bed and to meet with her doctor every two days until June 29, 2018, when a specialist would determine when claimant could return to work.

(10) From Monday, June 25 through Wednesday, June 28, 2018, claimant did not report to work or contact the employer.

(11) On Friday, June 29, 2018, claimant met with the specialist who gave claimant a note releasing her to return to work. Claimant left the office manager a voicemail message that she was released to return to work on July 2, 2018.

(12) On Sunday, June 30, 2018, the office manager left claimant a voicemail message that the employer had discharged claimant. The employer discharged claimant because she failed to report to work or provide a doctor's note on June 25, 26 and 27.

CONCLUSION AND REASONS: We agree with the ALJ that the employer discharged claimant 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. 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).

In its written argument, the employer contended that claimant had a history of attendance violations. However, the final instance that caused the employer to discharge claimant on June 30, 2018 was her failure to report to work, contact the employer, or provide a doctor's note on June 25, 26 and 27. That conduct is therefore the proximate cause of the discharge, and the initial focus of the misconduct analysis. Only if that conduct is found to be willful or wantonly negligent would claimant's other attendance be analyzed for purposes of a misconduct analysis. The employer has the burden of proving that, more likely than not, claimant's conduct in the June 25, 26 and 27 incident was willful or wantonly negligent. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified that she did not know the employer expected her to submit a doctor's note to the employer or communicate with the employer on a daily basis if she was absent due to illness, and that she would have done so had she known of the requirement. Audio Record at 20:43 to 21:04, 28:55 to 30:33. Claimant's testimony is credible, especially given her regular contact with the employer regarding her absences following her accident and the fact that the employer did not warn or discipline claimant when claimant did not report to work or contact the employer for four consecutive days from June 11 through June 14, 2018 after claimant told her supervisor she would be having surgery. Claimant provided the employer a doctor's note upon her return to work on June 19, 2018, just as she was prepared to do when she planned to return to work on Monday, July 2, 2018. On June 25, 26 and 27, claimant missed work pursuant to doctors' orders after having told her supervisor that she was scheduled for surgery on June 22. 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 medical status before her absence on June 25, 26 and 27, and be prepared with a doctor's note upon her return to work. Claimant's failure to contact the employer or provide a doctor's note on June 25, 26 or 27 therefore was not misconduct. Moreover, the employer's witness asserted that claimant's absences were affecting patient care and that it did not have another employee to perform claimant's work. Audio Record at 7:26 to 7:40, 15:32 to 15:49. To the extent the employer discharged claimant because her repeated absences due to injuries from an automobile

accident was a hardship for the employer or its patients, that circumstance 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-116531 is affirmed.

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

DATE of Service: November 1, 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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