

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0013

Reversed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On August 28, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #104352). Claimant filed a timely request for hearing. On November 5, 2013, ALJ S. Lee conducted a hearing, and on December 18, 2013 issued Hearing Decision 13-UI-06756, affirming the Department's decision. On January 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Coast to Coast Carports, Inc. employed claimant from July 28, 2010 to July 8, 2013 as a cutter.

(2) The employer expected employees to refrain from engaging in personal telephone calls during work time without prior permission from a supervisor. The employer also expected employees to sign written warnings presented to them by the employer.

(3) Claimant had a vehicle insurance claim pending during July 2013. Claimant asked his supervisor if he could speak with the insurance representative if the representative called claimant during work hours. The supervisor told claimant he could take those calls, and did not withdraw the permission, or limit it to a particular day or period of time. On July 7, 2013, claimant told his supervisor his insurance claim case would be closing the next day.

(4) On July 8, 2013, claimant received a call from the insurance representative during work time. Claimant took the call, and began to discuss his claim. Claimant's supervisor arrived at the plant, and asked claimant with whom he was talking. Claimant told the supervisor it was the insurance representative. The supervisor told claimant to hang up, and wrote claimant a warning for engaging in a

personal call during work time. Claimant hung up the telephone and met with the supervisor to discuss the warning.

(5) The supervisor told claimant to sign the warning, or to clock out, leave and not return to work. He told claimant his signature did not signify claimant agreed with the warning, and that he could write he disagreed with the warning, and provide an explanation. Claimant did not read the warning and refused to sign it because he disagreed that he violated the employer's telephone use policy. Claimant left after he told the employer that he had to meet with the insurance representative, and that he would continue working the following day.

(6) On July 9, 2013, claimant reported to work, but the employer refused to allow him to work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

The first issue is whether claimant quit or was discharged. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

We agree with the ALJ that the employer discharged claimant. On July 8, 2013, the employer told claimant to leave work if he was not willing to sign the warning. Transcript at 21. Claimant told the supervisor he had to leave to meet with the insurance representative, but that he would return for his shift on July 9, 2013. Transcript at 23. The employer did not permit claimant to work after July 8, 2013. Transcript at 24. Both parties' versions of what occurred show claimant refused to sign the warning, but did not show claimant was unwilling to continue to work. Both show the employer did not allow claimant to work because he refused to sign the warning. Because claimant was willing to work, but the employer did not permit him to do so, the work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he refused to sign the written warning. Claimant could have indicated on the warning that he disagreed with it, and could have written a statement. However, claimant refused to read or sign the warning. Claimant's refusal to sign the warning was insubordinate, and was a willful violation of the employer's right to expect claimant to sign the warning.

However, claimant's failure to sign the warning is excused from being misconduct as an isolated instance of poor judgment. The only other incident of alleged misconduct during claimant's employment was his failure to follow the employer's telephone policy on July 8, 2013. The ALJ concluded that incident was misconduct because claimant knew the employer expected him to ask for permission to take calls during work, and claimant did not request permission for the telephone call on July 8, 2013.¹ The ALJ's conclusion is not supported by the record. The preponderance of the evidence shows claimant knew he was required to have permission to engage in personal calls at work. However, claimant requested permission to engage in telephone calls about his insurance claim during work time. The employer granted claimant permission so he would not have to leave work, and did not limit the permission to a specific day or time. Transcript at 27 to 28. On July 7, 2013, claimant told the supervisor the insurance representative was closing his insurance claim on July 8, 2013, thus claimant reasonably believed the employer knew he might engage in a telephone call about his insurance claim that day. Claimant's sincere but mistaken belief that the employer permitted him to accept telephone calls about his insurance claim during work was at worst a good faith error. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). Thus, claimant's telephone call on July 8, 2013 was not a prior incident of misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 13-UI-06756 is set aside, as outlined above. *Decisión de la Audiencia 13-UI-06756 se deja a un lado, de acuerdo a lo indicado arriba.*

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: February 4, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante el Tribunal de Apelaciones de Oregon dentro de los 30 días siguientes a la fecha de notificación*

¹ Hearing Decision 13-UI-06756 at 4.

enumerados anteriormente. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la (Oregon Court of Appeals, Records Section) Corte de Apelaciones de Oregon, Sección de Registros, 1163 State Street, Salem, Oregon 97310, o visitando el sitio en el Internet en <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Nota: El vínculo anterior puede no funcionar debido a cambios sin previo aviso al sitio en el Internet de la Corte de Apelaciones, dándose el caso puede ponerse en contacto con el Registro de Apelaciones (Appellate Records) al (503) 986-5555.