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BYE: 201451

State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION

**2014-EAB-0402**

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On January 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130136). Claimant filed a timely request for hearing. On March 4, 2014, ALJ Menegat conducted a hearing, and on March 7, 2014, issued Hearing Decision 14-UI-11947, affirming the Department's decision. On March 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Superfloors of Oregon employed claimant as a scheduling assistant from October 8, 2012 to December 16, 2013.

(2) The employer expected claimant to report for work as scheduled or notify the employer in advance that he would be absent. The employer's expectations were set forth in its handbook, which also provided that absence from work without notification for three consecutive days would be considered by the employer to be job abandonment. Claimant received a copy of the employer's handbook at hire and was aware of the employer's expectations.

(3) Claimant suffered a back injury with the employer and his claim for worker's compensation benefits was accepted by the employer's insurance carrier, AIG. Claimant twice returned to work with modified medical restrictions and each time the employer prepared a "Employer Supervisor Job Assignment Agreement" which both claimant and his direct supervisor were required to agree to and follow. Transcript at 16, 37. On November 8, 2013, claimant reinjured his back while at work. His treating physician authorized him to be off work until November 13 and modified his medical restrictions. Claimant's physician faxed a copy of the authorization with claimant's modified restrictions to claimant's supervisor on November 11. Exhibit 1.

(4) On November 12, 2013, claimant received a text message from his supervisor inquiring if claimant would return to work on November 13. Claimant responded by text that he could "barely walk" and would not be able to return to work on November 13. Transcript at 11. That same day, claimant's workers compensation attorney's office staff advised AIG's claims adjuster and claimant's attorney personally advised AIG's claim's attorney to notify the employer that before claimant would return to work with his modified restrictions, the employer would have to strictly follow the requirements of ORS 656.325(5) and a related administrative rule and provide claimant "with a written job description [of] an offer of modified employment… approved by his physician." Transcript at 25-26. Claimant's attorney met with claimant, discussed the statute and rule and advised claimant to wait for a written offer of a modified job from the employer before returning to work.

(5) Claimant did not report for work on November 13, 14 and 15, 2013 because he was still injured. After that, claimant did not report for work because he was waiting for the employer to submit to him a written modified job offer, approved by his physician, which the employer declined to do based on advice from its worker's compensation insurer. Transcript at 27.

(6) On December 16, 2013, the employer discharged claimant for job abandonment based on his failure to report for work or notify the employer he would be absent on or after November 13, 2013.

**CONCLUSIONS AND REASONS:** We disagree with the Department and 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. 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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, claimant's and his attorney's first-hand testimony differed with the testimony of the employer's human resources representative, based largely on hearsay, on a number of issues. In the absence of evidence demonstrating that claimant or his attorney were not credible, their first hand testimony was at least as credible as the employer' s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant's evidence.

In its initial determination, the Department concluded claimant was discharged for misconduct, finding as fact that "claimant was expected to work on November 13, 2013, November 14, 2013 and November 15, 2013", "did not call out of work or report to work for those shifts" and the employer's policy was that "three 'no calls no shows' equal discharge due to job abandonment." Decision # 130136. Notably, however, the Department apparently was unaware that claimant had notified his supervisor on November 12 that he was not well enough to report for work on November 13, 2013 due to his back

condition. In addition, The Department was unaware that based on communications with his attorney, claimant was expecting a written job offer from the employer that was consistent with his modified medical restrictions before returning to work.

In Hearing Decision 14-UI-11947, after finding that claimant was discharged for failing to keep the employer informed as to his status and condition, the ALJ concluded claimant was discharged for misconduct. The ALJ reasoned that claimant's failure to communicate with the employer was "intentional." Hearing Decision 14-UI-11947 at 6. The ALJ, however, failed to address whether claimant's failure to communicate with the employer was the result of a good faith error following his communications with his attorney.

The employer had the right to expect claimant to report for work as scheduled or to notify the employer that he would be absent. Although claimant may have violated the letter of the employer's policy on November 13 and thereafter, on November 12 he notified his supervisor that he was not be able to return to work because of his injured back. Moreover, we infer from claimant's testimony that he was expecting to receive a modified job offer from the employer following the information and advice he received from his attorney and that he believed in good faith the employer was in the process of preparing one. That expectation was consistent with the employer's prior conduct in submitting "Employer Supervisor Job Assignment Agreement"[s] for claimant's signature following modification of his medical restrictions in April and July of 2013. Although claimant may have been mistaken, the record fails to show that any violation by claimant of the employer's no call no show policy that may have occurred on or after November 13 was "intentional" or wantonly negligent, and not based on a good faith belief that the employer was aware that it was required to submit a written offer of a modified job before claimant would be able to return and that claimant remained an employee until it did so. *See, Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006)( A "good faith error" typically involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving benefits on the basis of his work separation.

**DECISION:** Hearing Decision 14-UI-11947 is set aside, as outlined above.

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

**DATE of Service: <u>April 25, 2014</u>**

**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.

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.