

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0418

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 26, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntary left work without good cause (decision # 131117). Claimant filed a timely request for hearing. On February 19, 2014, ALJ Hatfield conducted a hearing, and on February 26, 2014 issued Hearing Decision 14-UI-11244, concluding the employer discharged claimant but not for misconduct. On March 17, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Silver Spur Trucking Company employed claimant as a truck driver from April 24, 2012 until December 4, 2014.

(2) Claimant had a problem with his back that involved bad discs and pinched nerves that sometimes limited his physical activities. When the employer hired claimant, claimant was told that the job required him to place chains on the truck in snowy weather. Claimant told the employer he had never before placed chains on a truck and that, although he had a bad back, he was willing to try to install chains.

(3) During the winter of 2012-2013, claimant was required to place chains on his truck on one occasion. The physical activity required to put the chains on the truck aggravated claimant's back and claimant was not able to walk for three days. After this incident, claimant told the employer that he physically was unable to perform the task of placing chains on a truck. The employer told claimant that the snowy weather was now over, and to bring up his limitation with the driver-manager next winter.

(4) In fall 2013, claimant brought up to the employer that he thought he was going to be unable to place chains on any trucks he drove in winter 2013-2014. On October 20, 2013, the employer sent claimant a letter telling him that if he was not able to place chains on trucks during winter storms, he would be disciplined under the employer's disciplinary policy, up to and including discharge.

(5) Sometime before December 4, 2013, when claimant was scheduled to drive for the employer, claimant noticed that there was snow predicted for his route. Claimant asked the driver-manager if he could be relieved from driving that day because he would be unable to install chains on the truck. The driver-manager told claimant to arrange for another employee to drive his assigned route if he thought he could not physically place chains on the truck. Claimant was unable to find another driver to handle the route. On December 4, 2013, claimant called the employer and said he was not able to drive the route assigned to him for December 4, 2013 because it was snowing over that route and he was physically unable to install the chains that driving that route would require. The employer told claimant he was assigned that route and if he did not drive it he would have to quit. Claimant told the employer that, under those circumstances, he was quitting. Claimant did not want to leave work, but thought that the employer was requiring him to quit if he was unable to drive that route.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The employer contended at hearing that claimant voluntarily quit work on December 4, 2013. Audio at ~15:55. Although claimant conceded that he told the employer that he was quitting on December 4, 2013, it was within the context of the employer couching the only alternatives available to claimant as either driving the route or quitting. Audio at ~11:31, ~14:05, ~19:01. Despite what he said, claimant was willing to continue working for the employer. Audio at ~14:05. Because it was not disputed that claimant had previously raised with the employer his inability to drive particular routes when chains were required, and the employer had notified claimant in the October 20, 2013 letter that his inability to drive snowy routes would lead to disciplinary sanctions, it was reasonable for claimant to conclude that the employer was not leaving him room on December 4, 2013 to decline to drive the route and maintain his job. On these facts, claimant was willing to continue working for the employer but, by the limited options it gave to claimant, it can only be inferred that the employer was not willing to allow claimant to continue working if he could not install chains on a truck. Despite claimant saying the words that he was quitting, applying the provisions of OAR 471-030-0038(2), claimant's work separation was a discharge on December 4, 2013.

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) 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is no evidence in the record that claimant engaged in any willful or wantonly negligent behavior that violated the employer's expectations. The employer did not seriously dispute claimant's contention

that he was physically unable to place chains on a truck. It was not misconduct for claimant to ask to be relieved of a route when he would likely need to install chains on a truck, a task he was unable physically to perform. This record does not support, more likely than not, that the employer discharged claimant for a willful or wantonly negligent violation of its expectations.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-11244 is affirmed.

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

DATE of Service: April 1, 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.