

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0493

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On November 27, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 153654). The employer filed a timely request for hearing. On February 26, 2014, ALJ Buckley conducted a hearing, and on February 28, 2014 issued Hearing Decision 14-UI-11371, affirming the Department's decision. On March 20, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB. That argument presented new information about the employer's FMLA policy, apparently in an effort to establish that if claimant did not return to work after the expiration of his FMLA leave claimant should have known the employer would consider him to have quit. However, because the employer's argument contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering that new information during the hearing, EAB did not consider it. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence when reaching this decision.

FINDINGS OF FACT: (1) Trees, Inc. employed claimant as a groundskeeper from September 7, 2003 until October 7, 2013.

(2) Sometime around November 29, 2012, the employer approved claimant's request for a medical leave from work under the Family Medical Leave Act (FMLA). The leave was approved for 120 days from November 29, 2012, or until March 29, 2013.

(3) By March 29, 2013, claimant still had not received a release to return to work from his treating physician. It was claimant's understanding that he should contact the employer only after he received such a release. Claimant did not communicate with the employer at the end of his approved FMLA leave or at any time after to inform the employer he still was not medically released to return work. The employer did not contact claimant during his absence to inquire about claimant's intentions, whether claimant was medically able to return to work or for any other reason.

(4) On October 7, 2013, claimant called his supervisor to inform the employer that he expected to receive a medical release from his physician within the next couple of weeks. This call was the first contact between claimant and the employer since November 29, 2012, when claimant's FMLA leave had started. Claimant asked the supervisor if the employer had any work available for him. The supervisor told claimant that there was no work available. By the supervisor's response on October 7, 2013, the employer discharged claimant. On October 14, 2013, claimant received a medical release from his physician allowing him to return to work for the first time since November 29, 2012.

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

The first issue this case presents is the nature and date 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 claimant 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).

Claimant's supervisor testified at hearing both that claimant was discharged on March 29, 2013, at the end of claimant's FMLA leave, and that the supervisor thought claimant had quit work by not communicating with the employer after the end of the FMLA leave. Audio at ~8:08, ~8:44, ~9:29, ~13:59, ~24:53. Claimant contended that he first was aware that the employer had no work for him when he called his supervisor on October 7, 2013 and that claimant then surmised that he had been discharged. Audio at ~13:53, ~21:30. Under the circumstances, claimant's failure to return to work after the expiration of the FMLA leave was, at best, a highly ambiguous expression of an intention to quit work when claimant was off from work for medical reasons and the employer was not in possession of any information that claimant had been medically released to work. Claimant's testimony at hearing that he thought he should only contact the employer after he had received a medical release appeared sincere and believable. Audio at ~17:26, ~18:42, ~18:58, ~20:06, ~21:54. On these facts, it was not reasonable for the employer to infer, absent corroborating information, that claimant's failure to communicate with the employer meant that claimant was quitting work. By calling his supervisor on October 7, 2013 to inquire about work when he thought he would imminently obtain his medical release, claimant unequivocally demonstrated that he was willing, and had been willing throughout his absence from work, to continue working for the employer when he was medically able. More likely than not, claimant's work separation was a discharge on October 7, 2013 when claimant's supervisor told claimant that the employer did not have any work for him.

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. 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).

The supervisor testified that the employer discharged claimant because claimant did not maintain contact with the employer during and after his FMLA leave. Audio at ~8:44, ~12:01, ~ 13:59. From the supervisor's testimony, we infer that the supervisor did not instruct claimant to keep in touch with the employer, but merely "assumed" that claimant would maintain contact. Audio at ~ 12:05. There is no evidence in the record that claimant was ever explicitly made aware of any expectation to maintain contact with the employer while away from work. Given the apparent sincerity of claimant's belief that he was expected to communicate with the employer only after he had received a medical release to return to work, we are reluctant to conclude that claimant acted willfully or with an indifference to the consequences of his behavior when he failed to contact his supervisor until he knew he was going to receive a medical release permitting him to return to work. Audio at ~17:26, ~18:42, ~18:58, ~20:06, ~21:54. Even if claimant reasonably should have inferred that, under the circumstances of his lengthy absence from work, the employer expected him to remain in contact, claimant's behavior in not contacting the employer would still be excused from misconduct as a good faith error in understanding the employer's requirements. *See* OAR 471-030-0038(3)(b). The employer did not meet its burden to establish claimant engaged in misconduct.

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

DECISION: Hearing Decision 14-UI-11371 is affirmed.

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

DATE of Service: April 11, 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.