

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0513

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 12, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #131539). The employer filed a request for hearing. On January 16, 2014, ALJ Kangas issued Hearing Decision 14-UI-08634 dismissing the request for hearing as untimely, subject to the employer's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.¹ On January 27, 2014, the employer submitted its response. On February 24, 2014, the Office of Administrative Hearings (OAH) issued a letter entitled, "Cancellation of Hearing Decision," cancelling and vacating Hearing Decision 14-UI-08634, and notifying the parties that a hearing would be scheduled. On February 25, 2014, OAH issued a notice of hearing on March 11, 2014. On March 11, 2014, ALJ Triana conducted a hearing, and on March 13, 2014 issued Hearing Decision 14-UI-12401, allowing the employer's request for hearing, and affirming decision #131539. On April 1, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

No party applied for review of that portion of Hearing Decision 14-UI-12401 allowing the employer's request for hearing. We therefore limit our review to whether claimant is disqualified from receiving benefits based on his work separation from the employer. EAB considered the employer's written argument on that issue, and the entire hearing record.

FINDINGS OF FACT: (1) Partnerships in Community Living employed claimant from September 9, 2010 to July 9, 2013 as a direct support professional.

(2) To establish an approved leave of absence from work, the employer expected employees to complete a leave request and provide the necessary medical certification. The employer expected employees on

¹ Hearing Decision 14-UI-08634 at 2.

an approved leave of absence to maintain contact with the employer. Claimant understood the employer expected him to maintain contact with the employer.

(3) On March 4, 2013, claimant was scheduled to work. Claimant contacted his supervisor and told her he was unable to work because he had a knee injury and was going to seek medical attention. The knee injury did not occur at work. Claimant received medical attention at an emergency room. He then went to work and gave his supervisor papers from the emergency room that stated he should not work and should seek further treatment from his primary care doctor. Claimant's supervisor told claimant he did not need to complete anything else at that time for approval to miss work.

(4) On approximately March 18, 2013, claimant told his supervisor his knee had not improved. He tried to call the employer's director of human resources at the end of March 2013, but she was not available when he called.

(5) On April 8, 2013, claimant left a voicemail message for the director of human resources. On April 9, 2013, claimant sent her an email. The email stated, "I have been informed I need to contact you before being able to return to work. I tried calling on 4-8, but did not receive a call back yet. If you'd please give me a call at [telephone number] so we could talk or set up a new time to meet that would be greatly appreciated." Transcript at 15. Claimant did not contact the employer again.

(6) The employer did not contact claimant until July 2, 2013, when it sent claimant a letter stating the employer was discharging him on July 9, 2013 because claimant had abandoned his job by not contacting the employer.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant, not for misconduct.

OAR 471-030-0038(2)(b) (August 3, 2011) provides that 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. 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). As used in OAR 471-030-0038(2), the term "work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a).

In this case, claimant's communications with his supervisor and attempts to communicate with the employer's human resources director showed his willingness to continue working for the employer. The record does not show the employer responded to claimant's email to the director of human resources other than to send him a letter stating the employer was discharging him because he had not contacted the employer. The record therefore establishes that claimant was willing to continue working for the employer for an additional period of time, but was not allowed to do so by the employer. The work separation therefore is 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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, for violating its leave of absence policy by failing to complete a leave of absence request form. However, claimant gave his supervisor documentation of his injury the first day he was unable to work due to his knee. His supervisor told him he did not need to complete additional forms at that time for approval to miss work. The employer therefore failed to show claimant knew or should have known his failure to complete a leave of absence request form probably violated the employer's expectations. Claimant's failure to complete a leave of absence request form was, at worst, the result of a good faith error in his understanding of the employer's expectations. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer also discharged claimant for failing to maintain contact with the employer during his absence. However, claimant maintained contact with his supervisor during March 2013, and on April 9, 2013 sent an email to the employer's director of human resources asking that she initiate the process for him to return to work. The employer failed to show it made any attempt to contact claimant from April 9 until July 2, 2013, when it sent claimant a letter stating that it was discharging him on July 9, 2013. The record therefore shows that it was the employer that failed to maintain contact prior to July 2, and not claimant.

At hearing, the employer's witness testified that the July 2 letter stated claimant could contact the employer if he disagreed with the employer's decision to discharge him. Transcript at 33. Claimant testified that he did not understand from the letter that he could contest the employer's decision to discharge him. Transcript at 32. The letter was not introduced as an exhibit. Based on the conflicting testimony from the parties, the employer has not shown by a preponderance of the evidence that claimant knew or should have known from the letter that he could contest the employer's decision to discharge him, and that failing to contact the employer before July 9 probably violated the employer's expectations. Claimant's failure to contact the employer before July 9 therefore was not a willful or wantonly negligent violation of those expectations.

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

DECISION: Hearing Decision 14-UI-12401 is affirmed.

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

DATE of Service: April 28, 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.