EO: 200
BYE: 201502

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-0573

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #84553). The employer filed a timely request for hearing. On March 21, 2014, ALJ Lohr conducted a hearing, and on March 25, 2014 issued Hearing Decision 14-UI-13308, concluding claimant voluntarily left work without good cause. On April 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record. Claimant argued that he mistakenly believed the ALJ would have information at hearing that he had provided to the Department, and that the ALJ erred in refusing to keep the record open to allow claimant to submit additional information. The Notice of Hearing states that the documents enclosed with the Notice of Hearing are the only documents that the ALJ would consider at hearing. It also states that a party wishing to have the ALJ consider other documents must provide copies of those documents to all parties and to the ALJ prior to the date of the scheduled hearing. Claimant failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. The ALJ was not required to leave the record open after the hearing to allow claimant to submit additional information that he could have offered during the hearing. Additionally, the relevant portions of the new information proffered by claimant are duplicative of information already in the record. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and the portions of claimant's argument that were based on the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Island Tanning OC employed claimant from September 28, 2009 to January 20, 2014 as a salesperson.

(2) On January 13, 2014, the employer sent claimant an email stating it was dissatisfied with claimant's management skills and level of sales, and that it was going to reduce his salary from $3,200 to $2,800 per month, plus commission, until his work performance improved. The email stated that his employment would be terminated if he did not improve his sales and attitude.

(3) On January 20, 2014, claimant reported to work. Claimant opened his paycheck for the pay period of January 1 through January 15, 2014, and saw the employer had reduced his wages and had not paid him the commission he had earned. Claimant called the employer's president to discuss his pay. The employer's president told claimant he would not pay claimant his prior wage amount and to "get the f--- (sic) off his premises." Transcript at 15. Claimant left and did not return to work.

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

The first issue is the nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) provides that 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. 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).

In Hearing Decision 14-UI-13308, the ALJ found facts consistent with the testimony of the employer's president. However, in doing so, the ALJ largely ignored claimant's contradictory testimony, without making an explicit determination about the credibility of the witnesses, or explaining that determination. Based on the testimony from the employer's president, the ALJ determined that the employer had continuing work available for claimant, and that claimant "walked off the job."[1] We disagree with the ALJ's implicit credibility determination favoring the testimony from the employer's president.

Claimant testified that he reported to work on January 20, 2014, and called the employer's president when he saw the employer had reduced his wages for the first pay period in 2014. Transcript at 19. Claimant testified that a disagreement followed, and the employer told him to "get the f--- (sic) off his premises." Transcript at 15, 19-20. Claimant then left work and did not return. He testified that he would have been willing to continue his employment had the employer not told him to leave. Transcript at 22. We found claimant's testimony to be consistent and plausible.

At hearing, the employer's president asserted claimant quit. Transcript at 5, 10. The employer's president asserted at hearing that the employer did not reduce claimant's wages, and that he had an amicable conversation with claimant on January 20, during which they did not discuss his wages. Transcript at 13-14. However, the testimony from the employer's president was evasive, confusing and contradictory. When asked whether he had reduced claimant's wages, he stated that "there may have been discussion about cutting his pay," but that "his pay wasn't cut at all." Transcript at 11-12. When

[1] Hearing Decision 14-UI-13308 at 2.

asked if he sent claimant an email stating the employer would reduce his wages, the president replied that he had not. Transcript at 44-45. The employer's president then conceded "he might be mistaken" because he had seven salons, and argued that it did not matter if he had reduced claimant's wages. Transcript at 45. He further conceded that he sent claimant an email on January 13, 2014 stating the employer was reducing claimant's salary from $3,200 to $2,800 per month. Transcript at 46-48. We found claimant more credible than the employer's president, and have found the facts in accordance with the claimant's testimony on matters in dispute.

The weight of the evidence shows the work separation occurred because the employer's president told claimant to get off the premises, thereby indicating that the employer was unwilling to allow claimant to continue working. Because the record shows claimant was willing to continue working, but was not allowed to do so by the employer, the separation 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) (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.

There is no evidence in the record that claimant engaged in any willful or wantonly negligent behavior that violated the employer's expectations. It was not misconduct for claimant to inquire about his paycheck, and the employer did not allege any insubordination or other misconduct occurred during the telephone conversation. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, the employer has not shown that it was more probable than not that claimant engaged in conduct that he knew or should have known would probably result in a violation of the employer's reasonable expectations.

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

DECISION: Hearing Decision 14-UI-13308 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J.S. Cromwell, *pro tempore*, not participating.

DATE of Service: <u>May 5, 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.