

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0664

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 18, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155106). Claimant filed a timely request for hearing. On February 18, 2014 and March 25, 2014, ALJ Vincent conducted a hearing, and on April 3, 2014 issued Hearing Decision 14-UI-14129, concluding the employer discharged claimant, but not for misconduct. On April 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Northwest Restaurants employed claimant as a restaurant general manager from February 4, 2007 to November 30, 2013.

(2) In mid-November, claimant and his district manager exchanged text messages about some issues related to the performance of the restaurant claimant managed. Claimant perceived that the district manager was dissatisfied with aspects of his performance; the district manager perceived sarcasm on claimant's part.

(3) On November 27, 2013, claimant and the district manager attended the same meeting. The district manager asked claimant to step away from the meeting with him to discuss the text messages and clear any misunderstandings. The discussion quickly became heated, and claimant repeatedly tried to walk away from the discussion while the district manager insisted that the discussion continue. Claimant told the district manager that he could not work for the district manager any longer.

(4) The district manager asked claimant for his keys to the employer's restaurant. Claimant refused to give the keys to the district manager, stating that he first wanted to speak with the owner and director of operations. Claimant wanted to ask to be transferred to a restaurant that was not within the district manager's area of supervision. The district manager said, "[Y]ou know what? Just give me your keys.

You're dismissed." February 18, 2014 hearing, Transcript at 14. Claimant gave his keys to the district manager and left.

(5) Claimant immediately placed calls to the owner and director of operations requesting a transfer to a different location. After several days, during which the employer investigated the events of November 27, 2013, the employer discharged claimant.

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

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) (August 3, 2011). 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).

Claimant and the employer disputed whether he quit or was discharged. The employer claimed claimant stated "I f-ing quit" during the November 27th conversation with the district manager. February 18, 2014 hearing, Transcript at 32. Claimant denied having done so. Absent a reason to conclude that either party lacked credibility, the evidence is no better than equally balanced as to whether that occurred. Because the evidence is equally balanced on that point, the preponderance of the evidence fails to show one way or the other whether claimant made that statement.

The preponderance of the evidence shows that claimant made an ambiguous statement about not wanting to work for the district manager after November 27th. He did not say he had decided to quit working for the employer, and the evidence fails to show that he resigned from work. His subsequent actions, including his refusal to return his keys to the district manager, insistence on discussing things with the owner and director of operations before doing so, and his repeated requests to transfer to a different location not supervised by the district manager all demonstrate that claimant was willing to continue to work for the employer for an additional period of time.

Due to the ambiguity of claimant's statement, it is plausible that the district manager formed a mistaken belief that claimant had quit work, and that his and the director of operation's subsequent actions stemmed from that belief, culminating with the director of operations ending claimant's employment. However, that the employer might have acted on a mistaken belief about claimant's intent when making the ambiguous statement does not change the nature of the work separation from a discharge to a quit. The director of operations objectively demonstrated the employer's unwillingness to allow claimant to continue working after November 30th by telling claimant that the employer had decided to move on without claimant and would not allow him to continue working, making the work separation 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.

The employer disputed that it discharged claimant, and therefore did not present any specific evidence as to why a discharge would have occurred. To the extent we can infer from the events surrounding

claimant's November 27th interaction with the district manager triggered the discharge, the record fails to show misconduct occurred. Although the employer alleged claimant's behavior was overly emotional and involved the use of foul language, the evidence the parties presented as to what occurred was equally balanced, and therefore fails to show that claimant's behavior was so egregious that it constituted a violation of the employer's expectations or exceeded mere poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 14-UI-14129 is affirmed.

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

DATE of Service: May 21, 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.