

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0752

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 104126). Claimant filed a timely request for hearing. On April 17 and 22, 2014, ALJ Clink conducted a hearing, and on April 30, 2014 issued Hearing Decision 14-UI-16439, concluding the employer discharged claimant for misconduct. On May 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Country Side Village employed claimant from January 6 through 30, 2014.

(2) Claimant worked for the employer as a part-time night shift receptionist. The position paid \$9.10 per hour. However, claimant understood she would be paid more based on her experience and the performance of additional duties, receive a pay differential for working night shifts, and not be required to work consecutive night shifts on weekends.

(3) The employer required claimant to perform cleaning duties that the other night shift receptionist was not required to perform. Claimant was trained to complete cleaning duties assigned to the employer's kitchen employees when they failed to complete them, and claimant did so. The employer required claimant to work consecutive night shifts on weekends. The employer paid claimant \$9.10 per hour. Claimant believed that the kitchen employees were not being held accountable for failing to complete their required duties, and that employer's executive employees sometimes treated her in a discourteous manner. When claimant questioned and complained to her superiors, she received no response. Employees suggested that claimant submit her questions and complaints in writing.

(4) On January 25, 2014, as advised by another employee, claimant left her supervisor a letter stating that the other night shift receptionist should be required to perform cleaning duties, and that it was not fair that claimant received the same pay as the other night shift receptionist when she was expected to do more work. Claimant also noted that the kitchen employees were failing to perform their assigned

cleaning duties. In addition, claimant left her supervisor a note stating that it was her opinion that the employer's executive staff needed to be reminded that the employer's employee handbook required all employees to be courteous.

(5) On January 26, 2014, claimant's supervisor left claimant a letter stating that claimant was expected to note whether the kitchen staff completed their assigned cleaning duties, some of which apparently were not being completed. The letter further stated that, going forward, the other night shift receptionist would be required to perform the same cleaning duties as claimant.

(6) On January 26, 2014, claimant left a letter for her supervisor complaining that the kitchen staff never cleaned the table bases as required, and should be held accountable for failing to do so. Claimant also complained that she was not receiving a pay differential for working night shifts, and was being required to work consecutive night shifts on weekends. In addition, claimant complained about being asked to perform duties that the kitchen staff was assigned to perform, and stated that she was not happy with the situation. Finally, claimant complained that she had been asked to sign training documents to acknowledge receiving materials that she had not received.

(7) Claimant was instructed to notify the kitchen manager in writing if the kitchen staff failed to clean the employer's dining room as required, or left menus out. Claimant subsequently left a note for the kitchen manager stating that nothing in the dining room had been wiped down, and that menus, food and plates had been left out. Claimant further stated that she had filled all the sugar caddies, and that it would be nice to "come into stocked tubs." Exhibit 1 at 18.

(8) On January 28, 2014, as advised by the employer's executive health coordinator, claimant left her supervisor a letter, copied to the employer's executive culinary director, stating that that was not the first night she had "come into" dirty dishes, that she did not feel good about placing dirty utensils on the placemats, and that she would not place dirty dishes on the tables again. Exhibit 1 at 23. Claimant asked if the night shift receptionist needed to check the kitchen toward the beginning of her shift and wash the dishes if necessary. That same day, claimant left her supervisor a note complaining that one of the other receptionists was a "yeller," and that claimant would no longer tolerate it. Exhibit 1 at 18. Claimant's supervisor left claimant a letter stating that she would like to meet with claimant on January 29 to "discuss the letters you have written me and the concerns you have." Exhibit 1 at 21.

(9) Prior to the January 29, 2014 meeting, as advised by one of the employer's cooks, claimant left the kitchen manager a letter, copied to claimant's supervisor, stating that claimant found ants in the dining room, notified the cook, and cleaned the ant-infested area several times. Claimant further stated that the kitchen crew seemed to think it was acceptable to state that they had performed a task when they had not, and that claimant was not pleased to see them taking credit for work they were not completing. Claimant asked who was expected to take stock of items in the employer's café, stating that she did so every night, and wanted to know if that also was something for which someone else was taking credit.

(10) On January 29, 2014, claimant met with her supervisor and the employer's executive director, who told claimant to stop making complaints about other employees and performing duties assigned to the kitchen employees. Claimant defended her actions, stating that she had been advised to submit questions and complaints in writing, and was improperly trained to complete cleaning duties assigned to the employer's kitchen employees when they failed to complete them. Claimant again complained that

kitchen employees were not being held accountable for failing to perform their assigned duties, that claimant was not receiving a pay differential for working night shifts, and that she was being required to work consecutive night shifts on weekends. Later that day, claimant gave her supervisor a letter, copied to the executive director, stating that she was disappointed with the results of their meeting. Claimant again complained that she was improperly trained, and asserted that she nevertheless managed to complete all the duties she was asked to perform.

(11) On January 29, 2014, the employer decided to discharge claimant for her behavior from January 25 through 29. On January 30, 2014, claimant drafted a letter stating that she was resigning, effective immediately. On January 30, 2014, claimant met with her supervisor, who informed claimant that she was discharged. Claimant responded by telling her supervisor that she was quitting work, and giving her the resignation letter.

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

The first issue in this case 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). An individual is separated from work when the employer-employee relationship is severed. *Id.*

In the present case, the employer decided to discharge claimant the day before claimant drafted her resignation letter. The employer also notified claimant that she was discharged before claimant notified the employer she was quitting work, and submitted her resignation letter. Because the employer severed the employment relationship before claimant, the work separation is a discharge, and not a voluntary leaving.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-16439, the ALJ concluded the employer discharged claimant for misconduct based on findings that claimant continued to “bombard” the employer with written complaints about other employees after the employer advised her stop doing so, and that claimant was “angry and combative” during her January 29, 2014 meeting with the employer, and indicated she would not

discontinue her behavior.¹ However, the record fails to show that the employer advised claimant before the January 29, 2014 meeting to stop making written complaints about other employees, or that claimant otherwise knew or should have known from prior training or experience that making such complaints probably violated the employer's expectations. Nor do we find claimant's conduct so egregious that we infer she knew or should have known as a matter of common sense.

With respect to claimant's behavior on January 29, 2014, claimant had the right to defend her actions and assert that her complaints were justified. The record does not show that claimant behaved in an "angry and combative" manner, that she indicated she would not stop complaining about other employees, or that she consciously engaged in other behavior she knew or should have known through prior training, experience or warnings probably violated the employer's expectations. Nor, again, do we find claimant's behavior so egregious that we infer she knew or should have known as a matter of commons sense.

In sum, the employer failed to show that it discharged claimant for 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 amounted to a willful or wantonly negligent disregard of an employer's interest. The employer therefore failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-16439 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 13, 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.

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.

¹ Hearing Decision 14-UI-16439 at 1-2.