

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0769

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 105825). The employer filed a timely request for hearing. On April 23, 2014, ALJ Lohr conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16088, affirming the Department's decision. On May 6, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fair Way Stations, Inc. employed claimant as a cook from October 17, 2014 until February 9, 2014.

(2) The employer expected claimant to report for work when scheduled. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On February 9, 2014, the assistant manager drove claimant home from work after claimant's shift ended at 2:00 p.m. During the ride home, the assistant manager asked claimant if he was willing to work the morning shift on February 10, 2014, a day when claimant was scheduled to be on-call for work. Claimant agreed. After claimant had arrived home, his wife reminded him that he could not work the morning of February 10, 2014 because their children had medical appointments scheduled that morning and he needed to drive them. Claimant's wife did not have a driver's license. The medical appointments were important to keep because claimant's oldest child could not return to school unless he received a vaccination. At approximately 5:00 p.m., claimant called the assistant manager and told her that he was not able to work the morning shift on February 10, 2014 due to the medical appointments about which his wife had just reminded him. Shortly after this conversation concluded, the assistant manager called claimant and asked him if he could work the swing shift on February 10, 2014, which started at 2:00 p.m. Claimant told the assistant manager that, because of the scheduling of the children's medical appointments, the earliest he was able to start work on February 10, 2014 was 6:00 p.m. The

assistant manager told claimant she would make other arrangements for the swing shift. Shortly after this conversation concluded, the assistant manager called claimant again and told him that she needed him to work the whole swing shift on February 10, 2014. Claimant again told the assistant manager that he was unable to start work on February 10, 2014 earlier than 6:00 p.m. For some short period of time, they discussed claimant's inability to work the entire swing shift. They both became upset. The assistant manager commented that it was sometimes difficult to accommodate claimant's work schedule to his personal schedule and that she was "tired of it." Audio at ~27:57. The assistant manager then told claimant that "we're done." Audio at ~28:06. Claimant asked her, "Are you letting me go?" Audio at ~28:35. The assistant manager answered, "Yes" and hung up the phone. Audio at ~28:37.

(4) On February 9, 2014, the employer discharged claimant.

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

The first issue this case presents is the nature 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).

The employer's witness contended that claimant voluntarily quit work when, for unknown reasons, he stopped reporting for scheduled shifts and the employer was unable to contact him. Audio at ~6:00, ~6:09. Claimant testified that the employer's assistant manager told him that his employment was terminated on February 9, 2014 and that the apparent termination was the reason that he did not thereafter report for work. Audio at ~11:03, ~11:28, ~27:10. The testimony of the employer's witness was apparently based on hearsay from the assistant manager and was comprised of generalized contentions without specific evidentiary detail. *See* Audio at ~6:09, ~7:16, ~7:45, ~9:36, ~14:48, ~17:04. In contrast, claimant's testimony about his conversations with the assistant manager on February 9, 2014 was highly specific and based on his direct participation in those conversations. *See* Audio at ~20:20, ~26:00, ~27:10. Claimant's first-hand information is entitled to greater weight than the employer's hearsay evidence and we accept claimant's testimony as an accurate account of his conversations with the assistant manager. Based on the statements that the assistant manager made to claimant on February 9, 2014, it was reasonable for claimant to conclude that the assistant manager had discharged him. Although the employer's witness contended, again very generally, that claimant should have been aware that assistant managers did not have the authority to discharge employees and, therefore it was unlikely that the assistant manager told claimant that he was discharged, the witness did not directly dispute claimant's testimony that he was never made aware of any limitations on the apparent authority of the assistant managers and that, in the past, claimant had observed the discharge of other employees by managers absent the apparent participation of the owner. Audio at ~10:10, ~10:55, ~32:07, ~38:36. The record does not show, more likely than not, that claimant knew the assistant manager was prohibited from discharging him or that did not reasonably believe or subjectively believe that, by her statements on February 9, 2014, the assistant manager had not discharged him. Since the record also supports the conclusion that, more likely than not, claimant would have continued working for the employer absent the assistant manager's statements to him, and his interpretation of those statements was reasonable, claimant did not voluntarily leave work. Claimant's work separation was therefore a discharge on February 9, 2014.

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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Because the employer contended that it had not discharged claimant, it did not present reasons for his discharge or any evidence of his misconduct. It can only be discerned from the record that the assistant manager disliked that claimant was not able to report to work on February 10, 2014 until 6:00 p.m. However, there was no evidence showing that claimant's reasons for not being able to report for work earlier violated a reasonable employer expectation or that claimant did not give the employer adequate notice of his inability to report for work earlier than 6:00 p.m.. On this record, the employer did not meet its burden to demonstrate claimant's misconduct.

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

DECISION: Hearing Decision 14-UI-16088 is affirmed.

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

DATE of Service: June 18, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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