

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0777

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #81809). Claimant filed a timely request for hearing. On April 16, 2014, ALJ M. Smith conducted a hearing, and on April 17, 2014 issued Hearing Decision 14-UI-15462, affirming the Department's decision. On May 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Insperity PEO Services LP employed claimant as a vice president of corporate development from March 1, 2013 to December 12, 2013.

(2) During the course of her employment, the employer transferred most of claimant's job duties to other employees. On December 3, 2013, the employer gave claimant a performance review stating that claimant met its minimum expectations, but needed to improve her performance regarding its national accounts. Exhibit 1. Claimant disagreed with the performance review, and discussed it with a company president. The company president told claimant that her job was in jeopardy.

(3) Claimant knew that a discharge "for cause" could decrease the disbursement she received from her vested stock options by approximately one third. On December 12, 2013, claimant notified the employer she was quitting work, effective January 11, 2014. The employer responded by terminating claimant's employment on December 12, 2013.

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

The first issue is the nature of the work separation. 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). "Work" means "the continuing relationship between an employer

and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 14-UI-15462, the ALJ found as fact that claimant quit work on December 12, 2013, without determining whether claimant’s work separation was a voluntary leaving or discharge under OAR 471-030-0038(2).¹ However, on December 12, 2013, claimant gave the employer written notice that she was quitting work, effective January 11, 2014. The record therefore shows that claimant was willing to continue working for the employer for an additional 30 days. The record does not show that claimant agreed to end her employment on December 12, 2013. Absent such a showing, we find the employer unilaterally terminated claimant’s employment on December 12. Because 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 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). However, the employer did not appear at the hearing or otherwise present evidence showing the reason it discharged claimant.

Although claimant believed the employer might discharge her in the future because it had removed most of her job duties, gave her a poor review in some areas of her work performance, and told her that her job was in jeopardy, the employer did not discharge claimant until she gave notice that she planned to quit. The record therefore shows the employer discharged claimant when it did because she notified the employer she planned to quit, and not because she had failed to meet the employers’ performance expectations. Nor does the record show that claimant consciously engaged in conduct she knew or should have known would probably result in her failure to meet the employer’s performance expectations, or that she was indifferent to the consequences of her actions. The record therefore fails to establish that the employer 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.

Therefore, we conclude 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-15462 is set aside, as outlined above.

DATE of Service: June 11, 2014

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

¹ Hearing Decision 14-UI-15462 at 2.

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.