

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1013-R

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 132612). Claimant filed a timely request for hearing. On May 23, 2014, ALJ R. Davis conducted a hearing, and on June 4, 2014, issued Hearing Decision 14-UI-18912, affirming the Department's decision. On June 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On July 16, 2014, EAB issued Appeals Board Decision 2014-EAB-1013, reversing Hearing Decision 14-UI-18912 as unsupported by a complete record, and remanding the matter for such other and further proceedings as may be necessary. On August 8, 2014, the Office of Administrative Hearings (OAH) submitted a complete hearing record. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered claimant's arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Dex Media employed claimant as a marketing consultant from January 6, 2014 to April 15, 2014.

(2) On April 14, 2014, claimant sent his supervisor an email in which he expressed his reservations about the employer's products, selling strategies and the profits made through his sales of products he believed did not benefit his customers. He notified the employer that he intended to seek other work and would give the employer two weeks' notice when he found a position. He explained that he would "continue serving [his] assigned customers to the best of [his] abilities" but would show them marketing reports they had access to that often demonstrated product purchases were ineffective. Audio Record ~ 8:00 to 10:45.

(3) Later that day, the supervisor spoke with claimant by telephone and told him she was accepting his “resignation.” Exhibit 1, CD Audio ~ 0:30 to 0:50. Claimant responded that he was not resigning but disclosing his thoughts and future intentions. A manager attempted to convince claimant that the employer’s products would be effective if properly matched with the customer. When claimant expressed that he did not share the manager’s enthusiasm for the employer’s products, the manager stated that it appeared the “job fit” for claimant was poor and claimant agreed. Exhibit 1, CD Audio ~ 14:55 to 15:45. The manager then requested claimant to turn in his equipment and agreed to pay him the next day to deliver it to the employer’s Eugene office.

(4) On April 15, claimant delivered the equipment to the employer’s Eugene office and the supervisor requested that claimant sign a resignation notice. Claimant declined, asserted he had not resigned and offered to return to Klamath Falls to work. Audio Record at 17:30 to 19:00. The supervisor asked claimant to return to the office later that day and when claimant returned, informed him that the employer had decided to “let [him] go.” Audio Record at 18:50 to 19:00. Claimant was not allowed to work after April 15, 2014.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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; 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) (August 3, 2011).

At hearing and in written argument, claimant asserted that rather than quit work, he was discharged. The ALJ concluded claimant quit, reasoning,

The parties agreed [during the parties April 14 telephone conversation] that the job was no longer a good fit for claimant. A mutual agreement that causes a work separation is adjudicated as a voluntary leaving of work. *Employment Dept v. Shurin*, 154 Or App 352 (1998). Because claimant mutually agreed to end the working relationship, I find claimant voluntarily left work.

Hearing Decision 14-UI-18912 at 2. However, although claimant may have agreed during the April 14 conversation that the “job fit” was not good, he did not assert that he was unwilling to work for the employer beyond that date. Rather, he clarified in both the April 14 email and telephone conversation that he was not resigning until he found other employment and reiterated that intention the next day when he refused to sign a resignation notice despite the employer’s offer of two weeks’ pay to do so. By directing claimant on April 14 to turn in his equipment and refusing to allow him to return to work in Klamath Falls on and after April 15, the employer demonstrated that it was unwilling to allow claimant to continue to work for the employer for an additional period of time despite claimant’s willingness to do so. Under OAR 471-030-0038(2), the work separation was 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 discharged claimant on April 14, effective the following day, because it concluded claimant's "job fit" for its sales position was not a good one. Although the employer may have had legitimate business reasons for its termination decision, the record fails to show that it discharged claimant because it believed he willfully, or with wanton negligence, violated a reasonable employer expectation.

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

DECISION: Hearing Decision 14-UI-18912 is set aside, as outlined above.

DATE of Service: September 17, 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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