

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1089

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On May 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 111719). Claimant filed a timely request for hearing. On June 11, 2014, ALJ Wiperman conducted an interpreted hearing, and on June 18, 2014, issued Hearing Decision 14-UI-19910, concluding that the employer discharged claimant not for misconduct. On June 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer 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.

FINDINGS OF FACT: (1) Teeny Foods Corporation employed claimant from September 6, 1998 to April 14, 2014, last as a worker on the day shift in packing and production.

(2) If an employee was unable to report for an assigned shift, the employer's policy and expectation required that the employee contact a manager, foreman or supervisor to report the absence. (Transcript at 24). Claimant understood this employer policy and expectation.

(3) The employer granted claimant's request for a leave of absence from March 14, 2014 to April 14, 2014. Before claimant left on her leave, her foreman explained that the employer would not guarantee her job if she did not return to work on April 14.

(4) Claimant traveled to Mexico to visit family during her leave of absence. While in Mexico, claimant became ill. She consulted a doctor, who prescribed medication and advised her to rest. Claimant felt too sick to return to the United States by April 14, as she had originally planned to do.

(5) On or about April 10, 2014, claimant called Roger Merrin at the employer's facility. Claimant believed that Merrin was the supervisor of the night shift. (Transcript at 6). Merrin worked as a production planner for the employer, however, and was not a supervisor. Claimant told Merrin that because she was ill, she was unable to report for work on April 14. Claimant said she would return to work as soon as she could.

(6) On April 12, 2014, Merrin sent an e-mail to the employer's human relations department in which he stated that claimant had called him and said that she would not be returning to work on April 14 and would try to get back as soon as she could.

(7) By letter dated April 22, 2014, the employer discharged claimant, effective April 14, 2014, for abandoning her position.

(8) On April 28, 2014, claimant went to the office of the employer's human resources manager. The human resources manager explained to claimant that her employment had been terminated because claimant had not reported to work or attempted to contact the employer to report her absence.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant, not for misconduct.

The first issue to consider is the nature of claimant's 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). Here, the employer's human resources manager testified that it chose to terminate claimant's employment because she did not return to work after her extended leave ended, and failed to contact a supervisor to report her absence. By visiting the human resources manager on April 28, 2014, claimant demonstrated that she wanted to continue working for the employer. Because claimant was willing to continue working for the employer after April 14, 2014, but was not permitted to do so by the employer, the employer discharged her on that date.

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. 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 the evidence. *Babcock v. Employment*

Division, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors and absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for failing to report for work on April 14, and failing to comply with its policy and expectation that she contact a supervisor to report her absence. Claimant's failure to return to work on April 14, 2014, did not constitute misconduct. Claimant's illness prevented her from returning to the United States and her job. Absences due to illness are not misconduct. *Id.*

Claimant's purported failure to contact a supervisor to report her absence also did not constitute misconduct. The employer contended that claimant's phone call to Merrin, in which she explained that she would not be returning to work on April 14, did not comply with its policy and expectations because Merrin was not a supervisor. However, claimant testified that she believed that Merin was the night shift supervisor. (Transcript at 6). Accordingly, the record demonstrated that claimant sincerely believed, and had a rational basis for believing, that she complied with the employer's expectations and policy when she spoke to Merrin on or about April 10. Claimant's conduct was, therefore, the result of a good faith error in her understanding of Merrin's position with the employer, and not misconduct.

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

DECISION: Hearing Decision 14-UI-19910 is affirmed. *Decisión de la Audiencia 14-UI-19910 queda confirmada.*

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

DATE of Service: July 28, 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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NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en court.oregon.gov. En este sitio web, haga clic en "Help" para acceso a información en español.*

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