EO: 200
BYE: 201504

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1221

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct connected with work (decision # 151915). Claimant filed a timely request for hearing. On June 24, 2014, ALJ S. Lee conducted a hearing, and on July 2, 2014 issued Hearing Decision 14-UI-20822, concluding the employer discharged claimant, but not for misconduct. On July 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) KT Contracting Company, Inc. employed claimant from May 8, 2014 to May 14, 2014.

(2) The employer hired claimant with the intent to assign him to work on a job site in Arlington, Oregon for approximately two months. The first task associated with the assignment was for claimant and coworkers to transport two trucks to Arlington.

(3) On May 13, 2014, the assignment began. Claimant and one coworker completed transport of the first truck by approximately 3:00 p.m. Communicating primarily through claimant's coworker, Ash, the employer's comptroller indicated that he believed claimant and Ash were expected to complete transport of the second truck and begin work in Arlington by 7:00 p.m. Claimant thought the comptroller was not certain that the 7:00 p.m. arrival time was correct and he would contact them to confirm the scheduled arrival time. Claimant did not understand that he and Ash were scheduled to begin work at 7:00 p.m., or that the employer would consider them late if they did not arrive in Arlington by that time.

(4) At approximately 5:00 p.m., claimant and Ash arrived at a truck stop in Troutdale, Oregon to collect the second truck to transport to Arlington. Before leaving the truck stop, they refueled the truck and had a meal in the restaurant. Claimant had diabetes, and, although he had successfully passed a recent

physical examination and was cleared to drive professionally, one of claimant's coworkers developed some concerns about claimant's health and reported those concerns to the comptroller. After that call, the comptroller called Ash to ask his opinion of claimant's health, and Ash "kind of confirmed" that "something's going on" with claimant. Transcript at 17. The comptroller expected Ash to notify him if he noticed any further issues with claimant, and, by Ash's subsequent silence, assumed that there were no additional problems.

(5) At approximately 6:45 p.m., while still at the truck stop in Troutdale, claimant spoke with the employer's comptroller and understood for the first time that he and Ash were due to arrive in Arlington, located over an hour away, by 7:00 p.m. Claimant and Ash left the truck stop at approximately 7:00 p.m. and arrived in Arlington at approximately 9:00 p.m. The site foreman excused claimant and Ash from working that night.

(6) At approximately 10:00 p.m., Ash spoke with the comptroller. After that conversation, the comptroller formed the impression that Ash and claimant were delayed because claimant "felt he needed to have dinner" and unilaterally "took it upon himself . . . to take an hour and a half to two hours to sit down and have a meal . . . making it impossible . . . for him to . . . arrive on time for work." Transcript at 18. The comptroller was concerned that claimant's behavior was attributable to his health problems, and that he should not drive for the employer. He was also concerned that claimant had engaged in behavior that prevented him from arriving at the job site by the 7:00 p.m. starting time.

(7) On May 14, 2014, the comptroller called claimant to discuss his health and tell claimant he was not pleased that claimant had taken an extended dinner break the night before, and ask claimant to return to the employer's facility in Salem to discuss the issues instead of working in Arlington. Claimant agreed to do so.

(8) Approximately 30 minutes later, claimant called the comptroller to ask if he was being fired, and the comptroller told claimant he was. Because claimant had confirmed he was discharged, claimant did not contact the comptroller until May 16, 2014, when he called to ask for his pay.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, but not for misconduct.

The employer argued that claimant was not an employee, but was instead an independent contractor, because claimant asked to be paid in cash based on an invoice for services rendered rather than being paid as an employee. For claimant to be considered an independent contractor for purposes of unemployment insurance benefits, he must have been "customarily engaged in an independently established business," among other things. *See* ORS 657.040, ORS 670.600. Since there is no evidence in this record that claimant was customarily engaged in an independently established business, and regardless of how claimant requested to be paid, claimant was not an independent contractor.

The employer argued that claimant quit work, and claimant asserted he was discharged. The distinction between a quit and a discharge is 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) (August 3, 2011).

Neither claimant nor the employer was a particularly credible witness. Both offered internally inconsistent testimony, did not provide any documentary evidence that would tend to support their version of events, and, despite there being two witnesses to the events of May 13 and May 14, neither called those witnesses to testify. Because neither party's evidence was reliable, where facts were in dispute, we relied on the most logically plausible version of events given the circumstances.

Although the comptroller testified that claimant quit work, he did not aver that claimant stated that he quit. Rather, the comptroller inferred that claimant quit work from the fact that claimant did not report to the comptroller's office on May 14th, or contact the comptroller between May 14th and May 16th until he called to request his final pay. Claimant, on the other hand, had agreed to report to the comptroller's office on May 14th, thus demonstrating his willingness to continue the employment relationship, until, according to claimant, he called the comptroller on May 14th to ask why the comptroller wanted him to report to the comptroller's office, and, during that call, was told to come to the office to be discharged. Although the comptroller disputed that he told claimant he was fired, the comptroller did not refute that claimant made that call, and did not offer any specific information as to what was said during that call. In the absence of evidence tending to disprove claimant's version of events with respect to what was discussed during the call, or tending to show that claimant was dissatisfied with his employment or had some reason for quitting work on May 14th, it does not make sense that claimant would simply refuse to meet with the comptroller unless he knew or had reason to know that the comptroller planned to end his employment during the planned meeting. We conclude, therefore, that it is more likely than not that the comptroller told claimant during the second May 14th phone call that claimant was being discharged. Because claimant was, ostensibly, willing to continue working for the employer for an additional period of time, and the employer did not have continuing work available to claimant after May 14th, the work separation was, more likely than not, 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. 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. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The events that immediately preceded claimant's discharge, and prompted the comptroller to remove claimant from the Arlington job site and have him report to Salem, included the comptroller's concerns about the effects of claimant's health condition on his ability to perform his duties, and his belief that claimant's behavior caused claimant and Ash to arrive late to the Arlington job site on May 13th. It is, therefore, more likely than not that those were the reasons the employer chose to discharge claimant when it did.

To the extent the employer discharged claimant based on the belief that claimant's health conditions interfered with his ability to perform his duties, or to perform them in a timely manner, the employer failed to show misconduct. Not only is there insufficient evidence showing claimant's health condition interfered with his duties, or caused his delayed arrival at the Arlington job site, issues resulting from an individual's illness or disability are generally excused from the type of behavior that is considered disqualifying misconduct. *See* OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant because he failed to report to Arlington by 7:00 p.m., we disagree with the ALJ that the record showed by a preponderance of evidence that claimant knew the employer expected him to report to work in Arlington by 7:00 p.m. Although the ALJ characterized claimant's testimony about the arrival time as inconsistent, we disagree that it was. For example, claimant testified that he was not initially told to be in Arlington with both trucks by 7:00 p.m. (Transcript at 28), and that the comptroller indicated at approximately 3:00 p.m. that he was not sure whether or not he and Ash should arrive by 7:00 p.m. and would let them know the correct time (Transcript at 50). Claimant further testified that the comptroller did not state until 6:45 p.m. that claimant was expected in Arlington at 7:00 p.m. (Transcript at 44), that he was not told on the morning of May 13th that he was to arrive in Arlington by 7:00 p.m. (Transcript at 44), and that he found out after arriving in Arlington that the shift was actually scheduled to begin at 9:00 p.m. (Transcript at 46). Claimant's testimony was consistent, and, considered as a whole, demonstrated his lack of knowledge about his expected arrival time in Arlington.

Not only did claimant testify that he was unaware of the scheduled arrival time, the record shows that most of the communication between claimant and the employer occurred through an intermediary, Ash, making it even less likely that claimant subjectively understood the comptroller's expectations with respect to his arrival time in Arlington. Moreover, if, as the employer claimed, claimant and Ash had both been told that they were expected to arrive in Arlington by 7:00 p.m., it does not make sense that Ash, who was traveling in a different vehicle than claimant, and had, earlier in the day, proceeded along his route even though claimant had turned off (Transcript at 69), thus demonstrating his willingness to stay on course despite claimant's behavior, would delay his own departure from Troutdale in his separate vehicle simply because claimant had unilaterally decided to take a protracted meal break. All things considered, it is more plausible, and therefore more likely, that neither understood that they had a 7:00 p.m. arrival deadline in Arlington, than it is that both would knowingly or willfully miss a known deadline by taking almost two hours in Troutdale to refuel a truck and eat in the restaurant.

Thus, the employer failed to show that by failing to report to Arlington by 7:00 p.m., claimant consciously engaged in conduct he knew or should have known would probably result in his failure to meet the employer's expectations. Therefore, to the extent the employer discharged claimant because of his late arrival to the Arlington work site, the employer discharged claimant, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-20822 is affirmed.

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

DATE of Service:

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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