

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1649

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 171810). Claimant filed a timely request for hearing. On October 2, 2014, ALJ Shoemake conducted a hearing, and on October 3, 2014 issued Hearing Decision 14-UI-26400, affirming the Department's decision. On October 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Sun River Country Store employed claimant from March 1, 2012 to August, 25 2014.

(2) On July 28, 2014, claimant became frustrated when trying to process a transaction with a customer's credit card. The original credit card presented by the customer did not work. Claimant repeatedly asked the customer if he had another credit card or method of payment. The customer repeatedly stated that he did not. When claimant again attempted to use the credit card to process the transaction, the customer told claimant that he had another credit card to use. Claimant became upset, questioned whether the customer was serious, and threw the customer's credit card. The employer's store manager told claimant to go home and rest, and that he would contact claimant to discuss his return to work.

(3) On Monday, August 4, 2014, claimant telephoned the store manager, who told claimant that he could not return to work until he obtained treatment for his anger issues. Claimant agreed that he needed help with his anger issues, and told the store manager that he would obtain that help.

(4) On August 11 and 18, claimant telephoned the store manager to determine whether he could return to work. The store manager refused to allow claimant to return to work until he obtained treatment for his

anger issues. Claimant received health care through the United States Veterans Health administration, and attempted to schedule an appointment to treat his anger issues. However, claimant was unable to do so.

(5) On August 25, 2014, claimant again telephoned the store manager to determine whether he could return to work. The store manager again refused to allow claimant to return to work until he obtained treatment for his anger issues. Claimant still was unable to schedule an appointment to treat his anger issues. The employer terminated claimant's employment for failing to obtain treatment for his anger issues.

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

OAR 471-030-0038(2)(a) (August 3, 2011) states that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. 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).¹ 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. 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. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-26400, the ALJ concluded that the work separation was a discharge, and found that the employer discharged claimant because of behavior toward a customer on July 28, 2014.² The record shows that, as of August 25, 2014, 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. We therefore agree with the ALJ that the work separation was a discharge. However, we disagree with the ALJ's finding that the employer discharged claimant because of his behavior toward the customer on July 28, 2014. The record instead shows that the employer discharged claimant for failing to obtain treatment for his anger issues. The record further shows that claimant attempted to obtain treatment for his anger issues but was unable to do so. Absent a showing that claimant consciously engaged in conduct that he knew or should have known would probably result in his failure to obtain treatment for his anger issues, the employer failed to establish that claimant's failure to do so was willful or wantonly negligent.

¹ "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.*

² Hearing Decision 14-UI-26400 at 3-4.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-26400 is set aside, as outlined above.

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

DATE of Service: December 2, 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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