

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1777

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141147). Claimant filed a timely request for hearing. On November 5, 2014, ALJ Lohr conducted a hearing, and on November 7, 2014, issued Hearing Decision 14-UI-28378, concluding claimant voluntarily left work without good cause. On November 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Earthly Goods, an online seller of footwear and accessories, employed claimant as a member of its technical support staff from April 15, 2013 to September 12, 2014.

(2) The employer expected its employees to obey their supervisors' reasonable instructions. On August 26, 2014, claimant received a written warning from the employer for "insubordination" for reportedly disobeying direct instructions from a supervisor regarding a project test. Claimant was aware of and understood the employer's expectation. Exhibit 1.

(3) Part of claimant's job consisted of engaging in lengthy phone calls with support agents of other companies. Claimant's desk was in the employer's shipping area which made it difficult to hear and otherwise engage in conversations with the individuals he talked to on the phone. As a result, claimant routinely stepped outside to conduct the employer's business on his cell phone. Because he often smoked during those conversations, other employees considered them to be personal breaks and complained to the employer.

(4) On September 1, 2014, the employer's general manager met with claimant to discuss establishing structured break rules to resolve the problem. The general manager suggested some break rules but claimant argued that rather than taking breaks he was conducting business and the two attempted to negotiate a resolution either by moving claimant's desk away from the shipping area or developing other options. Claimant eventually disclosed to the general manager that he had been considering a move to the Seattle area to find other work and believed the time to do so had come. He gave the

general manager 30 days' notice of his intent to quit to allow the employer time to find a replacement which the general manager appreciated. The parties did not agree on a structured break schedule for the interim and claimant believed it remained to be negotiated.

(5) On September 11, 2014, the operations manager observed claimant outside on his phone while smoking. She went outside to verbally warn him against doing so and claimant inquired if it was a "fireable offense." Transcript at 48. The operations manager reported their conversation to the general manager who decided to terminate claimant's employment, effective September 12, 2014, for insubordination. When claimant reported to work the next day, the employer discharged him for that reason.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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).

In Hearing Decision 14-UI-28378, after finding that on September 12, 2014 "the employer discharged [claimant] for insubordination by continuing to take unauthorized breaks despite his supervisor's specific instructions", the ALJ concluded claimant quit work, reasoning,

...claimant conditioned his continued employment when he indicated he would rather be fired than comply with the employer's break rules. Claimant's statement "just fire me" after his supervisor reprimanded him for continuing to take unauthorized smoke breaks indicates an unwillingness to continue his employment.

Hearing Decision 14-UI-28378 at 2. However, the evidence fails to show that claimant was unwilling to continue to work for the employer beyond September 12. Claimant denied stating "just fire me" to the operations manager both on September 12 when he was terminated and at hearing, asserting at hearing that he only asked her if going outside for a business call was a "fireable offense." Exhibit 1; Transcript at 48. Moreover, the general manager asserted that on September 1 claimant gave him 30 days' notice of his intent to quit to provide the employer time to find a suitable replacement. Transcript at 11. Finally, the employer's September 11 letter to claimant clearly states that his employment was "being terminated." Exhibit 1. Viewing the record as a whole, claimant was willing to continue to work for the employer but was not allowed 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. 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).

The employer asserted it discharged claimant for insubordination in part for “failing to adhere to outlined break rules.” However, in a discharge case, part of the employer’s burden of proof includes a showing that the expectation allegedly violated that resulted in termination was reasonable and fairly communicated. Here, the employer failed to present any evidence of the “outlined break rules” claimant reportedly violated and caused his termination during the week of September 11. The general manager testified that claimant originally gave his resignation notice on September 1 because “we were *trying* to structure...his breaks. In particular his smoking breaks...And he was immovable in terms of...putting out any type of plan in order to make it...a fair structured break system like the other employees were experiencing.” Transcript at 6. Claimant testified the general manager “was suggesting a break schedule [and] I thought we were still in a negotiating period” when he was terminated. Transcript at 23. Claimant cannot be found to have willfully or with wanton negligence violated an employer expectation which, on this record, was neither clearly established nor fairly communicated to him.

The employer also asserted it discharged claimant for insubordination in stating “just fire me” to the operations manager which it interpreted as a statement that he would not follow any break rules. However, as discussed above, claimant denied making that statement. Accordingly, the evidence on that issue is no more than evenly balanced. Where the evidence is evenly balanced, we resolve facts in dispute against the party with the burden of proof, here the employer. Therefore, the employer failed to show by a preponderance of the evidence that claimant made the disputed statement and was insubordinate in doing so.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-28378 is set aside, as outlined above.

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

DATE of Service: December 31, 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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