

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0080

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 72810). Claimant filed a timely request for hearing. On January 23, 2015, ALJ Shoemake conducted a hearing, and on January 27, 2015, issued Hearing Decision 15-UI-32424, affirming the Department's decision. On January 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Target Corporation and Subs employed claimant as a seasonal packing employee from October 16, 2014 to December 2, 2014. Claimant's job was expected to last no more than 120 days.

(2) The employer expected claimant to report for work as scheduled. Claimant understood that expectation as a matter of common sense.

(3) Between November 25 and December 2, 2014, claimant was absent from work due to illness for four consecutive days. On December 2, the fifth consecutive day, claimant told an employer human resources representative that she was still sick and did not know when she would be able to return to work. The representative asked claimant if she intended to quit. After claimant replied that she did not intend to quit, the representative told her that her job was "just a temporary job and...a very demanding job and ...might be a little too much for you so I'll go ahead and do the termination." Audio Record ~ 6:00 to 7:30.

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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

At hearing, the employer asserted claimant quit and claimant asserted her employment was terminated. In Hearing Decision 15-UI-32424, the ALJ accepted the employer's evidence, found that on December 2, 2014 "Claimant told the [human resources] representative that she quit", and concluded claimant voluntarily left work, reasoning,

...Claimant testified that she did not quit her job; however that testimony was not persuasive. Claimant was the moving party in the separation because she contacted human resources according to her testimony to "see what her options were." Prior to that, claimant was not told that her job was in jeopardy. Claimant's explanation for contacting human resources does not make sense...

Hearing Decision 15-UI-32424 at 2. However, the employer's witness, rather than claimant, testified that claimant called human resources regarding her "options." Audio Record ~ 12:25 to 14:00. That testimony was based entirely on a hearsay report from the human resources employee in question and the employer's witness asserted that typically contemporaneous notes of such conversations were taken but none were taken regarding that conversation. Audio Record ~ 13:30 to 16:00. And, even if claimant called human resources regarding her "options", it does not necessarily follow that the only sensible conclusion is that she initiated the work separation by quitting. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath more weight than the employer's hearsay evidence and found facts in accordance with her testimony on matters in dispute. Because claimant was willing to continue to work for the employer on and after December 2 but was not allowed to do so, 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 because the human resource employee concluded, based on claimant's absences, that the job "might be a little too much for you." The employer had the right to expect claimant to report for work as scheduled. Claimant understood that expectation and her absence from her seasonal job from November 25 through December 2, 2014 violated it.

However, to disqualify an individual from receiving benefits, an employer has the burden to establish by a preponderance of the evidence that a violation of a reasonable employer expectation for which the claimant was discharged was due to misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, claimant did not miss work because she was indifferent to the consequences of her actions. Claimant's absences were due to illness and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

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 her work separation.

DECISION: Hearing Decision 15-UI-32424 is set aside, as outlined above.

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

DATE of Service: March 11, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.