

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0227

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 121713). Claimant filed a timely request for hearing. On February 12, 2015, ALJ Shoemake conducted a hearing, and on February 13, 2015 issued Hearing Decision 15-UI-33574, affirming the Department's decision. On February 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Printgraphics Inc. employed claimant as a salesperson from February 1, 2011 to late October 2014.

(2) Claimant suffered from Post-Traumatic Stress Disorder (PTSD) resulting from abuse during his childhood, and recurring periods of clinical depression. In 2014, claimant began a period of clinical depression. Claimant was treated with medications, but the medications exacerbated his condition.

(3) On September 4, 2014, the employer's owner offered claimant a 30-day leave of absence to deal with his mental health issues. Claimant accepted the owner's offer. The employer's owner instructed claimant to contact the employer on a weekly basis while on leave.

(4) Claimant was mentally incapable of contacting the employer while on leave or returning to work due to his mental health issues. Claimant therefore did not return to work or contact the employer through late October 2014. The owner therefore notified claimant in late October 2014 that the employer was terminating claimant's employment.

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

The first issue in this case is the nature of the 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (August 3, 2011). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 15-UI-33574, the ALJ concluded that claimant quit work, asserting that claimant “chose” not to contact the employer during his leave of absence, and “effectively abandoned his job.”¹ However, the record shows that claimant’s debilitating mental health issues rendered him incapable of contacting the employer, and not that he chose not to do so, or that he was unwilling to continue working for the employer. The record instead shows that the employer severed the employment relationship in late October 2014, and therefore did not allow claimant to continue working for an additional period of time. The work separation therefore is a discharge, and not a quit.

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. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he did not return to work or contact the employer through late October 2014. However, claimant’s absence from work and failure to contact the employer were due to his debilitating mental health issues. Absences due to mental illness or disabilities are not misconduct. Nor does the record show claimant made, or was mentally capable of making, a conscious decision not to contact the employer. Absent such a showing, we cannot find misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-33574 is set aside, as outlined above.

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

DATE of Service: April 15, 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

¹ Hearing Decision 15-UI-33574 at 2-3.

‘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.

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