

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0536

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83403). Claimant filed a timely request for hearing. On April 10, 2015, ALJ S. Lee conducted a hearing, and on April 16, 2015 issued Hearing Decision 15-UI-37022, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On May 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Edgewood Ranch, Inc. employed claimant to perform maintenance and ranch-hand work from April 1, 1988 until January 1, 2015. The employer was a ranch, owned and operated by three family members.

(2) In September 2014, one of the employer's co-owners spoke with claimant about whether he planned to retire. Because claimant was sixty-eight years old and had longstanding health issues, the co-owners were concerned about claimant's health and his ability to safely perform ranch work if he continued to work. The co-owner who spoke to claimant suggested that he might want to retire in the near future. Claimant told the co-owner that he might retire at the end of the year and, if so, he wanted to return to work during summer 2015 and summers thereafter. When the co-owner reported this discussion to the other co-owners, they assumed claimant was going to retire on December 31, 2014.

(3) Sometime between September and December 2014, one or more of the co-owners had conversations with claimant from which claimant understood that he was going to be laid off sometime around January 1, 2015, but would be brought back to work at the ranch during summer 2015. Claimant understood that the employer was going to hire another person to perform his usual work during the winter months.

(4) By December 2014, the co-owners and the other workers at the ranch were aware that claimant had a court date in Sacramento, California on January 5, 2015 to finalize a long-pending divorce action.

Claimant was required to appear in person at the scheduled court proceeding. Claimant specifically told two of the co-owners that the court date was scheduled for January 5, 2015.

(5) Around December 31, 2014, none of the co-owners or representatives of the employer asked claimant if their assumption that claimant was going to retire on December 31, 2014 was correct.

(6) On January 1, 2015, claimant travelled to Sacramento to meet with his attorney before the court date and to appear at the court proceeding. On either December 31, 2014 or January 1, 2015, one of the employer's co-owners contacted claimant by cell phone to ask him to work on January 1, 2015 because some machinery in the employer's pellet mill on the ranch was broken down. Claimant was unable to report for this work because he was en route to California.

(7) On January 6 or 7, 2015, claimant returned to Oregon from California. Claimant tried to reach the co-owners to learn what work, if any, he was expected to perform after his return to Oregon. Claimant was unable to reach any of the co-owners. Claimant then went to the employer's ranch. The co-owners were not on the premises, but several of the ranch-hands told claimant that he was no longer employed, either because he had quit or been terminated. Claimant assumed he had been laid off on January 1, 2015, as one of the co-owners had previously indicated he might be.

(8) After January 6 or 7, 2015, one or more of the co-owners called claimant on a few occasions to perform work for them or the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The first issue in this case is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The position of the employer's witness at hearing was that claimant had resigned as of December 31, 2014 based on one co-owner's understanding of claimant's statements to him during the September 2014 conversation. Audio at ~26:37, ~26:59. Claimant testified that, when the co-owner pressed him to give a timeline for his retirement, he merely stated that he might do so by the end of the year, but only if he could return to work by summer 2015. Audio at ~20:52, ~36:15. Claimant's first-hand testimony about what was said during his September 2014 conversation with the co-owner is entitled to greater weight than the hearsay testimony of the employer's witness about the same matters. Based on claimant's testimony, claimant did not unambiguously state an intention to resign effective December 31, 2014 or to completely sever the work relationship after that date. It appears, at most, that claimant was willing to accept a lay off "at the end of the year," but only if he was promised the opportunity to return to work at a later time, which the employer's witness denied was offered to claimant. Audio at ~42:23, ~43:03. That claimant tried to contact two of the co-owners to confirm their awareness that he was going to be in California for a court appearance after December 31, 2014 strongly suggests that he did not think that he was retiring effective December 31, 2014. As well, that claimant contacted the co-owners about available work promptly after he returned to Oregon from California on January 6 or 7, 2015, and ultimately went to the ranch to discover if he was still employed, also strongly suggests that

he wanted to continue working after December 31, 2014 and did not resign on that date. Because the employer was unwilling to allow claimant to return to work after December 31, 2014, the date on which it assumed claimant had resigned, we conclude that the employer discharged claimant on January 1, 2015.

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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record shows that the employer's unwillingness to allow claimant to continue working was based on a mistaken belief that he had resigned. The employer's error was not caused by claimant's willful or wantonly negligent violation of the employer's standards, which is necessary to establish misconduct, but by confusion and an apparently unintended misunderstanding. On this record, the employer did not meet its burden to establish that it discharged claimant for misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-37022 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating

DATE of Service: June 24, 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.

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