

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1192

Hearing Decision 15-UI-45168 Reversed
Not Disqualified
Hearing Decision 15-UI-45169 Affirmed
Ineligible

PROCEDURAL HISTORY: On August 28, 2015, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding the employer discharged claimant for misconduct (decision # 90400) and the second concluding claimant was not available for work during the week of August 9 through August 15, 2015 (decision # 110033). Claimant filed timely requests for hearing on both administrative decisions. On September 28, 2015, ALJ Seideman conducted a consolidated hearing, and on September 30, 2015 issued two Hearing Decisions, the first affirming decision # 90400 (Hearing Decision 15-UI-45168) and the second affirming decision # 110033 (Hearing Decision 15-UI-45169). On October 5, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-45168 and 15-UI-45169. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2105-EAB-1192 and 2015-EAB-1193).

FINDINGS OF FACT: (1) Dollar Tree Stores employed claimant from December 4, 2010 until August 14, 2015, last as an assistant manager.

(2) The employer expected claimant to report for work as scheduled or to notify the employer that she was going to be absent. Claimant understood the employer's expectations as a matter of common sense.

(3) On Friday, August 7, 2015, the employer's district manager issued to claimant two written warnings for insubordination. Claimant refused to sign the warnings and the district manager suspended claimant "until further notice." Audio at ~21:08, ~21:51, ~26:38. After receiving the warnings, claimant called the employer's regional human resources manager and told her that the district manager had unfairly suspended her for recurring issues in the workplace for which she was not responsible. Claimant asked

the human resources manager to try to learn “what was going on,” and the manager agreed to call the district manager to determine why the warnings had been issued. Audio at ~20:10, ~23:44. The human resources manager told claimant that she would call her back when she had more information. Audio at ~20:10, ~23:44. At the time claimant was suspended, claimant was aware that she was otherwise scheduled to work on the upcoming Tuesday through Saturday, August 11 through 15, 2015.

(4) By August 11, 2015, claimant had not heard from the district manager, the human resources manager or any other employer representative about when her suspension from work would be over. As a result, claimant did not report for work on August 11, 2015. On that day, claimant filed an initial claim for unemployment benefits based on her suspension from work.

(5) On August 12, 2015, claimant did not report for work because she still had not been notified that the suspension had been lifted. Also on August 12, 2015, the district manager was notified that claimant had filed a claim for benefits. On that day, the district manager called claimant and left a message, stating that she assumed claimant had quit work and telling claimant that she needed to return her work keys to the store. Audio at ~22:00, ~32:01. On August 12, 2015, after claimant accessed the message, she called the district manager. Claimant told the district manager that she was not quitting work and, as a result, did not intend to bring in her keys. Audio at ~23:18. The district manager, who was under the impression that the human resources manager had called claimant on August 10, 2015 to discuss claimant’s return to work, then asked claimant if she had spoken with the human resources manager. Claimant said that she had not. Audio at ~19:47, ~22:00, ~22:13. The district manager asked claimant when she could return to work and claimant, who had agreed to assist her husband on August 13, 2015, told the district manager that she could be back at work on August 14, 2015. The district manager continued to ask claimant to return her work keys and told claimant that she wanted to confirm with the human resources manager whether or not that manager had spoken to claimant on August 10, 2015. Audio at ~33:11.

(6) By August 13, 2015, claimant had still had not heard from the human resources manager following up their August 7, 2015 conversation. On August 13, 2015 at 8:54 a.m., claimant again called the human resources manager to learn what the district manager had meant during her August 12, 2015 phone conversation with claimant. Audio at ~ 24:00. Claimant reached the human resources manager. The human resources manager told claimant that she would call her after she spoke with the district manager. Audio at ~23:44. Awaiting that call, claimant did not report for work on August 13, 2015. When the human resources manager did not get back to claimant during business hours on August 13, 2015, claimant called the manager that day at 6:05 p.m. and left a message asking the status of her employment and whether or not the district manager had discharged her. Audio at ~24:23. The human resources manager did not return claimant’s 6:05 p.m. call.

(7) On August 14, 2015, the human resources manager returned claimant’s call at 11:59 a.m. and spoke with claimant. The manager informed claimant that she was discharged. Claimant claimed benefits for the week of August 9, 2015 through August 15, 2014 (week 32-15), the week at issue.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct. Claimant was not available for work during the week of August 9, 2015 through August 15, 2015.

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

In Hearing Decision 15-UI-45168, the ALJ concluded the employer discharged claimant for misconduct because she failed to report for work on August 13, 2015 or to call in to notify the employer that she was going to be absent that day, which was a willful violation of the employer's standards. The ALJ apparently reasoned that the district manager's question about whether claimant was able to work on August 13, 2015 was tantamount to scheduling claimant for work and notifying her that her suspension from work was over, and claimant's statement that she was not able to do work on April 13, 2015 was the equivalent of a failure to work. We disagree.

The employer's witness contended at hearing that the employer discharged claimant because she failed to report for work or to notify the employer that she was going to be absent on August 11, 12 and 13, 2015. Audio at ~16:54. Although the ALJ did not explicitly decide whether claimant's absences on August 11 and 12, 2015 were misconduct, they were not. Both parties agreed that claimant was suspended from work beginning on August 8, 2015. Audio at 15:09, ~21:05. The employer contended that, on August 10, 2015, the human resources manager spoke with claimant and instructed her to call the workplace to learn her upcoming schedule, which showed that she was expected to report for work on August 11, 12 and 13, 2015. Audio at ~16:20, ~17:20. The evidence the employer presented about the August 10, 2015 conversation was hearsay from the human resources manager, and the employer's district manager testified that she "[could]n't speak to what [the human resources manager] and [claimant] spoke about [precisely]." Audio at ~16:54, ~31:56. In contrast, claimant testified that the human resources manager did not call her on August 10, 2015, never instructed her to call the store for her schedule and, based on the information she had on August 11 and August 12, 2015, she believed she was still suspended from work. Audio at ~19:47, ~22:00, ~27:35~28:28, ~29:34. If the employer cannot demonstrate that the human resources manager and claimant had the August 10, 2015 conversation, it was eminently reasonable for claimant to conclude that the employer was unwilling to allow her to work until she received notice that the suspension was over. Claimant's first-hand account about the non-occurrence of the alleged August 10, 2015 conversation is entitled to greater evidentiary weight than the employer's hearsay statement from the human resources manager about the occurrence and contents of that conversation, particularly in light of the district manager's candid statement that the specific contents of the conversation were not provided to her. With respect to the alleged August 10, 2015 conversation, the employer did not carry its burden to show that it happened. As a result, the employer was unable to demonstrate that claimant's failure to report for work or to notify the employer that she was going to be absent was misconduct since claimant had not been notified that her work suspension was ended.

In connection with claimant's absence from work on Thursday, August 13, 2015, the pivotal issue is the content of the conversation between claimant and the district manager on Wednesday, August 12, 2015. Both parties generally agreed that during that conversation the district manager asked claimant when she was able to come to work, claimant stated she was able to do so on August 14, 2014; when the district

manager asked if she was available to work on August 13, 2015, claimant responded that she was not. Audio at ~22:42, ~23:18, ~32:17. Accepting either party's account, claimant clearly notified the employer that she was not going to be able to report for work on August 13, 2014. As such, the employer did not demonstrate that claimant failed to report for work without notifying the employer of an absence. The employer did not meet its burden to demonstrate that the claimant's absence on August 13, 2015 was accompanied by misconduct, nor that her absences on August 11 and August 13, 2015 were misconduct. Claimant is not disqualified from unemployment insurance benefits based on her work separation.

Available to Work. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

It is undisputed that, on August 12, 2015, the district manager inquired whether claimant was willing to work on August 13, 2015 (during week 32-15) and claimant declined to work that day. Claimant stated that she refused because she had previously agreed to assist her husband on a job for which she was not going to be paid directly, although her husband was going to receive pay. Audio at ~46:50. By declining to work for the employer on August 13, 2015 in favor of performing an activity for which she was not going to be paid, claimant missed a work opportunity during week 32-15. Because claimant's availability for work in a particular week was predicated on her willingness to work and capability of reporting for all work opportunities during that week, claimant was not available for work during week 32-15. Claimant is not eligible to receive benefits during week 32-15.

DECISION: Hearing Decision 15-UI-45168 is reversed, as set out above.
Hearing Decision 15-UI-45169 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 27, 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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