

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1304

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 155639). The employer filed a timely request for hearing. On June 30, 2015, ALJ M. Davis conducted a hearing, and on August 19, 2015, issued Hearing Decision 15-UI-43211, reversing the Department’s decision and concluding that the employer discharged claimant for misconduct. On September 1, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On September 30, 2015, EAB issued Appeals Board Decision 2015-EAB-1043, reversing Hearing Decision 15-UI-43211 and remanding the matter to the Office of Administrative Hearings for further development of the record.

On October 20, 2015, ALJ M. Davis conducted a hearing, and on October 27, 2015, issued Hearing Decision 15-UI-46581, concluding that claimant voluntarily left work without good cause. On November 4, 2015, claimant filed an application for review of Hearing Decision 15-UI-46581 with EAB.

FINDINGS OF FACT: (1) WalMart employed claimant as a staff pharmacist from January 26, 2011 to April 22, 2015.

(2) On January 29, 2015, claimant emailed his supervisor, the employer’s health and wellness market director, and asked for two weeks of leave to address some health issues. Claimant’s supervisor responded with the following email: “That should be fine. I will get with [the employee responsible for scheduling pharmacists’ shifts] and work on covering shifts.” Exhibit 1. Claimant subsequently learned that his name had been removed from the work schedule for a two week period.

(3) On February 20, 2015 claimant emailed his supervisor and stated, in relevant part, that he was “going to need a few months away from work to re-establish my health and adjust the stress level. I need to do this right away. I am not sure the best way to implement this. You have been so helpful to

me, what do you think is the best way to do this?” Exhibit 2. Claimant’s supervisor told claimant that he needed to contact the personnel manager at the store where he worked and request a leave of absence. Claimant contacted an employer representative who told him that he would not qualify for a leave of absence.

(4) Also on February 20, 2015, claimant received an email from the employer which stated that “[t]he following time off requests have been moderated by your manager.” The email showed that claimant had been removed from the work schedule for the period February 23, through May 1, 2015. Exhibit 1.

(4) On March 2, 2015, claimant’s supervisor emailed claimant and asked him if he had been able to submit a request for a leave of absence. Claimant responded with an email in which he explained that he was not eligible for a leave of absence, but had submitted “a request for vacation and personal hours. Is that possible to get me by?” Claimant’s supervisor responded to claimant with the following email: “We may be able to do some vacation/personal; as it would be on an already published schedule it would just need to keep within budgeted hours for the market. I will ask [the employee responsible for scheduling pharmacists’ shifts] to take a look and see which ones we can approve. Exhibit 1.

(5) Based on the February 20 email he had received, and his supervisor’s March 2 email, claimant concluded that the employer had approved his request for leave for the period February 21 through May 1, 2015.

(6) From March 2 through March 21, 2015, the personnel manager for the store where claimant worked called claimant several times. The personnel manager did not reach claimant, and left messages, asking that claimant contact her regarding his absences. Although the personnel manager called claimant’s correct telephone number, claimant never received these messages.

(7) On March 18, 2015, claimant’s supervisor sent claimant an email in which he asked claimant to contact the personnel director about his absences. Although this email was sent to his correct email address, claimant did not receive it.

(8) On April 2, 2015, the personnel manager sent claimant a letter by certified mail which stated, in relevant part: “You have not requested a LOA at this time. You need to go to www.walmartone.com to get it started..... If we don’t hear back from you by the 8th of April 2015, we will take that as your resignation from Walmart.” Exhibit 2. The letter was sent to claimant at an address in Emmett, Idaho, where claimant’s ex-wife lived. Claimant had not lived in Emmett, Idaho for approximately two years; after he moved from Emmett, he gave the employer his new address in Ontario, Oregon. Claimant’s ex-wife signed the receipt for the letter, but did not forward the letter to claimant or otherwise notify him she had received it.

(9) On April 9, 2015, claimant’s supervisor sent him an email in which he asked claimant to “advise on your status” and instructed claimant to reply to him by “5 pm Friday 4/10.” Although this email was sent to claimant’s correct email address, he did not receive it.

(10) Claimant did not respond to the April 2 letter or the April 9 email, and on April 22, 2015, the employer discharged him for failing to report to work.

(11) In June 2015, an employer representative contacted claimant and confirmed his correct and current address in Ontario, Oregon.

CONCLUSION AND REASONS: We disagree with the ALJ. We conclude that the employer discharged claimant, but not for misconduct.

The administrative decision held that the employer discharged claimant, but not for misconduct. In Hearing Decision 15-UI-46581, however, the ALJ concluded that claimant voluntarily left work. We therefore begin our analysis by determining 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 claimant was willing to continue to work for the employer for an additional period of time but is not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

In Hearing Decision 15-UI-46581, the ALJ concluded that claimant voluntarily quit his job because he left work without approval to do so in February 2015, and failed to respond to numerous requests from the employer to explain his absences or apply for leave. According to the ALJ, claimant had no reason to believe that the employer had given him approval to take time off from work, and "[b]y not responding to the employer, claimant demonstrated that he was no longer willing to work for the employer. Thus, the work separation was a voluntary leaving." We disagree.

The record shows that claimant twice asked the employer for leave to deal with medical issues. In January 2015, claimant asked his supervisor for two weeks of leave; the supervisor responded that he was "fine" with the request and that he would work with the scheduler to cover claimant's previously scheduled shifts. Claimant then learned that he had been removed from the work schedule for a two week period. When claimant again asked his supervisor for leave on February 20, 2015, he received an email from the employer notifying him that his "time off requests" had been "moderated by his manager," and showing that claimant had been granted time off for all previously scheduled shifts from February 23 through May 1, 2015. Finding of Fact 4. Claimant's supervisor then sent claimant an email on March 2, 2015, in which the supervisor indicated that the supervisor would work with the scheduler to "see what we can approve" for time off for claimant. Based on these communications, claimant reasonably concluded that his February leave request had been approved the same way his January leave request had been – his supervisor had agreed to the leave and his name had been removed from the work schedule. Claimant therefore believed that he was on leave until May 1, 2015, and intended to and was willing to return to work for the employer at the conclusion of his leave. The employer, however, was unwilling to allow claimant to continue working after April 22, 2015, making the work separation a discharge.

We next determine whether claimant is disqualified from the receipt of unemployment benefits on the basis of his 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. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant on April 22, 2015, because it believed he left work without first obtaining appropriate approval, and because he failed to respond to the employer's repeated requests that he contact the employer to discuss his absences. As noted above, claimant believed that the employer had granted him two months of leave and that the employer therefore knew and understood that his absence from work was authorized. Claimant's belief was reasonable, given the procedure by which he was granted leave in January 2015, and the nature his of his communications with his employer in late February and early March 2015. Although claimant's understanding that the employer had authorized him to take leave might have been mistaken, it resulted from a good faith error and not from a conscious disregard of the employer's expectations and policies concerning time off from work. Good faith errors are not misconduct.

In regard to claimant's alleged failure to respond to the employer's emails and telephone calls, claimant testified that he never received the emails sent by his supervisor or the telephone messages left by the personnel manager. Claimant's supervisor testified that that the emails were sent to claimant's correct email address and the telephone calls were made to claimant's correct telephone number. Both claimant and his supervisor appeared sincere in their testimony and there is no reason in the record to doubt the credibility of either person. The evidence as to whether claimant received the employer's telephone calls and emails was, at best, equally balanced. The employer therefore failed to establish by a preponderance of evidence that claimant received emails and telephone calls that he intentionally ignored. Concerning the certified letter the employer sent claimant on April 4, 2015, claimant testified that the letter was mailed to an incorrect address. Although claimant had provided the employer with his correct and current address, the employer mistakenly sent the letter to an old address where claimant's ex-wife (but not claimant) lived. Because his ex-wife did not tell him about the letter, claimant was unaware that it had been sent. The employer therefore failed to demonstrate that claimant received the April 4 letter and either consciously or deliberately refused to respond to it.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-46581 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 4, 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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