

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1371

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 133056). The employer filed a timely request for hearing. On November 3, 2015, ALJ Logan conducted a hearing, and on November 4, 2015 issued Hearing Decision 15-UI-47120, affirming the Department's decision. On November 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) WenOregon LLC employed claimant as the general manager of a Wendy's restaurant from April 1, 2014 to August 29, 2015. Claimant worked for the employer's predecessor company for over 20 years before continuing in her position with the employer on April 1, 2014.

(2) Claimant decided to retire, and on July 6, 2015, submitted to the employer written notice of her intent to do so on September 30, 2015. The notice stated, in part:

"In order to alleviate the transition and give you time to find coverage for me, I have decided to stay to September 30th, but on these terms:

1. I [will] work all of my August 2015 schedule as posted
2. I [will] still take my vacation as approved in September 2015 (Sept 1-8)
3. After my vacation I will only work in the range from 6am to 6pm. Tuesday to Saturday until [September] 30th . . . (my last day)"

Exhibit 1.

(3) On or about August 21, 2015, the employer decided it was time to "move on" with installing the new manager, told claimant to take her week of vacation immediately and that her employment would end at the end of her vacation. Claimant's last day with the employer was August 29, 2015.

CONCLUSIONS AND REASONS: We agree with the Department and 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. 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).

The employer denied claimant was discharged and asserted that claimant quit by submitting a resignation notice on July 6, 2015. Audio Record ~ 7:15 to 11:20. However, although claimant's resignation notice was dated July 6, it stated she would work to September 30, 2015, her "last day." Exhibit 1. Moreover, the employer did not dispute that it ended claimant's employment on August 29, 2015, more than 15 days before claimant's planned voluntary leaving date. Because claimant was willing to continue to work for the employer for an additional period of time, but was not allowed to do so, the work separation was a discharge.¹

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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer asserted that it ended claimant's employment before her planned retirement date because it wanted to install the new general manager as soon as it could and claimant restricted the days and hours she would work from September 8 to September 30 to 12 hours per day, six days per week. However, the employer did not assert or show that it even discussed that issue with claimant before informing her that her employment would end in August and discharged her at that time because it decided it was time to "move on" and install the new manager. Audio Record~8:45 to 10:20. Claimant's 86-day notice of her intent to retire "to alleviate the transition and give [the employer] time to find coverage" demonstrated that she was not indifferent to the employer's interests, and simply choosing to retire after 25 years did not violate a reasonable employer expectation. Regardless of the employer's exact motivation for claimant's discharge, the employer failed to establish that it discharged her for misconduct under ORS 657.176(2)(a). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-47120 is affirmed.

¹ ORS 657.176(8) provides that when an individual has notified an employer that she (or he) will quit work on a specific date, and the employer discharges her, not for misconduct, no more than fifteen days prior to that date, and the planned voluntary leaving would have been without good cause, the work separation shall be adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual disqualified from receiving benefits, except that she would be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date. This statute is inapplicable here because the work separation occurred more than 15 days prior to the planned voluntary leaving date.

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 5, 2016

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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