

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1536

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 130602). Claimant filed a timely request for hearing. On December 23, 2015, ALJ Frank conducted a hearing, and on December 24, 2015 issued Hearing Decision 15-UI-50017, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On December 29, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered new information not presented at the hearing. The employer did not explain why it was unable to present this new information during the hearing or show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to present in its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Sarkis Freight employed claimant as a long-haul truck driver from June 5, 2015 until September 21, 2015.

(2) The employer originally hired claimant and her husband to operate one of the employer's trucks as a team. On August 3, 2015, claimant's husband suffered a stroke and was unable to continue driving. Afterward, claimant accepted the employer's offer to continue driving as part of a team with another driver. On August 14, 2015, claimant began working as the member of a team with another co-driver.

(3) After August 14, 2015, claimant had difficulties working with her co-driver. Claimant thought the co-driver was not following the routes required of drivers and dictated all decisions for the team without consulting her. They did not get along and their working relationship was poor.

(4) On September 21, 2015, claimant and the co-driver arrived at their destination in Colorado too late to deliver the freight they were hauling. Claimant and the co-driver then began to argue until the co-driver instructed claimant to leave the truck and to obtain a motel room. Claimant rented a car, intending not to complete the route with the co-driver but to travel to her home in Oregon. Shortly after, claimant called the employer and spoke with the director of operations. Claimant was very upset about the situation with the co-driver and told the director that she had secured a rental car and was going to drive home. The operations director asked claimant if she could help resolve the situation with the co-driver. Claimant insisted she was driving home. Claimant did not tell the operations director that she was quitting work or leaving employment.

(5) Later in the day on September 21, 2015, while claimant was traveling through Boise, Idaho on her way back to Oregon, the operations director called claimant. The operations director told claimant she would have another assignment for her as soon as she located another co-driver. After September 21, 2015, the employer did not contact claimant with another assignment.

(6) Sometime after September 23, 2015, the employer mailed a final paycheck to claimant for the week of September 16 to September 23, 2015. On the pay stub the employer wrote, "We appreciate your partnership. When [your husband] is ready, we will be excited to work with you again. This is the last of your pay." Audio at ~12:16. Claimant assumed that she had been discharged.

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

The first issue this case presents is the nature of the work separation. Claimant contended that the employer discharged her, either when the operations director told her on September 21, 2015 that there was no assignment for her until another co-driver was located to work with her or when the employer did not subsequently contact her and she received her final paycheck. Audio at ~12:16, ~37:22. The employer's position was that claimant quit work on September 21, 2015 when she did not continue on the route with the co-driver. Audio at ~20:20, ~21:36, ~21:55. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining whether a work separation is properly characterized as a discharge or a voluntary leaving. If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the 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).

Neither party testified that claimant ever definitively stated she was quitting work and neither testified that the employer ever told claimant in so many words that she was discharged. Although claimant might have discontinued the route with her co-driver on September 21, 2015 and traveled home, this was not a clear manifestation that she intended to quit her job and the employment relationship altogether. Under the circumstances, where claimant's co-driver had just expelled her from the truck in a state distant from her home and the employer perceived that claimant was "very, very upset" over the co-driver's actions, that claimant decided to drive home was, at best, an ambiguous expression of intention. Audio at ~18:32. The operations director's inference, based on these actions, that claimant had quit work was not reasonable under the circumstances without making a further clarifying inquiry of claimant, which the operations director did not do. Audio at ~20:20, ~21:55. We discount the operations director's later testimony in which she recounted additional statements claimant supposedly

made on September 21, 2015, including that she had her subsequent employment “lined up” and she was going to pursue self-employment activities because the statements the operations director attributed to claimant were self-serving, and she testified about them statements late in her testimony, after she had already provided what appeared to be a complete explanation about the reasons she inferred that claimant had left work without mention of the additional statements, and only testified about those after the ALJ questioned whether she had correctly inferred that claimant voluntarily left work. Audio at ~22:23, ~24:38, ~25:26, ~25:48, ~30:57. On this record, the preponderance of the reliable evidence shows that claimant did not unambiguously manifest an intention to leave work on September 21, 2015. The first behaviors that unequivocally showed an intention to sever the employment relationship were the employer’s failure to contact claimant about additional work with a new co-driver after September 21, 2015 and the statement the employer wrote on claimant’s last paycheck for the week of September 16 through 23, 2015. Claimant’s work separation was a discharge, and the inferred effective date was September 21, 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 show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Since the employer took the position that claimant quit work, it did not present evidence of the basis for any discharge. Based on the operations director’s statement to claimant that she would be able to work when a new co-driver was located and the statement the employer wrote on claimant’s last paycheck, it does not appear that the employer discharged claimant for not continuing on her route with the co-driver on September 21, 2015, but, rather, because claimant was not willing to work with her replacement co-driver and the employer was unable to provide claimant with another one at the time. To the extent the employer discharged claimant, or was unwilling to allow her to continue working due to a lack of available co-drivers or available work, that discharge was not the result of any willful or wantonly negligent behavior on claimant’s part.

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

DECISION: Hearing Decision 15-UI-50017 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: January 22, 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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