

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0262

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 25335). Claimant filed a timely request for hearing. On February 12, 2016, ALJ Shoemake conducted a hearing, and on February 18, 2016 issued Hearing Decision 16-UI-53225, affirming the Department's decision. On March 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from March 24, 2011 until November 27, 2015, last as a clerk in the shoe department.

(2) Sometime before approximately 2015, claimant was diagnosed with a panic disorder and post-traumatic stress disorder (PTSD). Claimant was treated for these conditions and prescribed medication. The combined effects of these conditions were that claimant experienced disorganized thoughts and impaired memory.

(3) Sometime before November 2015, the employer authorized claimant to take an extended leave of absence from work due to her anxiety and PTSD. Exhibit 2 at 1. On November 3, 2015, claimant's mental health provider released her for a "provisional trial of full-time work." Exhibit 2 at 1. On approximately November 4, 2014, claimant returned to work, but asked to step down from her position as a shoe department lead because of the pressures. Thereafter, claimant worked as a clerk.

(4) After November 4, 2015, the employer was aware that claimant might have difficulty dealing with adjusting to the pressures and stress of the workplace upon her return to work. The employer's assistant manager and its human resources representative had several conversations with claimant after she returned to work about her difficulty dealing with customers and the general stress she experienced from working. Transcript at 24-25.

(5) On November 24, 2015, claimant's coworkers reported to the employer human resources representative that they observed claimant standing still on the sales floor with her eyes closed and appearing to fall asleep in the middle of conversations or "struggling to stay awake." Transcript at 15, Exhibit 1 at 2. At approximately 11:00 a.m., the human resources representative went to speak to claimant and claimant started to cry. They went to the representative's office and claimant stated she was having "a hard time getting back into things [at work after her leave]" and "the customers were mean." Exhibit 1 at 2; Transcript at 16. The representative told claimant she had received some complaints about claimant's behavior that day, her cell phone use on the sales floor and the revealing nature of the blouse she was wearing. Claimant mentioned to the representative that she did not think she could handle the stress of working on November 27, 2015, which was Black Friday, and the representative told claimant she worked in retail and "everyone [in retail] works on [Black] Friday." Exhibit 1 at 2. Claimant then commented she would increase the medication she was taking to enable her to work on November 27, 2015. The representative asked claimant if there was anything she could do to help and advised claimant if she needed to go home for the day to speak with the manager. Claimant understood the representative to be instructing her to leave work for the day due to the complaints she had received.

(6) On November 24, 2015, after her conversation with the human resources representative, claimant returned to the shoe department to prepare certain merchandise for pickup as "salvage" before she left for the day as she thought she had been instructed to do by the representative. Transcript at 39. Claimant clocked out from work at noon. Around that time, claimant called the human resources representative and asked her to identify the person(s) who had complained about her that day. Exhibit 1 at 2. The representative told claimant the complaints had come during earlier shifts and claimant responded, "Whatever" and hung up. Exhibit 2 at 3. After she clocked out but before she left the workplace, claimant was paged to call the assistant manager. When claimant called the assistant manager, she told the assistant manager she had been told to go home for the day because she had a "bad attitude." Transcript at 30; Exhibit 2 at 4. Claimant then stated "everyone at the Division Fred Meyer could just kiss my ass." Exhibit 2 at 4; Transcript at 30. Claimant then left the workplace and went home.

(7) On November 24, 2015, sometime after noon and after claimant had left the workplace, the human resources representative was walking through the shoe department. The assistant manager told the representative about her conversation with claimant. The assistant manager appeared "baffled" and "confused" by her conversation with claimant and why claimant had been told to leave work and go home. Transcript at 18, 19. The representative stated that she had not told claimant to leave and called the manager and the store director, who confirmed that they had not told claimant to leave. The human resources representative concluded that by leaving work at lunch time during the middle of her shift, claimant had quit work.

(8) On November 27, 2015, Black Friday, claimant reported for work at 8:00 a.m., the scheduled start of her shift. The manager did not know why claimant had appeared for work. Approximately a half hour after claimant clocked in, the human resources representative and the store manager met with claimant. In response to their questions, they thought claimant was "unclear" about why she had thought she was sent home early on November 24, 2015. Transcript at 19. They did not allow claimant to work her shift that day.

(9) A few days after November 27, 2015, claimant met with the human resources representative in the company of her union representative. During their conversation, the human resources representative concluded claimant was still “unclear” about the reason she had thought she was sent home early on November 24, 2015, because claimant stated that she had “memory issues” and could not remember who had sent her home. Transcript at 20. Because claimant had returned to work without medical restrictions, the employer concluded that it was not going to allow claimant to continue working because she had walked off the job on November 24, 2015 without authorization. Transcript at 21.

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

In Hearing Decision 16-UI-53255, the ALJ concluded the work separation was a voluntary leaving, and not a discharge, reasoning that claimant walked off the job on November 24, 2015. The ALJ disregarded claimant’s testimony that she thought she had been sent home on November 24, 2015, apparently not finding it credible, because when she left work that day she displayed “frustration” with the assistant manager and used “profanity,” which suggested to the ALJ that claimant left work on November 24, 2015 with the intention of never returning to work. Hearing Decision 16-UI-53225 at 3. Having found that claimant voluntarily left work, the ALJ further concluded that claimant was disqualified from receiving benefits because she failed to show good cause for leaving work when she did. We disagree with the ALJ’s determination that claimant voluntarily left work and that she was disqualified from receiving benefits.

The standard for characterizing a work separation as a discharge or a voluntary leaving is set out at OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, 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). Claimant contended that she left the workplace on November 24, 2015 because she believed some employer representative had told her to go home for the remainder of her shift, and that she was willing to continue working for the employer as evidenced by her reporting for work on November 27, 2015. Transcript at 6, 8, 13, 14. The employer did not dispute that claimant told the assistant manager on November 24, 2015 that she was going home because she had been sent home, that she reported for work on November 27, 2015 and on that November 27, 2015 she repeated to the employer that she had been sent home on November 24, 2015. Transcript at 18, 19, 21, 29-30. The employer did not contend that claimant ever stated to it or its representatives on November 24, 2015, or anytime thereafter, that she was quitting work. Transcript at 14. While the human resources representative might not have thought she said anything to claimant indicating that she wanted her to go home on November 24, 2015, claimant’s description of her mental state and the impact of the medication she was taking on her thought processes, as well as the employer’s description of claimant’s unusual behavior earlier in the day of November 24, 2015 make it plausible that claimant was confused during the conversation, and did not understand that the representative was not sending her home, but was suggesting that she speak with the store manager if she thought she needed to go home. Transcript at 9, 13, 17-18, 20, 21. Given what claimant stated to the assistant manager and later to the human resources representative about being sent home before she left the workplace on November 24, 2015, the fact that she left the workplace mid-day on November 24, 2015 appears to have been based on a misunderstanding, and was not an unambiguous expression of an intention to quit work. By claimant’s statement to the assistant manager, the employer was on notice of her misunderstanding before she left

work that day, and it did nothing to resolve the ambiguity attending claimant's departure from the workplace. Given claimant's lack of intent to sever the work relationship when she went home on November 24, 2015, the first unambiguous manifestation of an objective intention to end the work relationship was on November 27, 2015, when the employer was unwilling to allow claimant to continue working. Claimant's work separation therefore was a discharge on November 27, 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 employer was unwilling to allow claimant to continue working, and it discharged her because she left work early without permission on November 24, 2015. Transcript at 17-18, 21. In light of the impacts of claimant's mental health conditions and medications she was taking, it is likely that claimant left work due to a misunderstanding. As such, the employer did not meet its burden to show that claimant had the state of mind when she left work on November 24, 2015 to constitute a willful or wantonly negligent violation of the employer's expectations. *See* OAR 471-030-0038(3)(a). Alternatively, based on claimant's subjective but erroneous belief about the human resources representative's instructions to her on November 24, 2015, a good faith error caused her to leave the workplace early that day. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Although the employer discharged claimant, it did not show that it was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Hearing Decision 16-UI-53225 is set aside, as outlined above.

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

DATE of Service: March 30, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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