EO: 990
BYE: 201641

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0267

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 143417). Claimant filed a timely request for hearing. On February 11, 2016, ALJ Ainsworth conducted a hearing, and on February 19, 2016 issued Hearing Decision 16-UI-53405, concluding the employer discharged claimant, but not for misconduct. On March 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a written argument that included four pages of evidence concerning its policies and claimant's conduct, and argued that the employer thoroughly investigated claimant and his allegations and concluded that claimant quit work to avoid being held accountable for sleeping on the job, which made his work separation a voluntary resignation. *See* Employer's argument at 4. Notably, the employer did not offer any of that evidence at the hearing and declined to have its witnesses testify. Transcript at 29-30. The information the employer offered in its written argument is, therefore, new evidence.

ORS 657.275(2) provides that EAB "perform[s] de novo review *on the record*." (Emphasis added.) That means that EAB's review is confined to the evidence the ALJ developed during the hearing. EAB may not consider a party's offer of additional evidence unless, among other things, the party establishes that factors or circumstances beyond its reasonable control prevented the party from offering the information into evidence at the hearing. OAR 471-041-0090(2)(b).

The notice of hearing mailed to the parties on February 2, 2016 stated, in pertinent part, that the ALJ would take evidence during the hearing upon which he would base his decision, and that EAB "generally does not allow anybody to present new evidence, but instead reviews the testimony and any documents from the hearing." Although the ALJ offered the employer the opportunity to present evidence concerning the reasons why claimant's employment ended, the employer chose not to do so. The employer's argument did not include any explanation for the employer's failure to provide evidence about claimant's work separation during the hearing, much less establish that any circumstance prevented it from doing so had the employer so chose.

For those reasons, we conclude that the employer had the opportunity to present evidence at the hearing and chose not to do so, and did not establish that it was prevented from doing so by factors or circumstances beyond its reasonable control. Therefore, under ORS 657.175(2) and OAR 471-041-0090(2)(b), EAB may not consider the employer's new information when reaching this decision. Our review of this matter is confined to the evidence gathered during the February 11, 2016 hearing.

FINDINGS OF FACT: (1) SAPA Profiles, Inc. employed claimant as a general laborer from May 4, 2016 to October 10, 2015.

(2) Claimant felt threatened on one occasion by an assistant maintenance worker and was concerned that the other worker was stealing from the employer. Claimant reported the possible theft to the employer. On October 9, 2015, claimant attempted to speak with a manager. Claimant heard the manager and claimant's work partner discuss claimant, heard the manager tell claimant's work partner to make sure claimant did not clock in, and then saw the manager leave without speaking with claimant.

(3) On October 10, 2015, claimant reported to the workplace. He encountered the assistant maintenance worker, his work partner and others in the parking lot. His work partner stated, "I told you not to show up." Transcript at 8. The assistant maintenance worker stated, "Boy, does it take a bad accident for you to get hurt bad before you get it that nobody wants you here?" *Id.* Claimant got in his vehicle to leave, and the assistant manager lunged toward his vehicle, spit on the windshield, and yelled, "Don't come back!" *Id.* Claimant felt that the workers were retaliating against him for reporting possible theft.

(4) On and after October 10, 2015, claimant made repeated calls to the manager and left voicemail messages. The manager did not answer the phone, return claimant's calls or attempt to contact claimant. Claimant did not know who else to contact, and concluded he had been fired. He did not return to work. On October 23, 2015, the employer sent claimant a letter stating that, because claimant had not worked since October 9, 2015 or called in, he was considered to have voluntarily left work.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, 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 considered claimant to have voluntarily left work because he did not report to work after October 10. However, on this record, nothing about the circumstances present on October 9, October 10 and thereafter communicated to claimant that he was welcome to continue working. He reported to work and was driven away by his coworkers, and his attempts to return to work were unsuccessful because the manager claimant thought could resolve the matter did not return his calls. Claimant was willing to continue working for the employer as demonstrated by his attempt to report to work on October 10 and attempts to contact the employer, but he was not allowed to do so. The work separation is, therefore, a 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

According to the employer's termination letter, claimant's work separation occurred because he had an unreported absence of three or more working days. Exhibit 1. Given the circumstances as described at the hearing, though, it was not clear that claimant was scheduled to work, or that he knew or should have known he was scheduled to work, following the incident on October 10. To any extent he knew or should have known he was scheduled to work and chose not to do so, it was not reasonable to expect him to report to work after experiencing his coworkers' intimidating and potentially unlawful behavior toward him, and possible retaliation for reporting a coworkers' crime, without first having some contact with the employer.[1] On this record, claimant made an earnest attempt to return to work after October 10th, and an earnest attempt to contact the employer. His failures to do so were, therefore, not attributable to him as willful or wantonly negligent acts.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-53405 is affirmed.

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

DATE of Service: <u>April 5, 2016</u>

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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[1] Under some circumstances, spitting at or upon another person may be considered unlawful conduct. *See e.g.* ORS 161.405; ORS 166.065; *State v. Keller*, 40 Or App 143, 594 P2d 1250 (1979).