

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0508

Reversed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On March 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 94918). Claimant filed a timely request for hearing. On April 21, 2016, ALJ Vincent conducted a hearing interpreted in Spanish, and on April 25, 2016, issued Hearing Decision 16-UIB-58075, affirming the Department's decision. On May 6, 2016, ALJ Vincent issued an amended hearing decision, Hearing Decision 16-UI-59074, to correct the effective date of his previous order. On May 20, 2016, claimant filed an application for review of Hearing Decision 16-UI-59074 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) United Building Services LLC employed claimant as a janitor from October 7, 2015 through January 5, 2016.

(2) Until January 1, 2016, claimant's job consisted of cleaning two buildings in West Linn, Oregon. On that day, claimant's supervisor told him that the employer no longer was going to clean one of the buildings and that it intended to assign claimant to clean an office building in Portland, Oregon, beginning January 5, if that was acceptable to him. Claimant asked if there was an assignment that was closer to his residence. Claimant's supervisor told him there was not, but claimant agreed to the Portland assignment anyway because it was 8 hours per day. The supervisor told claimant that he would not work on January 1 but to report to the other West Linn building on January 4 to show his replacement "the ropes" and that it would be his last day at that building. Transcript at 13-14.

(3) On January 4, 2016, claimant went to the West Linn building and showed his replacement the cleaning routine. Claimant was told to report to the employer's Portland office on January 5 so that an employee there could take him to his new building assignment to show him the cleaning routine there. On January 5, 2016, claimant reported to the employer's Portland office as instructed, but when he arrived, a different supervisor told him, "Oh, I don't have that job anymore. I gave it to another person." Transcript at 5-6. He told claimant that he believed that claimant was not interested in that job because

claimant had commented to the other supervisor on January 1 that “it was a long ways” from his residence. Transcript at 7. Claimant then explained that he had agreed to report to the new assignment.

(4) On and after January 5, 2016, the employer had no work available for claimant and did not assign him to any other jobs.

CONCLUSIONS AND REASONS: We disagree with 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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

The parties are in dispute about the conversations and events that occurred from January 1 through January 5, 2016. The employer argues claimant quit, based on hearsay evidence from one of the supervisors that after stating he wanted more work, claimant was told to come into the office on a specific day to talk about possible job opportunities, but “never showed up.” Transcript at 10. Claimant testified that he was told it would be “better for [him] to go another building where [he] would have eight hours” and that he was to begin that assignment at a Portland building on January 5, after he reported to the employer’s Portland office from which an employee would take him to the new job. Transcript at 13. He further testified that after he reported to the employer’s Portland office that day, a supervisor told him, “I don’t have that job anymore. I gave it to another person,” and thereafter he was not assigned any work. In Hearing Decision 16-UI-59074, without any analysis, the ALJ accepted the employer’s version of events and concluded claimant quit “for unknown reasons” on January 15, 2016. Hearing Decision 16-UI-59074 at 2. We disagree. Absent a basis for concluding that claimant was not a credible witness, we conclude his plausible and consistent firsthand testimony under oath had more weight than the employer’s hearsay evidence and found facts in accordance with his testimony on matters in dispute. Because claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so on and after January 5, the separation was 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. 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 claimant quit, did not present any evidence regarding its discharge decision, and therefore discharged claimant for unknown reasons. Although the employer may have had legitimate business reasons for its termination decision, it failed to meet its burden to establish that it discharged claimant because he willfully, or with wanton negligence, violated a reasonable employer expectation or willfully or wantonly disregarded the employer’s interests.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 16-UI-58075 is set aside, as outlined above.¹ *Decisión de la Audiencia 16-UI-58075 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: June 7, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.

¹ 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.

Esta decisión revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios días a dos semanas para pagar los beneficios atrasados.