

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0739

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct (decision # 103607). The employer filed a timely request for hearing. On June 10, 2016, ALJ Mann conducted a hearing, and on June 17, 2016 issued Hearing Decision 16-UI-62003, concluding claimant voluntarily left work without good cause. On June 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) WGL Corp., a contractor for FedEx Ground Services, employed claimant as a delivery driver from July 22, 2013 until April 5, 2016.

(2) On February 1, 2016, claimant sustained an on-the-job injury to his back. On that same day, shortly after he was injured, claimant went to his chiropractor for an evaluation and treatment. Claimant then returned to work and notified Jacob Gold (Gold), one of the employer's principals, that he was injured and needed help completing his delivery route. Gold assisted claimant.

(3) On February 2, 2016, claimant's back injury was no better and he did not report for work. Claimant went to the chiropractor again. This time, the chiropractor stated claimant's injury was not one that he was familiar with and recommended that claimant have an MRI. The chiropractor told claimant he did not want him to perform any work, even light duty work, until his condition was more fully evaluated. Claimant scheduled the MRI for Tuesday, February 9, 2016. On February 2, 2016, claimant notified Gold that he was not able to return to work due to his back injury until his back improved.

(4) On February 9, 2016, claimant had an MRI, which revealed that two of his spinal discs were herniated. On or around this same day, claimant's physician gave him a note excusing him from work for the period of approximately February 2, 2016 until March 2, 2016. The physician told claimant he did not want claimant to stand or sit and drive for any length of time, which might jostle his back. Claimant called Gold to inform him of his condition. Gold wanted claimant to return to light duty work. Claimant informed Gold of his medical restrictions and told him he was not able to return to work even in a light duty capacity.

(5) After February 9, 2016, claimant's physician did not lift claimant's medical restrictions. Around March 2, 2016, claimant's physician gave him another note excusing him from work from March 3, 2016 until approximately April 4, 2016, and restricting him from all work, including light duty work.

(6) After February 9, 2016, claimant remained in constant contact with Gold advising him of the progress of his recovery. Gold offered claimant light duty that would involve only driving and not lifting packages. Claimant told Gold he was still wholly restricted from working. During this time, claimant asked Gold if he should bring the notes from his physician to him. Gold told claimant he did not need to provide the medical notes.

(7) Sometime after February 9, 2016, James Washburn (Washburn), another of the employer's principals, returned from vacation. At least twice between when Washburn returned and April 4, 2016, claimant spoke by telephone with Washburn, during which time Washburn asked him if he was able to return to light duty work. Claimant told Washburn he was medically restricted from performing even light duty work. During these calls, Washburn would tell claimant, "We can't wait forever [for you to return] because we have to get somebody in the truck [doing deliveries]," and, "When are you going to have an answer about when you can come back to work?" Audio at ~35:42. Claimant told Washburn that he did not know and it was "up to the doctors." Audio at ~36:10. Shortly before March 20, 2016, claimant and Washburn had a final phone conversation in which claimant still was unable to give a date by which he expected to return to work. Washburn told claimant at that time, "We're going to have to move on. We need somebody to do it [drive your route]." Audio ~36:20. Washburn did not ask claimant to bring him the medical notes his physician had prepared to excuse him from work.

(8) On approximately March 20, 2016, the employer transferred one of its existing employees into claimant's position to replace him.

(9) On April 5, 2016, claimant's physician released him to work. Claimant telephoned Washburn to notify him he was finally able to return to work. Washburn told claimant he could not return to work because his position had been filled with a replacement. Washburn offered to help claimant to locate a new job with a different FedEx contractor.

(10) On April 5, 2016, the employer discharged claimant.

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

In Hearing Decision 16-UI-62003, the ALJ concluded claimant's work separation was a voluntary leaving, and that claimant was disqualified from benefits because he did not show he left work for good

cause. As to the work separation, the ALJ reasoned that claimant left work, rather than being discharged, because claimant could have continued to work for the employer by either accepting light duty work or providing to the employer the physician's notes excusing him from work. Hearing Decision 16-UI-62003 at 3. We disagree and conclude that the separation was a discharge. We further conclude that claimant was not disqualified from benefits because the employer did not show that it discharged claimant for misconduct.

OAR 471-030-0038(2) (August 3, 2011) provides the standard for determining whether a work separation is a voluntary leaving or a discharge. If the claimant could have continued to work for the employer for an additional period of time, the work 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).

In reaching her determination about the work separation, the ALJ improperly conflated the availability of steps that claimant could have, but did not, take to preserve his employment (i.e., taking light duty work or providing a medical excuse) with the conclusion that the work separation was voluntary on claimant's part. If claimant was willing to continue working, but the employer was unwilling to allow claimant to do so, the separation was an involuntary discharge regardless of the fact that if claimant had taken certain actions the separation might have been averted. Here, as described in the testimony of the employer's witness, Washburn, as of the conversation on approximately March 20, 2016, Washburn plainly stated to claimant that the employer intended to replace him, which obviously would not allow him to return to work, because he had not supplied a definite date on which he would return. Audio at ~35:42. Washburn did not dispute that claimant was willing to continue working for the employer on April 5, 2016, when he called Washburn to notify him that he had a unrestricted release, and wanted to return to work. That Washburn intended to and did involuntarily sever claimant's work relationship with the employer during the April 5, 2016 call is plain from the offer he made in that call to assist claimant in seeking work with other FedEx contractors. Such a statement would be gratuitous unless the employer was unwilling to allow claimant to work for it on and after April 5, 2016. Audio at ~23:43. On this record, claimant's work separation was a discharge on April 5, 2016.

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 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 has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

From the record, it appears that the employer discharged claimant either due to his lengthy absence from work after February 1, 2016 and the uncertainty about when he would return or his alleged failure to provide a medical note excusing those absences. With respect claimant's absences, it is not misconduct if those absences were due to illness or, as here, a physical injury. OAR 471-030-0038(3)(b). With respect to claimant's alleged failure to provide medical excuses for his absences to the employer, claimant testified that he offered to bring in the excuses, but Gold told him that was not necessary, and Washburn never asked him to provide any excuses. Audio at ~30:30, ~33:19. Although Washburn offered testimony conflicting with that of claimant, there was no reason to doubt the credibility of either

or the truth of either's testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party that carries the burden of persuasion in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not demonstrate that its principals ever requested that claimant provide medical excuses for his absences, or that claimant somehow knew or should have known that medical excuses were required since he was speaking regularly with Gold about his health and the opinions of his physician. Audio at ~28:04, ~30:30. Thus, the record shows that claimant's failure to give the employer the medical excuses from his physician was not a willful or wantonly negligent violation of the employer's standards and was not misconduct. Finally, while the testimony that claimant offered about his "constant contact" with Gold throughout his absence was disputed by Washburn, resolving this uncertainty based on the burden of proof principles discussed above results in a finding that claimant was communicating regularly with Gold. Audio at ~28:04. To the extent the employer discharged claimant for failing to remain in sufficient contact with it, the employer did not demonstrate that claimant's contact was inadequate, or that claimant knew or should have known it was inadequate.

Although it discharged claimant, the employer did not establish that the discharge was for reasons that constituted misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-62003 is set aside, as outlined above.

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

DATE of Service: August 4, 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.

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.