

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0948

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 150111). Claimant filed a timely request for hearing. On August 10, 2016, ALJ Frank conducted a hearing, and on August 12, 2016 issued Hearing Decision 16-UI-65555, concluding the employer discharged claimant, but not for misconduct. On August 15, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Freres Lumber Co., Inc. employed claimant from December 14, 2015 to May 22, 2016, last as a forklift operator.

(2) Beginning on May 19, 2016, the employer assigned claimant to perform grading work for three shifts. During each shift, claimant reported to his employer that performing the grading work was causing him back pain.

(3) On May 22, 2016, about 1.5 hours before the end of his shift, claimant told a supervisor that he was no longer able to bear the pain and needed to go to the emergency room. The supervisor told claimant to wait until after his coworker took his break. Claimant waited until his coworker finished his break, and went to the hospital.

(4) Claimant was next scheduled to work for the employer on May 26, 2016. On May 22, while he was at the hospital, claimant's medical providers excused claimant from work for his next three shifts so claimant could undergo testing that later showed he had a fracture in his back.

(5) When claimant returned home from the hospital on May 22, 2016, he discovered that the employer had not deposited his paycheck into his bank account per its normal payday schedule.

(6) On May 23, 2016, claimant went to the workplace and gave the employer's human resources representative the doctors' note excusing him from work for his next three shifts. Claimant asked the human resources representative why the employer did not deposit his check into his account. The human resources representative told claimant that his regular paycheck was being deposited automatically into his bank account and gave claimant another paycheck for his remaining work hours. The representative showed claimant a notice stating he was discharged for leaving work without permission before the end of his shift on May 22.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

Because the Department concluded that claimant voluntarily left work, the first issue in this case is the nature of the work separation. 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).

Claimant worked most of his shift, but left early on May 22, 2016 to seek medical attention after receiving permission to do so from his supervisor. Claimant showed he was willing to continue working after he received medical care because he returned to work on May 23 to give the employer the doctors' note releasing him from work for three days. The employer severed the employment relationship on May 23 when its human resources representative told claimant he was discharged and gave claimant his final paycheck. Because claimant was willing to continue working, but was not allowed to do so by the employer, the work 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) (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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer's human resources representative told claimant on May 23, 2016 that the employer discharged claimant because he left work early from his shift on May 22 without permission. A person testifying under oath is presumed to be truthful unless it can be shown otherwise. *See* ORS 44.370. Claimant offered sworn, first-hand testimony that he needed to seek medical attention due to back pain on May 22. Thus, absent a reason to disbelieve claimant, the record shows claimant left work due to illness or other physical disability, which is not misconduct. OAR 471-030-0038(3)(b). To the extent the employer discharged claimant because he allegedly left work without first informing the employer that he was leaving, the record shows claimant told his supervisor he had to go to the emergency room, and received permission to leave after his coworker's break. The employer failed to meet its burden to show by a preponderance of the evidence that claimant left work due to a reason other than illness or physical disability or that he failed to inform the employer he was leaving work to seek medical care.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-65555 is affirmed.

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

DATE of Service: September 13, 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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