

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1084

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120043). Claimant filed a timely request for hearing. On August 30, 2016, ALJ M. Davis conducted a hearing at which the employer failed to appear, and on September 2, 2016 issued Hearing Decision 16-UI-66864, concluding the employer discharged claimant, not for misconduct. On September 15, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In its application for review, the employer requested that EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new relevant and material information when the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. In support of its request, the employer asserted that claimant filed a formal complaint against her manager and a coworker on June 16, 2016, and that the employer was still investigating claimant's complaint as of the hearing date and "didn't feel comfortable providing information to the ALJ while the facts had yet to be determined." Employer September 15, 2016 Letter to ALJ M. Davis at 1. With the exception of the employer's September 7, 2016 written response to claimant's official complaint, all of the new documentary information submitted by the employer predated the hearing and could have been provided by the employer had the employer chosen to attend the hearing. Although the employer was not prepared to attend the hearing on its scheduled date due to the status of its investigation, the employer did not explain why it did not request that it be postponed or appear at the hearing to request a continuance rather than simply not participating in the hearing. The employer therefore failed to establish that it was beyond its reasonable control to offer its new information into evidence at hearing. Moreover, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, the employer's request for EAB to consider the information is denied.

FINDINGS OF FACT: (1) The Oregon Department of Transportation employed claimant from April 4, 2005 until June 20, 2016 as an office specialist.

(2) On November 13, 2015, claimant began maternity leave due to her pregnancy and the birth of her child. By June 2016, claimant had used all of her leave provided under family medical leave laws. After claimant exhausted her medical leave, claimant requested additional leave due to ongoing postpartum complications. The employer denied claimant's request for additional leave.

(3) During June 2016, claimant exchanged a series of emails with human resources, her manager and her section manager regarding her return to work. Claimant's managers told claimant she had to return to work with a medical release to work or provide a reasonable accommodation request completed by her doctor so that the employer could determine if it had suitable work for claimant. Claimant requested a medical release from her doctor, but did not receive an immediate response because he was on vacation. Claimant gave the employer permission to contact her doctor. The employer did not receive a response when it requested reasonable accommodation information from claimant's doctor. Claimant told the employer her doctor was on vacation.

(4) On June 17, 2016, the employer informed claimant that it would discharge her if she did not return to work by June 25, 2016 with a doctor's release, or she had the option of submitting her resignation due to medical reasons. Claimant had still not received a release to work from her doctor. Claimant was concerned that she would not be able to work for the State of Oregon in the future if the employer discharged her from work, but believed that she would be eligible for rehire if she resigned.

(5) On June 20, 2016, claimant's section manager told claimant by email that the employer would discharge claimant if she did not report to work immediately with a medical release to work because she was no longer on approved leave. Claimant understood from the email that the employer would discharge her immediately. Claimant was willing to return to work if her doctor released her to work.

(6) By June 22, 2016, claimant's doctor had not released her to return to work and claimant did not know if or when her doctor would release her to work. On June 22, 2016, claimant gave the employer a letter of resignation.

CONCLUSIONS AND REASONS: We agree with the ALJ, and conclude that 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. 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).

Although the Department characterized claimant's work separation as a voluntary quit, claimant was willing to continue working for the employer, but the employer told claimant on June 20, 2016 that it would not permit claimant to return to work without a medical release to work. Claimant's doctor had not yet released claimant to work. Because, as of June 20, the employer would not allow claimant to continue working for the employer for an additional period of time because claimant had not yet been released to work, 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 connected with work. 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. 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 discharged claimant because she did not return to work. Claimant did not return to work because her doctor did not release her to return to work before the employer told claimant she had to return or quit. With respect to claimant's failure to return to work, it is not misconduct if claimant failed to report to work due to illness. OAR 471-030-0038(3)(b). With respect to claimant's failure to obtain a medical release from her doctor before the employer's deadline, claimant tried to comply with the employer's instruction, allowed the employer to communicate with her physician, and was unable to provide a medical release due to circumstances that were outside her control. The record does not show that the delay in obtaining a medical release to work was avoidable or attributable to claimant. Thus, the record shows that claimant's failure to give the employer the medical release from her doctor was not caused by a willful or wantonly negligent violation of the employer's standards on claimant's part, and, therefore, and was not misconduct.

The record did not establish that claimant's discharge was for reasons that constituted misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-66864 is affirmed.

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

DATE of Service: October 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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