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

EMPLOYMENT APPEALS BOARD DECISION 2016-EAB-1206

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 162037). Claimant filed a timely request for hearing. On September 27, 2016, ALJ Vincent convened a hearing, which was continued to and conducted on October 5, 2016, and on October 13, 2016 issued Hearing Decision 16-UI-69183, concluding the employer discharged claimant, not for misconduct. On October 27, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument in which it sought to reopen the hearing to enable it to present testimony from two additional witnesses that it did not call to testify during the hearing. EAB construes the employer's request as one to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider additional evidence if the party offering it show that factors or circumstances beyond its reasonable control prevented that party from presenting the information during the hearing. In preparing for a hearing, it is within a party's reasonable control to gather all information and testimony that it wishes to have considered at the hearing and offer it into evidence at that time. The employer contended that the two witnesses that it now wants to testify were not able to attend the hearing "due to medical issues." However, it was within the employer's reasonable control to notify the ALJ if certain witnesses it wanted to testify on its behalf were sick and unavailable to participate during the hearing. It also was within the employer's reasonable control to have requested a continuance of the hearing to allow its witnesses to recover sufficiently to testify. For these reasons, the employer did not show that factors or circumstances beyond its reasonable control prevented it from offering the information that it would offer if the hearing were reopened. The employer's request for EAB to consider the information therefore is denied.

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Pressure Safe, LLC employed claimant as a warehouse worker from June 20, 2015 until June 1, 2016. At times, claimant drove a forklift for both the employer and the employer's parent company, Morasch Meats.

(2) The employer expected claimant to avoid having accidents and damaging the employer's property when operating the employer's forklifts. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On February 15, 2016, claimant drove a forklift he was operating into a parked pallet jack and damaged the jack. On February 16, 2016, the employer's human resources representative and claimant's lead issued a written warning to claimant for this accident. Exhibit 1 at 13. On May 9, 2016, while operating a forklift, claimant drove the forklift into a cooler door. On May 11, 2016, the employer's human resources representative and claimant's lead met with him and issued him a written warning. As a result of this accident, claimant was suspended from work for seven days. Exhibit 1 at 15.

(4) On May 31, 2016, claimant drove a forklift he was operating into a warehouse dock door. On June 1, 2016, claimant met with the employer's human resources representative and his lead to discuss the forklift accident. Exhibit 1 at 16. At the meeting, the human resources representative told claimant he was going to be "fired" if he did not quit as a result of the accident. Audio at ~21:39, ~23:34, ~29:14. Claimant thought it would be better for his future employment prospects of he quit since he would avoid having a discharge on his employment history. On June 1, 2016, claimant submitted a resignation note to the employer.

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

Although claimant submitted a resignation note on June 1, 2016, he testified that he did so only after he was told that the employer was otherwise going to discharge him. Audio at ~21:39. The first issue this case presents is the nature of the work separation and whether it is properly characterized as a discharge or a voluntary leaving under OAR 471-030-0038(2)(August 3, 2011). If claimant could have continued to work for the same employer for an additional period of time at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the same 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).

While cross-examining claimant, the employer's witness suggested that the employer's human resources representative might not have told claimant if he did not resign he would be fired, the employer's witness did not directly dispute in his own testimony that claimant was given such an ultimatum. Audio at ~29:00. Also, the only participants in the June 1, 2016 conversation during which the ultimatum was allegedly issued to claimant were claimant, the human resources representative and the lead worker. Claimant's first hand testimony about what was said during that conversation is entitled to greater evidentiary weight than the suggestions of the employer's witness, who at best had only hearsay knowledge of what was said to claimant during the June 1, 2016 conversation. On this record, the preponderance of the reliable evidence shows claimant did not spontaneously resign on his own initiative, but did so only after the human resources representative told him he would otherwise be discharged. The representative was clearly expressing that the employer would not allow claimant to continue working for it. The work separation therefore 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) (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. 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. 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).

While claimant denied he ran into the dock door while driving a forklift on June 1, 2016, the employer's witness contended that he personally viewed the employer's video surveillance from that day and observed clamant striking the door. Audio at ~13:55, ~25:03. Claimant did not suggest any motive on the part of the employer's witness to fabricate evidence against him, and did not suggest that any factors interfered with the witness's accurate perception of what was depicted on the video. For purposes of this discussion, it is assumed that claimant drove the forklift into the dock door on June 1, 2016.

Even if claimant drove the forklift into the dock door, however, he is disqualified from benefits only if that accident was the result of his willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). Since claimant denied he damaged the dock door, he did not present any evidence about his state of mind at the time of the accident. The employer's witness testified that he did not think claimant had intentionally or willfully struck the dock door and, from what he observed on the video, claimant's "day dreaming" or failing to pay attention to his work probably led to the accident. Audio at ~34:00, ~34:09, ~34:53. Mistakes, accidents, lapses and the like are usually not accompanied by the state of mind required to find willful or wantonly negligent behavior since, by its nature, a claimant is not aware or conscious of such behavior when it is occurring or that such behavior might violate the employer's standards. Absent additional evidence about claimant's state of mind when he drove the forklift into the dock door, which the employer did not present, the employer did not show claimant's caused the accident on June 1, 2016 willfully or with wanton negligence. The employer therefore failed to establish misconduct.

The employer discharged claimant, but did not meet its burden to show that discharge was for misconduct. Claimant is not disqualified from receiving benefits.

DECISION: Hearing Decision 16-UI-69183 is affirmed.

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

DATE of Service: November 22, 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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