

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1396

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 11418). Claimant filed a timely request for hearing. On November 30, 2016, ALJ Vincent conducted a hearing, and on December 2, 2016 issued Hearing Decision 16-UI-72166, affirming the Department's decision. On December 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

PRELIMINARY MATTERS: In Hearing Decision 16-UI-72166, the ALJ stated that, at hearing, claimant was represented by her attorney, and that no exhibits were offered or admitted into evidence. Hearing Decision 16-UI-72166 at 1. However, the record shows that claimant represented herself at the hearing. Audio Record at 1:25-1:30. The record also shows that claimant offered a 22-page document into evidence, which the ALJ admitted as Exhibit 1 without objection from the employer. Audio Record at 3:35-4:00. However, the ALJ failed to mark the document as Exhibit 1. EAB therefore has done so, and considered the entire hearing record, including Exhibit 1, when reaching this decision. EAB also considered claimant's written argument to the extent it was based on Exhibit 1 and other information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Beach Break Vacation Rentals LLC employed claimant as a housekeeper from May 9, 2016 to August 30, 2016.

(2) The employer expected its housekeepers to call in each day to determine if they were scheduled to work, and work as scheduled. Claimant understood that expectation.

(3) On August 23 or 26, 2016, claimant and the employer's owner had a conversation about claimant's continued employment. After the conversation, claimant continued to call in each day to determine if she was scheduled to work, and worked as scheduled, through August 29, 2016.

(4) On August 30, 2016, claimant again called in to work to determine if she was scheduled to work, and intended to work if scheduled. The employer's owner told claimant that she was accepting claimant's resignation, effective immediately. Claimant told the employer that she was not quitting. The owner told claimant the employer had no work for her.

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

ORS 657.176(2) provides that an individual is disqualified from the receipt of benefits if the individual has been discharged for misconduct connected with work or voluntarily left work with good cause. The first issue in this case is whether claimant quit work or was discharged. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 16-UI-72166, the ALJ found as fact that on August 26, 2016, claimant notified the employer's owner that she was quitting work, effective at the end of the month, and that her last day worked for the employer was August 29, 2016. Hearing Decision 16-UI-72166 at 1. Based on those findings, the ALJ implicitly concluded, without analysis, that claimant voluntarily left work on August 29, 2016. Hearing Decision 16-UI-72166 at 2. However, the ALJ's findings and conclusion overlook the undisputed evidence that on August 30, 2016, claimant called in to determine whether she was scheduled to work and intended to work if scheduled, and that the employer's owner severed the employment relationship at that time. It therefore is undisputed that, as of August 30, 2016, claimant was willing to continue working for the employer for at least some additional period of time, but was not allowed to do so by the employer. The employer therefore discharged claimant on August 30, 2016.

ORS 657.176(8) provides that under certain circumstances, a work separation shall be adjudicated as a voluntary leaving when an individual notified an employer that the individual would leave work on a specific date, and the employer discharged the individual no more than 15 days prior to the planned voluntary leaving. Here, the employer's owner testified that on August 26, 2016, claimant notified her that she would leave work, effective September 1, 2016. Audio Record at 13:00-14:00, 16:15-16:35. Given that the employer discharged claimant on August 30, 2016, the owner's testimony raises the issue of whether claimant's work separation should be adjudicated as a voluntary leaving under ORS 657.176(8).

At hearing, claimant testified that the conversation with the owner at issue took place on August 23, 2016, and that she only told the owner that, effective September 1, she would no longer call in on each day to determine whether she was scheduled to work, but would let the employer know on a weekly basis which days she was available for work. Audio Record at 5:00-5:40, 6:25-7:30. We find no basis in the hearing record for the ALJ's implicit determination that claimant was not a credible witness, and find the evidence as to what she told the owner on August 23 or 26 equally balanced. A finding that claimant notified the employer that she would leave work on September 1 therefore is not supported by

a preponderance of evidence in the record. Claimant's August 30, 2016 work separation therefore shall be adjudicated as a discharge, and not a voluntary leaving under ORS 657.176(8).

The final issue is whether claimant's discharge was 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, it is undisputed that, as of August 30, 2016, claimant still was calling in each day to determine whether she was scheduled to work, and working as scheduled. Even if we found that the employer discharged claimant for telling the employer's owner she was going to limit her availability in the future, the record fails to show the owner told claimant she was prohibited from doing so. The record therefore fails to show claimant knew or should have known that limiting her availability in the future probably violated the employer's expectations.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-72166 is set aside, as outlined above.

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

DATE of Service: January 13, 2017

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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