

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0169

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 63935). Claimant filed a timely request for hearing. On January 30, 2017, ALJ Murdock conducted a hearing, and on February 2, 2017 issued Hearing Decision 17-UI-76079, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On February 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information that was not offered into evidence during the hearing. The employer did not explain why it did not present this information at the hearing or otherwise show that it was prevented from doing so by factors or circumstances beyond its reasonable control as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument.

FINDINGS OF FACT: (1) Platinum Exteriors, Inc. employed claimant as a construction worker from September 14, 2015 until sometime after October 30, 2016.

(2) Due to the nature of its business, the employer sometimes had no work for claimant for a couple of days before the employer assigned claimant to a new job. Beginning sometime around approximately early October 2016, claimant began working for the employer on a job in the Seattle, Washington area. Claimant lived in Salem, Oregon. Around the time claimant started working in the Seattle area, he experienced problems with his car. Claimant began traveling to the job in the Seattle area with a coworker who was also his supervisor's son. They would drive up to the Seattle area and work Mondays through Thursdays and then return to their homes in Oregon on Fridays.

(3) On Friday, October 14, 2016, claimant returned to his home in Oregon after working on the Seattle area job. At that time, claimant thought his work on the Seattle area job might be completed. On Saturday, October 15, 2016, claimant left a message for his coworker asking the coworker to call him on Sunday, October 16, 2016 to let him know if he was needed on the Seattle area job on Monday, October

17, 2016, if the coworker was planning to travel to the Seattle area job, and, if so, when he would pick-up claimant. When the coworker did not call claimant as requested, claimant decided he was not needed on the job and travelled to a remote location on the Oregon coast to help a friend perform repairs on the friend's cabin. Claimant did not have cell phone reception when he was at his friend's cabin.

(4) On Monday, October 17, 2016, claimant's supervisor sent claimant a text message stating, "If you want to work this week, you better get ahold of me." Transcript at 18, 30-31. The supervisor also told claimant to contact his coworker if he needed a ride to the Seattle area. Claimant did not immediately know he had received this text message because his cell phone did not have service at his location on the coast. Sometime after the supervisor sent this text message to claimant, the supervisor called claimant's wife and she told the supervisor she would tell claimant that the supervisor was trying to reach him when she next spoke to claimant.

(5) On Tuesday, October 18, 2016, the supervisor sent claimant a text message stating, "I'm done with you, bro. You can kiss your job good-bye. [You] always never answer your phone. She [claimant's wife] told you to call me and you didn't call me. Your job must not mean much to you." Transcript at 18, 31. Claimant accessed the text message when he left his friend's cabin that day to obtain materials for the cabin. Claimant replied to the supervisor's text message, explaining that his coworker had not contacted him about the Seattle job as claimant had requested to tell him "the plan" and that he was at a location where he did not have phone reception and could not promptly respond to the supervisor's text message. Transcript at 21. The supervisor responded, "Bullshit" and stated that he had spoken to claimant's wife and claimant's wife should have told claimant that he was trying to reach him about working on the Seattle job. Transcript at 19, 31. Claimant replied, "That's not a nice way to talk," and stated that he had spoken to his wife late the previous evening. Transcript at 19, 22.

(6) On Tuesday, October 25, 2016, the supervisor sent another text message to claimant stating "If you want to work, call me." Transcript at 19, 23. On Wednesday, October 26, 2016, the supervisor sent yet another text message to claimant, stating, "[The owner] wants to know if you're headed up to Seattle to work for him [on another job]. If not, I can send somebody else." Transcript at 23, 31. Then in a later text message, the supervisor stated, "Don't worry about going up and working for [the owner on the Seattle job] this week." Transcript at 19, 23, 32. Claimant did not respond to these text messages since he thought the last message about working for the owner had cancelled that work and his services were not needed. On Thursday, October 27, 2016, the supervisor sent a further text message to claimant stating, "Don't think you're going to [get]¹ unemployment, bro. We offered you work." Transcript at 19, 23, 32. Approximately around this time or shortly after, the supervisor informed claimant that some drywall work for the owner was coming up and he would let claimant know when it was to start.

(7) On Sunday, October 30, 2016, the supervisor sent a text message to claimant, "Don't forget to call [the owner]. He has some sheet rock work for you to work." Transcript at 19, 24, 32. Claimant tried several times in November 2016 to reach the owner about performing this work, but the owner did not respond to the phone messages claimant left for him. Claimant did not try to reach the owner by text message because the owner preferred communications by voice and did not like text messages. Later, claimant learned that the owner's father had died and the owner was not able to attend to work as he had

¹ The transcript of the hearing indicated the word used in the text message was "quit," but that does not make sense in the context of the message. Transcript at 23. In context, it seems likely that the word actually used was "get" and the transcriptionist mis-heard and confused it with the cognate word "quit."

before the death. At that time, the owner asked claimant not to contact him for two weeks and claimant complied with that request.

(8) Claimant continued to try to reach the owner about available work through December 2016. Claimant also contacted his supervisor about work, but his supervisor told him to contact the owner. On Wednesday, December 28, 2016, claimant sent a text message to the supervisor stating, "You got any work for us right now?" Transcript at 19, 22. The supervisor did not respond.

(9) After October 30, 2016, the employer discharged claimant by failing to give him any work to perform.

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

At hearing, the employer's witness argued that claimant failed to report for work when it was offered and, accordingly, that claimant's work separation was a voluntarily leaving. Transcript at 14, 15. In contrast, claimant contended that he was discharged. Transcript at 35. OAR 471-030-0038(2)(August 3, 2011) sets out the standard for determining the nature a 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). 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).

Neither party disputed that, as of the text message sent to claimant on October 30, 2016, the employer considered claimant to be employed and claimant considered himself to be an employee. Whatever might have happened before that date and the implications of some of the text messages sent before October 30 2016, neither party had acted to sever the employment relationship and it was ongoing. Claimant testified that he tried multiple times to contact the employer about the work he was promised on October 30, 2016 or other work, but his communications were not answered. Transcript at 4, 5, 36. The employer's witnesses did not dispute claimant's testimony about trying unsuccessfully to contact the owner in response to the October 30, 2016 text message, stated they did not know what why claimant failed to perform the work with the owner that was offered on October 30, 2016 and suggested that claimant was the witness best situated to answer any questions about why that work was not performed. Transcript at 24, 30. Due to the employer's implicit agreement with claimant's testimony in connection with the work offered on October 30, 2016, the preponderance of the evidence establishes that claimant tried several times unsuccessfully to reach the owner to arrange to perform that work and that the employer did not offer claimant any work after October 30, 2016. Claimant's behavior in following up on that offered work shows that claimant was willing to continue working for the employer. However, the owner's failure to respond to the many messages claimant left about the work that was offered and the employer's failure to offer any further work to claimant demonstrates that the employer was unwilling to allow claimant to perform any work for it after October 30, 2016. As such, claimant's work separation was a discharge after October 30, 2016.

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 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).

Although the employer's witnesses described aspects of claimant's work performance before October 30, 2016 that was allegedly inadequate or not in compliance with the employer's standards, they were not the cause of claimant's discharge since the employer offered claimant additional work despite these alleged defaults on October 30, 2016. Transcript at 16-18. Since the employer had known of all of these incidents of alleged misconduct on and before October 30, 2016 and had not discharged claimant for them, it is not likely that they proximately caused the employer to discharge claimant after October 30, 2016. We can discern no other reason in the record for the employer to have discharged claimant when it did. On this record, the employer did not meet its burden to show that it discharged claimant for engaging in misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-76079 is affirmed.

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

DATE of Service: March 17, 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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