

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0392**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 101053). Claimant filed a timely request for hearing. On March 23, 2017, ALJ Meerdink conducted a hearing, and on March 24, 2017, issued Hearing Decision 17-UI-79539, affirming the administrative decision. On March 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Securitas Security employed claimant as a security guard from July 2016 through December 5, 2016. For the last three months he worked for the employer, claimant was assigned to work at the Rite Aid distribution center, Tuesday through Sunday, from 10 p.m. to 6 a.m.

(2) Several years ago, claimant was diagnosed with anxiety and depression, conditions for which he is currently receiving treatment. Claimant found that working the graveyard shift, as the employer had assigned him to do at Rite Aid, exacerbated his anxiety and depression.

(3) On or about October 28, 2016, claimant spoke to the employer's scheduling manager and explained that he needed to have a different assignment that would not require him to work a graveyard shift. As a result of this conversation, claimant understood that the employer was agreeable for him to end his work for Rite Aid in mid-November, when the employer would be able to arrange for someone to replace him, and that the employer was willing to reassign him, but it would take some time until a reassignment could be arranged. Audio recording at 20:11.

(4) By letter dated November 3, 2016, claimant notified his supervisor at Rite Aid and the employer's scheduling manager that his last day at Rite Aid would be November 14, 2016, that he would be taking time off to travel from November 16 through 25, 2016, and that he wished to continue working for the employer after he returned home. Audio recording at 9:51.

(5) The employer scheduled claimant to work at Rite Aid on November 16 through 19, and 23-27, 2016. Claimant did not report to work any of these scheduled shifts, however.<sup>1</sup>

(6) When claimant returned from his trip on November 25, 2016, he did not contact the employer. Claimant believed that he was awaiting a new assignment, and that the employer would contact him when a new assignment was available. Claimant understood, based on his October conversation with the scheduling manager, that it would take some time for the employer to arrange a new assignment for him. Audio recording at 29:23.

(7) By letter dated December 5, 2016, the employer informed claimant that it considered him to have resigned his position because he was leaving the area.

**CONCLUSION AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

**Work Separation:** We begin our analysis by considering 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).

Here, the parties presented conflicting evidence regarding the circumstances that ultimately resulted in claimant's work separation. According to the employer's scheduling manager, claimant spoke with him on November 4 or 5, 2016, and asked for time off. The manager testified that when he told claimant he could not approve the time off claimant wanted to take, and asked claimant if he was quitting, claimant responded that "if it comes to that, I guess I am." Audio recording at 32:29. Claimant, however, testified that he never spoke to the scheduling manager on November 4 or 5, and that he understood, based on his October 28 conversation with the manager, that the employer had granted his request to be removed from the Rite Aid assignment, and would eventually find a new assignment for him. Audio recording at 20:11. We find it unnecessary to decide which account of claimant's conversations with the scheduling manager is more credible, however. The record shows that whatever statements claimant allegedly made during a November 4 or 5 conversation with the scheduling manager, the employer was willing to allow claimant to continue working: it scheduled him to work on November 16-19, and also on November 23-27.

The record also shows that claimant was willing to continue working for the employer, after he took time off from November 16 through 25. Claimant's employment ended only after the employer sent him the December 5, 2016 letter in which it indicated that it was no longer willing to allow the claimant to work because it believed he had resigned his position. Claimant's work separation is therefore a discharge.

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<sup>1</sup> The employer's attendance policy provided that an employee would be discharged after three instances of "no call, no show," *i.e.*, failing to report for work and failing to contact the employer in advance of a scheduled shift to report the absence. Audio recording at 37:14.

**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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Based on this record, we conclude that the employer discharged claimant because he failed to report for work after November 14, 2016, and failed to contact the employer to report his absences, in violation of the employer's attendance policy. After conversation with the employer's scheduling manager in late October 2016, however, claimant concluded that the employer had approved his request to be removed from an assignment that required him to work a graveyard shift, had agreed to find him a new assignment, and had warned him that it might take some time before a new assignment could be arranged. Claimant's failure to contact the employer after November 14 resulted from his belief that he was awaiting a new assignment from the employer and that the employer would contact him when one was available. Claimant's violation of the employer's attendance policy therefore resulted from a good faith error in his understanding of what the employer expected of him; good faith errors are not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-79539 is set aside, as outlined above.

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

**DATE of Service:** April 19, 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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