

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

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0444

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with the employer without good cause on or about October 13, 2016 (decision # 162609). On January 18, 2017, claimant filed a timely request for hearing. On March 20, 2017, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for March 31, 2017. On March 31, 2017, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on April 7, 2017 issued Hearing Decision 17-UI-80513, concluding the employer discharged claimant, not for misconduct, on October 11, 2016. On April 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer requested that the March 31, 2017 hearing be reopened, asserting that its representative failed to appear at the hearing because claimant's supervisor no longer worked for the employer and declined to testify at the hearing, and the employer's representative had no first-hand knowledge of claimant's work history with the employer. On April 25, 2017, the employer submitted a written statement from claimant's supervisor containing new information regarding claimant's work separation from the employer, and on May 5, 2017 EAB received written argument from claimant responding to his supervisor's statement.

The employer's request for the March 31 hearing to be reopened is construed as a request for EAB to consider claimant's supervisor's written statement regarding claimant's work separation. OAR 471-041-0090(2) (October 29, 2016) 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. Here, the employer failed to show that its representative could not have obtained and provided claimant's supervisor's written statement to OAH and claimant before the hearing, and appeared at the hearing and offered the document into evidence at that time. Nor did the employer show that its representative could not have discussed claimant's work separation with claimant's supervisor before the hearing, and appeared at the hearing and offered the supervisor's information into evidence via the representative's testimony. Absent such showings, the employer failed to establish that factors or circumstances beyond

its reasonable control prevented it from offering the information into evidence at the hearing. EAB therefore did not consider the employer's new information, or claimant's written argument responding to the information. EAB considered only information received into evidence at the hearing.

FINDINGS OF FACT: (1) A Vannett Insurance Agency Inc. last employed claimant as an on-call employee from October 7 to 11, 2016.

(2) Claimant previously had worked for the employer from September 22, 2014 to June 30, 2016. On October 7, 2016, the employer re-hired to work as an on-call employee until a newly hired employee started working for the employer. On October 11, 2016, claimant telephoned the employer to determine whether it needed him to work on October 13, 2016. The employer informed claimant that the newly hired employee had started working for the employer, and that claimant's services were no longer needed.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, not for misconduct.

The Department concluded that claimant voluntarily left work with the employer on or about October 13, 2016. The ALJ concluded that the employer discharged claimant on October 11, 2016. OAR 471-030-0038(2)(a) (August 3, 2011) states that 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. 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). The date an individual is separated for work is the date the employer-employee relationship is severed. *Id.*

The record shows that as of October 11, 2016, claimant was willing to continue to work for the employer for an additional period of time, but the employer did not allow him to do so. The work separation therefore is a discharge, and not a voluntary leaving.

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. 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 record shows the employer discharged claimant due to a lack of work, and not because claimant violated the standards of behavior which an employer has the right to expect of an employee, or disregarded the employer's interest. The employer therefore discharge claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation from the employer.

DECISION: Hearing Decision 17-UI-80513 is affirmed.

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

DATE of Service: May 15, 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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