

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0759

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74139). Claimant filed a timely request for hearing. On June 13, 2017, ALJ M. Davis conducted a hearing, and on June 16, 2017 issued Hearing Decision 17-UI-85915, concluding the employer discharged claimant, but not for misconduct. On June 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Anderson Painting employed claimant as a painter from August 2016 to February 18, 2017.

(2) The employer's owner expected employees to have a vehicle and driver's license as a condition of employment, and to transport themselves to and from work and between job sites. The owner had informed claimant of his expectation and refused to hire claimant prior to August 2016 because claimant lacked a vehicle and driver's license. In August 2016, the owner hired claimant with the knowledge that, although he had plans to obtain a driver's license, claimant did not yet have one and would have to rely upon rides from others in order to transport himself to and from work and between job sites.

(3) In approximately early February 2017, with the owner's financial assistance, claimant obtained his driver's license. He thought he would have access to a functioning vehicle when that occurred, but did not. Although he and his spouse owned two vehicles, his spouse would not allow him to drive one of them, and the other was not functional. He continued to obtain rides from a coworker and his wife to transport himself to and from work and between job sites.

(4) For various reasons, by the early part of February claimant was unable to reliably obtain rides from others and the owner began providing him with rides. The owner did not consider it acceptable that he had to provide rides to claimant.

(5) The owner offered to locate and purchase a mechanically sound vehicle in the \$1,500 price range on claimant's behalf, and allow claimant to reimburse him for it by making installment payments via payroll deductions. The owner believed claimant was living paycheck-to-paycheck, and suggested a way that claimant pay for the vehicle without reducing his take-home pay. The owner proposed giving claimant a \$1.00 per hour raise, and suggested that he could deduct only the portion of claimant's income derived from the raise to reimburse the owner for the cost of the vehicle, essentially leaving claimant's take-home pay the same as it was before the vehicle purchase. However, the owner did not consider that to be a large enough payment, and suggested that claimant also work six hours of overtime each week so the owner could also deduct the earnings from that work from claimant's pay, again, without affecting claimant's pre-vehicle purchase take-home pay.

(6) Claimant was initially interested in the idea, but upon consideration opted not to have the owner purchase him a vehicle. Claimant's spouse objected to the idea, and he did not want or feel he could afford a car payment at that time, even on the terms the owner suggested. He was also concerned about the quality of the vehicle the owner would purchase and had decided he wanted to purchase a vehicle in the \$400 to \$500 price range rather than the higher price range the owner had suggested.

(7) On February 10, 2017, the owner gave claimant an ultimatum to have his own vehicle to transport himself to and from work, and between job sites, by February 17th in order to continue his employment. Claimant did not obtain access to a vehicle by February 17th. The owner gave claimant one more day to think about his options, and, when claimant still did not have a vehicle by February 18, 2017, the owner discharged claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

The owner discharged claimant for not having a vehicle to transport himself to and from work and between job sites. There is no real dispute that claimant did not have a vehicle for either purpose, nor is there any dispute that claimant's lack of access to a vehicle ultimately violated the owner's expectations. However, for such violation to be considered misconduct and disqualify claimant from receiving unemployment insurance benefits, it must have been done with the intent to violate the expectations or with conscious indifference to them, and the owner did not establish that those conditions existed.

The owner hired claimant with the full knowledge that he was incapable of transporting himself to and from work and between job sites. Although claimant and the owner both expected that condition to be

temporary, the fact that claimant's ability to drive himself did not change during his employment did not amount to a willful violation of the owner's expectations, and was not misconduct.

Likewise, although claimant was conscious that his lack of vehicle was violating the owner's expectations, it does not appear on this record that claimant was acting with indifference to the standards of behavior the owner had the right to expect of him. Claimant lacked access to a functioning vehicle and lacked the funds to purchase a new one even though doing so amounted to a violation of the owner's expectations. Moreover, although an employer may reasonably expect employees to transport themselves to and from work, and might reasonably expect employees to provide their own transportation between work sites, it was not reasonable under the circumstances for the owner to require claimant to purchase a vehicle to meet those expectations, and claimant's conscious violation of an unreasonable expectation was not misconduct under OAR 471-030-0038(1)(d)(C).

It appears on this record that the owner was generous to claimant with his resources, advancing him funds to pay for his driver's license reinstatement fee and car insurance, and offering in essence to finance an interest-free vehicle purchase for claimant. Under the circumstances, however, claimant's refusal to allow the owner's generosity to extend to purchasing him a vehicle did not amount to disqualifying misconduct. The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-85915 is affirmed.

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

DATE of Service: July 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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