

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0987

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82415). Claimant filed a timely request for hearing. On July 25, 2017, ALJ Lohr conducted a hearing at which the employer did not appear, and on July 27, 2017 issued Hearing Decision 17-UI-89037, affirming the Department's decision. On August 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wright Manufacturing, LLC employed claimant as a welder from June 5, 2017 until June 7, 2017.

(2) On claimant's first day, June 5, 2017, the employer assigned claimant principally to cleaning the shop. That day, claimant performed welding for approximately an hour. On June 6, 2017, claimant again performed cleaning while at work and did no welding.

(3) On June 7, 2017, claimant was feeling ill but reported for work. Again, claimant was told to clean up the shop. Sometime later that day, claimant asked the shop supervisor when he would be allowed to perform welding duties. The shop supervisor told claimant he wanted to further assess his proficiency at welding and, from what he had seen, the supervisor "wasn't impressed." Audio at ~14:56. Claimant was upset and told he supervisor, "I don't think this is gonna work out." Audio at ~7:38. The supervisor told claimant to speak with one of the employer's managers, Brian.

(4) Claimant approached Brian, told Brian about his conversation with the shop supervisor and expressed his dissatisfaction at not being permitted to perform welding work. Claimant told Brian, "This isn't working out." Audio at ~9:17. Brian then told claimant the employer would "cut him a check," which claimant interpreted as Brian having concluded claimant was quitting work. Audio at ~11:03. Claimant responded that he was not sure what he wanted to do and asked if he could go home and think about it. Audio at ~11:03. Brian repeated that the employer was going to give claimant his final check. Claimant interpreted Brian's insistence about the check as meaning that the employer did

not want him to continue working. Soon after, the employer gave claimant his final check. Claimant did not return to the workplace after he was given the check.

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

In Hearing Decision 17-UI-89037, the ALJ concluded that that claimant's work separation was a voluntary leaving and claimant was disqualified from benefits because he left work without good cause. The ALJ reasoned that claimant left work because he was unhappy about not performing welding and claimant's preference for welding work was not a grave reason for him to quit work. We disagree with the ALJ's conclusion about the nature of the work separation, conclude that it was a discharge, and further conclude that claimant is not disqualified from benefits based on it.

The first issue this case presents is the nature of the work separation. If claimant could have continued to work for the same employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant did not tell the employer that he was quitting work on June 7, 2017, but only that he was not pleased about his work assignments during his first two days, and asked if he could be allowed to go home to think about whether or not he wanted to quit. By these statements, claimant did not objectively manifest a clear intention to quit work on July 7, 2017. However, the response of the employer's manager in not addressing claimant's request, but insisting that the employer was going to give claimant his final check that day was reasonably construed by claimant as manifesting the employer's unwillingness to allow claimant to continue working. By the manager's insistence, it appears that the employer was the first party to express of an unequivocal intention to sever the work relationship. Claimant's work separation was a discharge as of June 7, 2017

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. 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).

The record best suggests that the employer discharged claimant on June 7, 2017 because claimant was dissatisfied with his job assignment. There was no evidence showing that claimant expressed his displeasure with the tasks he was asked to perform rudely or in a way that could be construed a willful or wantonly negligent violation of the employer's reasonable expectations. Without more, it was not misconduct for claimant to have merely stated that he was not happy with the work assignments the employer was giving him, to ask to be allowed to perform welding, and to state that he was thinking about quitting work if he was not assigned to welding work. Reviewing the current state of the record, there are no other discernible reasons for the employer to have discharged claimant on June 7, 2017. The evidence in the record is insufficient to establish that claimant engaged in any willful or wantonly negligent violations of the employer's standards for which he was discharged.

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

DECISION: Hearing Decision 17-UI-89037 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 11, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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