

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0996

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74526). Claimant filed a timely request for hearing. On August 15, 2017, ALJ Janzen conducted a hearing at which the employer failed to appear, and on August 16, 2017 issued Hearing Decision 17-UI-90520, concluding claimant voluntarily left work without good cause. On August 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Home Depot employed claimant from September 2015 until March 19, 2017 as a lumber sales associate.

(2) The employer expected claimant to refrain from having unscheduled absences from work. Claimant understood the employer's policy.

(3) In May 2016, claimant pleaded guilty to driving under the influence of intoxicants (DUII) and the court placed claimant on probation. As part of his probation, the court required claimant to participate in treatment. The treatment center required claimant to submit to random drug and alcohol testing. In early March 2017, one of claimant's tests was positive for alcohol. As a result, the court ordered claimant to appear in court on March 20, 2017 regarding his DUII case. Claimant understood that the court might impose a jail sentence at that time.

(4) On March 5, 2017, claimant told the department manager that he was unable to work on March 20 because he had a court appearance that day regarding a DUII case from 2016, and that the court might impose a jail sentence, but that he did not know if it would be "a day, a week or month" long. Audio Record at ~ 10:30. Claimant told the manager that, if he did not report to work after his court date, it would be because he was in jail. Claimant believed that he gave the employer sufficient notice that he would not report to work on March 20. The department manager told the store manager what claimant had told him.

(5) On March 6, 2017, claimant had a meeting with the store manager and asked if he could have a leave of absence if he went to jail. The department manager told claimant that the employer did not give leaves of absence and told claimant he could quit and reapply for work when he completed his jail sentence. Claimant agreed he would quit and reapply for work when he completed his jail sentence. Claimant was willing to continue working until he was incarcerated.

(6) On March 20, 2017, claimant reported to court, and the court postponed claimant's court appearance until April 17, 2017. After his court appearance, claimant called the store manager and left telephone messages for him that he was available to work. The manager did not return claimant's telephone messages. The employer was not willing to allow claimant to return to work.

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

In Hearing Decision 17-UI-90520, the ALJ concluded that claimant was disqualified from the receipt of benefits because he voluntarily left work without good cause. The ALJ reasoned that claimant and the employer mutually agreed that the employment relationship would end and such mutual agreements are properly characterized as voluntary quits.¹ We, however, disagree that claimant quit or that he is disqualified from benefits based on this work separation.

The first issue is 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

Claimant told the employer in advance that he would miss work on March 20 due his pending court appearance and that there was the possibility the court would impose a jail sentence on that day. Because the employer would not allow claimant to take a leave of absence, claimant planned to quit if the court sentenced him to jail. However, claimant was willing to continue working until he was incarcerated, if ever. The reason claimant did not return to work after his March 20 court appearance was not incarceration, but the employer's unwillingness to allow claimant to continue working, presumably because it was dissatisfied with claimant missing work on March 20, or with the possibility that he might miss work in the future due to incarceration. Because claimant was willing to continue working for the employer until he was incarcerated, but was not allowed to do so by the employer, the work separation was a discharge.

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. Isolated instances of poor

¹ Hearing Decision 17-UI-90520 at 3, *citing Employment Department v. Shurin*, 154 Or App 352, 959 P2d 639 (1998)(A mutual agreement between an employer and an employee to end the work relationship is treated as a voluntary leaving.)

judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

To the extent the employer discharged claimant because he did not report to work on March 20, the employer discharged claimant not for misconduct. The employer had a reasonable right to expect claimant to report to work unless he had an excused absence. Claimant told the employer in advance that he would miss work on March 20 due to a court appearance and reasonably presumed that he was permitted to miss work to attend his court hearing. The record does not show that claimant knew or should have known that failing to report to work due to his court appearance probably violated the employer's expectations. At worst, claimant's failure to report to work was the result of a good faith error in his understanding of those expectations. Good faith errors are not misconduct.

Moreover, to the extent the employer discharged claimant because he might miss work in the future due to incarceration, the employer did not discharge him for misconduct. The employer's preference not to continue employment for an employee with a pending criminal case that might result in incarceration is not misconduct attributable to claimant. Nor did the employer assert, and the record does not otherwise show, that claimant failed to disclose his criminal record, or that claimant's criminal case affected a license, certification or other similar authority necessary to the performance of his occupation.

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

DECISION: Hearing Decision 17-UI-90520 is set aside, as outlined above.

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

DATE of Service: September 14, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.