

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1104

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 100753). Claimant filed a timely request for hearing. On August 30, 2017, ALJ Janzen conducted a hearing, and on August 31, 2017 issued Hearing Decision 17-UI-91668, affirming the Department’s decision. On September 15, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant’s written argument to the extent it was relevant and based on the hearing record.

FINDINGS OF FACT: (1) PacificSource employed claimant as a membership representative trainee from June 26 to June 30, 2017

(2) Claimant lived with her husband in Eugene, Oregon and worked for the employer in Springfield, Oregon. The employer’s director of operations expected claimant’s basic training period to be 3 to 4 weeks, but claimant’s manager did not expect claimant to be a fully trained and productive membership representative for 3 to 4 months. Claimant’s trainer, who was pregnant, told claimant she hoped claimant would be fully trained before the trainer went on maternity leave in October, and in time for the employer’s busy season.

(3) On June 29, 2017, claimant’s husband accepted a job in Bend, Oregon, a 2.5 hour drive from the Eugene-Springfield area. Claimant was willing to continue working for the employer until she and her husband moved to Bend. On June 30, 2017, claimant told her manager that her husband had accepted a job in Bend, and that they would be moving to Bend in a few weeks or a month. Claimant’s manager asked her what they should do. Claimant replied that she was not sure. Claimant’s manager told claimant she would not be able to “produce anything” before she left,¹ so she thought they should make

¹ Audio Record at 20:48.

that day claimant's last. Claimant replied that that made sense. Claimant's manager asked claimant to draft a resignation letter, and claimant complied.

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

In Hearing Decision 17-UI-91668, the ALJ found as fact, without analysis, that claimant quit working for the employer.² However, the nature of claimant's work separation is a mixed question of fact and law under OAR 471-030-0038(2) and where, as here, the nature of the work separation is at issue, it must be analyzed under that rule. 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). An individual is separated from work when the employer-employee relationship is severed. *Id.*

We disagree with the ALJ that claimant voluntarily left work. It is undisputed that claimant was willing to work for the employer after June 30, 2017, and until she and her husband moved to Bend. On June 30, 2017, claimant told her manager only that her husband had accepted the job in Bend and that they would be moving in a few weeks or a month. Claimant's manager responded by recognizing that it would be a waste of the employer's time to continue training claimant, telling claimant that they should make that day her last, and asking claimant to draft a resignation letter. Claimant's manager's response demonstrated that she was unwilling to allow claimant to continue working for the employer, and therefore was severing the employment relationship. Because the employer did not allow claimant to continue working after June 30, the work separation 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, the employer discharged claimant because she notified the employer that she was moving to Bend, and not because she violated 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 therefore discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

² Hearing Decision 17-UI-91668 at 2.

DECISION: Hearing Decision 17-UI-91668 is set aside, as outlined above.³

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

DATE of Service: October 12, 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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³ 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.