EO: 200
BYE: 201828

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1252

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 160626). Claimant filed a timely request for hearing. On October 9, 2017, ALJ Griffin conducted a hearing, and on October 11, 2017 issued Hearing Decision 17-UI-94327, concluding the employer discharged claimant for misconduct. On October 26, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CREDIBILITY: As a preliminary matter, the ALJ determined that aspects of claimant's and the employer's testimony were "irreconcilable," specifically, that claimant's claim that he personally called the employer's attendance line to report his absences and the employer's witness's testimony that she personally listened to the attendance line messages on the days claimant claimed he had called and found no messages from claimant could not both be true.[1] With regard to the employer's witness's testimony, the ALJ wrote that he "found it unlikely that an individual with no personal stake in the outcome of this proceeding who knows that hard evidence would be available to rebut false testimony would either intentionally provide false testimony or would be careless in providing her specific recollection of reviewing the attendance lines."[2] The ALJ also wrote that claimant's testimony about how he called in was inconsistent and that because claimant allegedly stated to the employer that he wanted to be laid off work "a few weeks prior to claimant's final attendance events" and discussed retiring, he "may have been motivated to separate from the company on his own terms," which was a "potential motive to fabricate" a story about how he called to report his absences.[3] We disagree, and considered both claimant and the employer equally credible witnesses.

[1] Hearing Decision 17-UI-94327 at 1.

[2] *Id.* at 2.

[3] *Id.*

Claimant's and the employer's testimony about claimant's alleged calls to the employer's attendance line was not irreconcilable. As we will discuss, there are many plausible circumstances under which an individual might call and leave a voicemail for someone that the intended recipient did not receive or hear that do not involve deception. Although we agree with the ALJ that it is highly unlikely that the employer's witness in this case provided or might have been motivated to provide false testimony at the hearing, the fact that "hard evidence would be available to rebut false testimony" is immaterial here, where the employer had exclusive control over that "hard evidence," and neither submitted it or offered to submit it into evidence; nor are carelessness or intentional deception the only reasons a witness might provide inaccurate testimony.[4]

With respect to claimant's testimony, we decline to consider claimant's testimony internally inconsistent given that the ALJ's questions to claimant and claimant's answers as depicted in the transcript were translated, which means that as a practical matter we do not know precisely what claimant was told the ALJ had asked him or what his responses were in the context of the language in which they were asked and answered. As to claimant's potential motive to fabricate a story about his calls to the employer's attendance line, we cannot reconcile the ALJ's conclusion that claimant fabricated a story or failed to call the attendance line in order to "separate from the company on his own terms" with the ALJ's conclusion, with which we agree, that claimant was, at all relevant times, willing to continue working for the employer past the date of his separation. We also decline to make a finding that claimant asked to be laid off work or wanted to retire, much less conclude that claimant lacked credibility about his calls to the attendance line because of his desire to be laid off or retire, where, as here, the ALJ did not even ask claimant to respond to the employer's allegations that he had asked to be laid off or wanted to retire. Based upon our review of this record, we find no reason to doubt the credibility of either claimant or the employer's witness.

FINDINGS OF FACT: (1) Kai USA, Ltd. employed claimant as a machine operator from 1999 to July 13, 2017.

(2) The employer expected employees to report to work as scheduled or notify the employer of any absences by calling an attendance line phone number and leaving a message. The employer considered employees who failed to report to work or notify the employer of their absences two days in a row to have abandoned their jobs.

(3) The employer scheduled claimant to work on July 11, 2017 and July 12, 2017. Claimant did not report to work because he was ill. Claimant did not have the employer's attendance line phone number written down, he had not memorized it, and it had "been a while" since he had to call it. Transcript at 14. Claimant he looked in his cell phone's "recent calls" log, found a number he thought was for the attendance line, and called it to report his illness and both absences. The employer did not receive any messages from claimant on its attendance line on either day.

(4) On July 13, 2017, claimant returned to work. His intent at the time was to work his scheduled shift. During claimant's shift the employer called claimant into an office to discuss his absences and the employer's belief that he had not called the attendance line to report his absences. The employer

[4] For example, parties sometimes provide inaccurate testimony because they are confused about a question, confused about what happened, lack perfect recall, or because of an innocent or inadvertent mistake.

determined during the conversation that claimant "wanted to retire," discharged him from work mid-shift, and processed his work separation as a retirement. Transcript at 9.

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

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).

Although the employer processed claimant's work separation as a retirement and believed claimant wanted to be laid off work, the work separation occurred when it did because the employer called claimant to a meeting mid-shift on July 13th and processed his work separation effective that day. At that time, and all relevant times, claimant was willing to continue working for an additional period of time, as demonstrated by his actions in reporting to work that day and working until the employer would not allow him to do so. His work separation was, therefore, 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) 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.

To the extent the employer discharged claimant based upon a belief that he wanted to be laid off or retire, the discharge was not for misconduct. Asking about a layoff and wanting to retire are not willful or wantonly negligent violations of the standards of behavior the employer had the right to expect of an employee.

To the extent the employer also discharged claimant based upon his two absences from work and his failure to call the employer's attendance line to report either absence, the discharge was also not for misconduct. Claimant was absent from work because he was ill. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). The employer credibly alleged that claimant failed to call the attendance line to report his absences. Claimant credibly alleged, however, that he did call the attendance line. We have no reason to doubt either party's testimony. Notably, there are many circumstances under which an individual's attempt to leave a message for an intended recipient might fail, including technical problems with the individual's phone or the intended recipient's messaging system, errors by the caller in leaving a message on the recipient's messaging system, or, particularly where an individual is relying upon old "recent call" logs to try to identify the right number to call, errors by the caller in dialing the intended recipient could result in the caller leaving messages at the wrong number. The record does not show what occurred in this case, and regardless of the specific circumstances that might have resulted in the employer's failure to receive claimant's attempted calls

about his absences, we find it more likely than not that claimant made some efforts to comply with the employer's expectation that he call the attendance line to report his absences from work. Given claimant's efforts, it is more likely than not that his failure to actually comply with that expectation was the result of an inadvertent error rather than willful or wantonly negligent behavior attributable to him as misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-94327 is set aside, as outlined above.[5]

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

DATE of Service: November 20, 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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[5] 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.