

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1320

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 100557). The employer filed a timely request for hearing. On November 3, 2017, ALJ Monroe conducted a hearing, and on November 9, 2017, issued Hearing Decision 17-UI-96652, affirming the Department’s decision. On November 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Both the employer and claimant submitted written argument to EAB. However, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Both parties’ written arguments contained additional information, but failed to show that factors or circumstances beyond their reasonable control prevented the parties from offering the information during the hearing. Therefore, we considered only the record, in its entirety, when reaching this decision.

FINDINGS OF FACT: (1) Cody Staffing employed claimant as a recruiter from July 27, 2017 to August 18, 2017.

(2) To assist her in performing tasks as a recruiter, claimant utilized her personal Facebook account to communicate with others. On or around Friday, August 18, 2017, claimant left work while her Facebook account remained logged in on the employer’s computer. On Monday, August 21, 2018, after claimant emailed the manager and informed him that she would not be in due to illness but would monitor her emails and “be back tomorrow,” the employer’s manager learned of claimant’s prior Facebook communications concerning a potential job interview with another staffing company. Transcript at 19. That same day, the manager left claimant a voicemail message stating, “We know you’ve got a job somewhere else. Don’t bother returning,” and directing her to drop off her office key. Transcript at 11-13. That day, claimant also received a text message from a former coworker who had learned that someone at the employer had gone through her Facebook messages, “knew” that claimant had obtained a job elsewhere and that the employer “[was] going to let [her] go if they hadn’t already.” Transcript at 12.

(3) Very early on Tuesday, August 22, 2017, claimant returned to the employer's office, picked up her personal belongings, locked the office door and then slid her key under the door. She then sent the employer an email stating, "[T]he key's under the door. I will not be returning." Transcript at 13.

(4) Although claimant had been looking into obtaining a job interview with another employer, she had not obtained a job elsewhere and was willing to continue to work for the employer on and after August 21, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct.

At hearing, the parties disagreed on the nature of the work separation with the employer asserting that claimant quit and claimant asserting that she was discharged. *Cf.* Transcript at 4-6 and 11. 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). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Here, claimant's August 21 email early that morning demonstrated that claimant intended to report for work the next day, and the manager's voicemail message demonstrated that the employer did not intend to allow claimant to continue working for the employer after August 21. Under the above cited rules, the work separation was a discharge that occurred on August 21, 2017.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record shows that the employer discharged claimant based on its belief that claimant had obtained a job with a competing staffing agency, although she had not. Although the employer may have made an understandable business decision to end her employment, we agree with the ALJ that there is no evidence in the record demonstrating that it discharged her for willfully, or with wanton negligence, violating a reasonable employer expectation. Accordingly, the employer failed to meet its burden to establish misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-96652 is affirmed.

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

DATE of Service: December 19, 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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