

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1349

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154446). Claimant filed a timely request for hearing. On November 6, 2017, ALJ Seideman conducted a hearing at which the employer failed to appear, and on November 9, 2017 issued Hearing Decision 17-UI-96574, affirming the Department's decision. On November 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with her application for review but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) In November 2016, claimant moved from Oregon to Billings, Montana. She was not able to find affordable housing and rented a small apartment for \$1,400 per month and a storage space for her belongings that did not fit in her apartment. Claimant was not able to afford the apartment and storage rent.

(2) Dillards, a department store, hired claimant on January 13, 2017 as a part time sales associate in its women's lingerie department for \$13 per hour. Claimant's schedule varied from 8 to 30 hours per week. The employer expected claimant to report to work for her scheduled shifts unless she had permission to miss work. Claimant knew or should have known this expectation as a matter of common sense.

(3) In July 2017, claimant found a more affordable housing option and began the process of packing to move. On July 12, 2017, claimant wrote an email to her store manager and her department manager asking for time off work to move from her apartment. The managers did not reply to claimant's email.

(4) On July 13, 2017, claimant began paying rent for the new apartment. She was paying rent for her current apartment and the new apartment until she was able to move. Claimant had difficulty with the moving process because of the summer heat, the fact that her apartment was on a second floor, and because she had to work and look for other work, and had limited help with packing and moving. On

July 13, claimant asked the operations manager for a leave of absence so she would have time to move. The employer denied claimant's request because she did not have a medical need for the absence.

(5) On July 14, 2017, claimant worked. She was scheduled to work again on July 16, 2017, but did not report to work because she had to move.

(6) On July 18, 2017, claimant called the store manager and she was not available. Claimant spoke with the operations manager and asked for options to take time off work. The operations manager told claimant she would speak with the store manager before she replied to claimant's request. Neither manager ever replied to claimant.

(7) On July 28, 2017, claimant called the store manager again, and because she was not available, claimant left a message with the support staff. The manager did not return claimant's message.

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

Work Separation. The first issue in this case is the nature of the work separation. If the employer 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). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 17-UI-96574, the ALJ concluded that claimant "decided to quit" on July 14, 2017 when the employer denied her requests for time off work to move, and that her voluntary leaving was without good cause because she could have moved and continued to work. Hearing Decision 17-UI-96574 at 2-3. However, claimant testified that she did not quit, but instead was asking the employer for options so that she could have time off to move. Audio Record at 30:08-30:35. Claimant repeatedly requested time off to move and the employer either denied or ignored claimant's requests. Claimant continued to request time off on July 18 and July 28, showing her willingness to continue working even after her missed shift on July 16. The record therefore shows that the reason claimant took time off work was not because she was unwilling to continue working for the employer, but because she needed to move and the employer did not grant her time off work to do so. By failing to call claimant back when she contacted the employer on July 18 and July 28, the employer showed it was not willing to allow claimant to continue working. Because claimant was willing to continue working but was not allowed to do so by the employer, we disagree with the ALJ and conclude that the work separation was a discharge.

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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer did not return claimant's messages or otherwise contact claimant after July 16, 2017, and the record does not show that claimant was scheduled to work again after missing her shift on July 16, 2017. Because the employer did not allow claimant to return to work after claimant missed work that day, we presume the employer discharged claimant because she missed work without the employer's permission. The employer had a right to expect claimant to report to work for her scheduled shifts. Claimant apparently understood that expectation as shown by her repeated efforts to obtain permission to miss work. Although claimant's circumstances were somewhat exigent due to the employer's refusal to grant claimant time off work to move, claimant failed to obtain permission to miss work on July 16. Because claimant was conscious of her conduct and knew or should have known it would violate the employer's expectations, her conduct was at least wantonly negligent.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined as a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct, and it must not exceed mere poor judgment. OAR 471-030-0038(1)(d). The record does not show that claimant had failed to report to work for her scheduled shifts on other occasions or that she had violated the employer's expectations in any other way. Claimant's unauthorized absence from work on July 16 was, therefore, an isolated act. Given that the claimant had an urgent financial need to move and the employer was unwilling to offer claimant time off to do so, the record fails to show that claimant's single unauthorized absence was so egregious that the employer could no longer trust claimant, or that it made a continuing employment relationship between claimant and the employer impossible.

The employer discharged claimant, but it was for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-96574 is set aside, as outlined above.

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

DATE of Service: December 15, 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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