

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0018

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 9, 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 # 145627). Claimant filed a timely request for hearing. On December 22, 2017, ALJ Scott conducted a hearing, and on December 26, 2017 issued Hearing Decision 17-UI-99687, affirming the Department’s decision. On January 3, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Propel Insurance employed claimant from March 2016 to October 6, 2017.

(2) On Friday, October 6, 2017, claimant notified the employer she was quitting work, effective October 31, 2017. The employer believed claimant had been looking for another job, and mistakenly believed she had found one, possibly with a competitor. The employer therefore terminated claimant’s employment, effective October 6, 2017, although it paid her through October 20, 2017.

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

Nature of Work Separation. In Hearing Decision 17-UI-99687, the ALJ found that on October 6, 2017, claimant notified the employer she was quitting work, and “proposed that her last day of work would be October 31, 2017.”¹ The ALJ further found that the employer told claimant that October 6, 2017 “could be her last day of work.”² Based on those findings, the ALJ implicitly concluded, without

¹ Hearing Decision 17-UI-99687 at 2.

² *Id.*

analysis, that claimant voluntarily left work on October 6, 2017.³ However, we disagree with ALJ's findings and conclusion that claimant voluntarily left work.

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.* For a continuing employment relationship to exist there must be some future opportunity for the employee to perform services for the employer. *See* EAB Decision 97-AB-873, June 5, 1997; EAB Decision 11-AB-0939, March 31, 2011. No continuing relationship exists if the employer does not have an expectation that a service will be performed. EAB Decision 02-AB-2040, October 15, 2002.

We first disagree with the ALJ's finding that claimant "proposed" that her last day of work would be October 31, 2017 to the extent it suggests she was leaving that up to the employer. At hearing, claimant testified that she notified that employer that she was quitting work and that, "my last day would be October 31st." Transcript at 9. The employer's witness confirmed that claimant stated in writing that, "I am formally tendering my resignation effective October 31, 2017." Transcript at 32-33. The record therefore shows that claimant notified the employer she was quitting work, effective October 31, 2017, and not that she merely "proposed" that her last day would be October 31.

We next disagree with the ALJ's finding that the employer told claimant October 6, 2017 "could" be her last day of work" to the extent it suggests claimant was given the option of working through at least part of her notice period, but chose not to do so. Although claimant initially testified that her supervisors told her that she "could pack up and go home," she immediately clarified that they "told me to leave. And so I did." Transcript at 9. The employer's witness confirmed that the employer informed claimant that "October 6th was her last day," which was standard procedure, "especially if they're going to a competitor and she didn't tell us where she was going. And so we made the decision to just go ahead and . . . term her as . . . of that day." Transcript at 33.

In sum, the record shows that on October 6, 2017, claimant notified the employer that she was quitting work, effective October 31, 2017, and that she was willing to work through her notice period. The record also shows that the employer did not allow her to do so, and instead severed the employment relationship on October 6, 2017, regardless of the fact that it paid her through October 20, 2017. We therefore conclude the employer discharged claimant on October 6, 2017. And because the employer discharged claimant more than 15 days before her planned voluntary leaving, there is no statutory basis for adjudicating claimant's work separation as a voluntary leaving, and not a discharge.⁴

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 *Id.* at 2-4.

⁴ *Cf.* ORS 657.176(8) (when an individual has notified an employer that the individual will leave work on a specific date, and the voluntary leaving would be without good cause, but the employer discharged the individual, not for misconduct, no more than 15 days prior to the date of the planned voluntary leaving, then the work separation shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred).

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.

Here, the employer discharged claimant because she gave notice that she was quitting work, and the employer believed she had been looking for another job, and mistakenly believed she had found one, possibly with a competitor. The employer therefore did not discharge claimant for 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. Claimant's discharge was not for misconduct, and she is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-99687 is set aside, as outlined above.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: February 2, 2018

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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