

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0115

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 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 # 91240). Claimant filed a timely request for hearing. On January 31, 2018, ALJ M. Davis conducted a hearing, and on January 31, 2018 issued Hearing Decision 18-UI-102117, concluding that the employer discharged claimant, not for misconduct. On February 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant was employed by Swaggart Brothers Inc. as a multi-craft from April 10, 2017 through July 3, 2017.

(2) Claimant lived and worked for the employer in Ohio. On June 26, 2017 claimant notified his supervisor that he would be taking two weeks off starting July 3, 2017 to seek medical treatment for diabetes in Arizona. Claimant planned on returning to work upon his return from Arizona. The employer typically allowed employees to take time off from work for medical reasons.

(3) On July 3, 2017 his supervisor notified him that the job he was working on was going to end in two weeks and that he was being laid off. The supervisor told him that he did not need to return to work when he returned from Arizona. Claimant was willing to continue to work for the employer.

(4) Claimant's supervisor reported to the employer that claimant left work for personal reasons, before the end of the job.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant was discharged, but not for misconduct.

At hearing, the employer argued that claimant voluntarily left work, but claimant argued that he was discharged. 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

At hearing, claimant testified that the supervisor told him he was being laid off because the job he was working on was being completed. Audio Record at 5:32. The employer’s representative testified from records prepared by the supervisor, that claimant quit for personal reasons. Audio Record at 11:47. Absent a showing that claimant was not a credible witness, his testimony based on first-hand knowledge has more probative value than the employer’s hearsay evidence. We therefore found facts in accordance with the claimant’s testimony, which shows that claimant was willing to continue to work for the employer but the employer did not allow him to do so. The work separation therefore is a discharge. We next address whether claimant is disqualified from receiving benefits as a result of his 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. 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In the present case, the record fails to show that claimant knew or should have known that taking a leave of absence to seek medical treatment would probably violate the employer’s expectations. Nor are absences due to illness or other physical disabilities misconduct. Claimant therefore was not discharged for misconduct, and is not disqualified from benefits.

DECISION: Hearing Decision 18-UI-102117 is affirmed.

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

DATE of Service: March 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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