

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0144

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On December 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 73924). Claimant filed a timely request for hearing. On January 31, 2018, ALJ Wyatt conducted a hearing, and on February 7, 2018, issued Hearing Decision 18-UI-102785, concluding the employer discharged claimant but not for misconduct. On February 12, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cal Farms Inc. employed claimant as a farm worker from July 2, 2017 to November 27, 2017.

(2) On July 2, 2017, the employer hired claimant as a domestic farm worker to work under the United States Citizenship and Immigration Services (USCIS) H-2A Program.¹ The employer had claimant sign a written contract for employment for the period from July 2, 2017 through November 27, 2017.

(3) Claimant had worked for the employer in the past under the same program and with a written contract for employment, with a start date and an end date. In previous years, when the employer

¹ The H-2A program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs. Generally, USCIS may grant H-2A classification for up to the period of time authorized on the temporary labor certification. H-2A classification may be extended for qualifying employment in increments of up to 1 year each. A new, valid temporary labor certification covering the requested time must accompany each extension request. The maximum period of stay in H-2A classification is 3 years.

<https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers>

extended claimant's work beyond the contractual dates, the employer had provided claimant with a letter extending his contract dates.

(4) On November 27, 2017, the employer's general manager asked claimant if he was interested in continuing to work for the company beyond that date and claimant told him that he was. He then asked claimant for his phone number, which claimant gave to him, and told him, "I will call you if I have work for you." Transcript at 5-6. However, claimant never received a call from the employer or an offer of additional work.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist there must be some future opportunity for the employee to perform services for the employer. *See, Appeals Board Decision 97-AB-873*, June 5, 1997. No continuing relationship exists if the employer does not have an expectation that a service will be performed. *See, Appeals Board Decision 02-AB-2040*, October 15, 2002.

The parties disagreed on the nature of the work separation with the employer asserting that claimant quit when he did not return to work after November 27, 2017. Transcript at 8. However, claimant's response to the general manager on November 27, 2017 that he was interested in continuing to work for the employer after that date, in conjunction with claimant giving the general manager his phone number, and claimant's previous experience with the employer that the contract dates were extended in writing, demonstrated that claimant was willing to continue to work for the employer for an additional period of time. The general manager's failure to contact claimant thereafter, despite having his phone number after telling him "I will call you if I have work for you", demonstrated that the employer was not willing to allow claimant to perform any additional service for the employer.² Under the above cited rules, the work separation was discharge and occurred on November 27, 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.

² The employer's witness's testimony that the general manager offered claimant additional work on November 27, 2017 and claimant simply failed to report for work thereafter was based on hearsay and was not as persuasive as claimant's first hand testimony under oath. Transcript at 8. Accordingly, on this matter in dispute we found facts in accordance with claimant's testimony.

Viewing the record as a whole, the employer discharged claimant because his written labor contract ended on November 27, 2017 and the employer was not willing to renew it, despite the general manager's apparent approval of claimant's prior work performance. Accordingly, the employer failed to establish that it discharged claimant for willfully or with wanton negligence violating a standard of behavior the employer had the right to expect of claimant. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 18-UI-102785 is affirmed. *Decisión de la Audiencia 18-UI-102785 queda confirmada.*

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

DATE of Service: March 9, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.