

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0647

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 82208). The employer filed a timely request for hearing. On June 13, 2018, ALJ Snyder conducted a hearing, and on June 19, 2018 issued Order No. 18-UI-111630, affirming the Department's decision. On June 25, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Butler Ford/Butler Hyundai employed claimant as a sales consultant from November 1, 2017 until April 30, 2018.

(2) As claimant's employment proceeded, claimant became interested in being promoted to a management position. Claimant discussed the possibility of such a promotion with the sales manager and understood that he would be considered for management positions. Sometime after, a new person assumed the position of sales manager. At the end of April 2018, the general manager met with claimant to discuss a recent decline in his sales performance. At that time, claimant also told the general manager that he wanted to be considered for a management position.

(3) Sometime before April 27, 2018, claimant became aware that the employer had an open management position for which he thought he was qualified. On Friday, April 27, 2018, claimant was at work and asked the new sales manager if the employer had filled the management position for which he was qualified. The sales manager told claimant that the employer had hired someone and mentioned to claimant that he was displeased with the recent decline in claimant's sales. The sales manager told claimant to leave work early and to take the weekend to decide whether he wanted to remain employed because if claimant's sales did not improve the sales manager thought it was likely that the employer would not keep claimant on as a sales consultant.

(4) On Sunday, April 30, 2018, although claimant was not scheduled to work, the sales manager called claimant and asked him to come in. Claimant did so and, at that time, the sales manager told claimant

that “it [his continued employment] was not gonna work out with the sales thing [the recent decline in claimant’s sales performance].” Audio at ~11:56. The sales manager advised claimant to file a claim for unemployment benefits. Claimant assumed he was discharged and turned in the keys and dealer’s license plate that the employer had provided to him to the sales manager.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

While the employer’s witness contended that the employer did not discharge claimant, claimant contended that he was discharged by the sales manager. Audio at ~4:00, ~11:37. The first issue this case presents is the nature of claimant’s work separation. 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) (January 11, 2018). 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).

Claimant participated in the encounter in which he contended that the sales manager discharged him. The employer’s witness at hearing was not present when claimant was allegedly discharged and the information on which he based his hearing testimony came second-hand from the sales manager. Audio at ~15:30. Claimant’s first-hand testimony about what was stated in the conversation between him and the sales manager is entitled to greater weight than the employer’s hearsay evidence. Accordingly, the preponderance of the evidence in this record shows that the employer discharged claimant on April 30, 2018.

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) (January 11, 2018) 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. The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Since the employer’s position at hearing was that it did not discharge claimant, it provided no reasons for discharge. The record suggests that the sales manager discharged claimant because of his declining sales performance. Without more, a poor sales performance does not establish that claimant willfully or with wanton negligent violated the employer’s standards. On this record, the employer did not meet its burden to show that it discharged claimant for misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-111630 is affirmed.

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

DATE of Service: July 27, 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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