

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0854

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 123246). Claimant filed a timely request for hearing. On August 20, 2018, ALJ Snyder conducted a hearing, and on August 29, 2018, issued Order No. 18-UI-115720, concluding the employer discharged claimant but not for misconduct. On August 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Interim Health Care of Oregon employed claimant as a licensed practical nurse (LPN) from mid-2015 to June 29, 2018.

(2) Claimant typically worked for the employer during the school year on a single assignment attending to a particular student. After the school year ended and during the summer months, the employer offered claimant substitute shifts that he was allowed to accept or decline. However, after declining four shifts, at least some of which were located outside of his labor market, the employer placed claimant on “inactive status” but called claimant back to work on his student assignment when the school year started again.

(3) On June 13, 2018, the employer offered claimant a substitute shift at a facility in Mt. Angel, Oregon, located outside of his labor market. Claimant declined because of the distance and requested in an email “to go inactive for a little bit.” Audio Record ~ 27:30 to 28:00. The employer responded to claimant’s email by notifying claimant that it concluded that he had quit without notice. Claimant then contacted the employer and explained that he had not quit and was available for other shifts.

(4) On June 29, 2018 the employer closed claimant’s file as a quit.

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. 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).

The parties disagreed on the nature of the work separation with the employer asserting claimant quit and claimant asserting that he was discharged. *Cf.* Audio Record ~ 24:00 to 25:00 and 7:00 to 8:00. However, claimant's June 13 email to the employer requesting "to go inactive for a little bit" and his subsequent communication to his supervisor explaining that he had not quit his job and was available for other shifts indicated that he was interested in continuing to work for the employer after that date. The employer's action in closing claimant's file on June 29, 2018, after receiving claimant's requests for additional shifts indicated that the employer was not willing to allow claimant to perform any additional service for the employer at that time. Under the above cited rules, the work separation was a discharge that occurred on or about June 29, 2018.

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) 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.

Viewing the record as a whole, the employer discharged claimant because he requested that he be placed on inactive status "for a little bit." However, the employer admitted that it had placed claimant on inactive status several times before with impunity and did not assert or show that it had ever notified claimant that requesting "inactive status" on his own would violate an employer expectation for which he could be discharged. 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: Order No. 18-UI-115720 is affirmed.

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

DATE of Service: October 3, 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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