EO: 200
BYE: 201831

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0914

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 94749). The employer filed a timely request for hearing. On August 28, 2018, ALJ Janzen conducted a hearing, and on August 30, 2018 issued Order No. 18-UI-115793, concluding that claimant quit working for the employer without good cause. On September 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included information that was not offered during the hearing. Claimant did not show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from presenting that information at the hearing. For this reason, EAB did not consider the new information that claimant offered when reaching this decision. EAB considered only information received into evidence at the hearing.

FINDINGS OF FACT: (1) Tigard Brake Force, LLC employed claimant from October 19, 2017 until July 14, 2018, last as manager of an automobile repair shop.

(2) By June 2018, claimant had observed behavior by the employer's owner that he thought was unlawful and unethical. Claimant thought the owner was selling unnecessary products and services to customers and expected claimant to acquiesce to these sales tactics. In mid-June, claimant had a discussion with the owner and told the owner that he was not going to misrepresent or conceal information from customers about the repairs they actually needed. In response, the owner told claimant, "That's fine." Audio at ~27:28. Around this time, claimant began to apply for work at other automobile repair shops.

(3) After the discussion in mid-June 2018, claimant had a few interactions with the owner in which he thought the owner wanted him to sell unnecessary products and services to customers. Around June 24, 2018, claimant told a customer that the employer would make up for faulty service it had performed on the customer's vehicle by performing some repairs for only the cost of the parts. The owner was out of

town, but learned of claimant's arrangement with the customer and called claimant. The owner told claimant that such arrangements caused the employer to lose money and expressed displeasure that claimant had made similar arrangements with other customers earlier that same week. The owner told claimant, "I don't think this is gonna work out" and "I don't think you should work here," but stated that they would discuss the matter further when the owner returned. Audio at ~ 2810, ~42:24. The owner also asked claimant if he would agree to stay working at least through the next week and claimant agreed. Claimant thought the owner was going to discharge him when he returned.

(4) On approximately June 25, 2018, the owner returned and spoke with claimant in his office. At that meeting, claimant told the owner that he "did not have a problem" working for the employer so long as the owner allowed claimant to deal with the customers, rather than doing so himself. Audio at ~29:00. The owner responded, "I can't keep losing money like this" and "We tried it and it didn't work." Audio at ~28:56. The owner asked claimant if he would work for another week, or until July 14, 2018, and claimant agreed to do so. At this time, claimant was willing to continue working for the employer after July 14, 2018 and would have done so.

(5) July 14, 2018, was claimant's last day working for the employer.

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

In Hearing Decision 18-UI-115793, the ALJ concluded that claimant voluntarily left work and that he was disqualified from benefits because he did not show good cause for that leaving. We disagree as to the nature of work separation and conclude that it was a discharge. We also conclude that claimant is not disqualified from benefits because the employer did now show that claimant's discharge was for misconduct.

OAR 471-030-0038(2) (January 11, 2018) sets forth standards for determining the nature of the 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).

Although the ALJ appeared to accept as accurate claimant's testimony that the owner told him on approximately June 25, 2018 that he did not want claimant to continue working for the employer, the ALJ also appeared to conclude that because claimant agreed to remain at work until July 14, 2018, the work separation should be treated as a voluntary leaving under the holding in *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998). Order No. 18-UI-115793 at 2. While the ALJ is correct that *Shurin* holds that where the parties agree that the employment relationship will end on mutually acceptable date, the separation should be treated as a voluntary leaving rather than a discharge, *Shurin* presupposes not only that there is mutual agreement as to the *date* that the employment will terminate, but also mutual agreement as to the *termination* of the employment relationship. *Shurin* at 154 Or App at 356 (emphasis added).

Claimant's testimony as to what the owner told him on June 24 and 25 shows that the employer was not willing to allow claimant to continue working for it after July 14. That the employer discharged

claimant was supported by claimant's testimony that he was willing to continue working for the employer after July 14 if the owner would have allowed him to do so. Audio at ~28:56, ~29:26. While both of the employer's witnesses contended that claimant quit work, rather than having been discharged, neither one testified that he was present during claimant's conversations with the owner and had personal knowledge of their substance. Claimant's first-hand evidence about the substance of those conversations is entitled to greater weight than the hearsay testimony of the employer's witnesses.

The employer's witnesses also testified that claimant sent a text message to the owner on June 25 stating that he was quitting and signed a resignation notice on June 27, but the employer did not offer copies of either communication into evidence. In contrast, claimant denied having sent the text or given a resignation notice for the employer. Audio at ~40:00, ~40:24. In light of claimant's rebuttal and the lack of documentary evidence supporting the employer's contentions, the record does not show that claimant communicated to the employer that he intended to resign. On this record, the preponderance of the evidence does not show that the employer had continuing work available for claimant after July 14 or that claimant, rather than the employer, instigated and was the operative force behind the work separation. Although claimant agreed on approximately June 25 to remain working for the employer until July 14, the preponderance of the evidence does not show that by this willingness claimant was "mutually agreeing" to the termination of the employment relationship, but only that he was acquiescing to the employer's decision to end it. On this record, claimant's work separation was a discharge on July 14, 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).

At hearing, both of the employer's witnesses testified they were not aware of any disciplinary notices that the employer issued to claimant or of any occasions when claimant had not complied with the employer's expectations. Audio at ~16:38, ~21:27. On this record, the employer did not show that claimant engaged in any willful or wantonly negligent violations of the employer's expectations, or, therefore, that the employer 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-115793 is set aside, as outlined above.

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

DATE of Service: <u>October 25, 2018</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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