

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0997

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155849). Claimant filed a timely request for hearing. On September 25, 2018, ALJ Snyder conducted a hearing, and on October 3, 2018, issued Order No. 18-UI-117610, affirming the Department's decision. On October 15, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument in reaching this decision. Claimant asserted in his argument that the ALJ erred in failing to admit the documents claimant offered at hearing into the record. The ALJ did not admit the documents because the employer did not receive them before the hearing. *See* Audio Record at 6:31 to 9:17. Due process required that claimant provide the documents to the other parties before the hearing, as stated on the notice of hearing. Claimant did so by mailing the documents by first class mail to the employer's address of record as shown on the notice of hearing on September 27, 2018, which afforded the employer reasonable notice of the documents. *See* OAR 471-040-0015(1) (August 1, 2004) (the notice of hearing shall be mailed at least five days in advance of the hearing to the party's last known address with the Department). The employer requested that its address of record be changed at the hearing, but did not assert that its address of record on the notice of hearing was not one of the employer's addresses, and it apparently received the notice of hearing that was sent to that address. Claimant therefore appropriately provided a copy of his documents to the employer in accordance with the instructions set forth in his notice of hearing, and the ALJ erred in excluding the documents from evidence. Claimant's documents included a notice of acceptance of the worker's compensation claim for claimant, a release for claimant to return to work, a May 7, 2018 work separation letter from the employer, and a copy of Oregon administrative rules. These documents are hereby admitted into the record as EAB Exhibit 1. A copy of EAB Exhibit 1 is being mailed to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, the documents will remain in the record at EAB Exhibit 1.

Claimant also asserted that the ALJ failed to give him the opportunity to call his witness, a representative from claimant's union. Although claimant stated at the beginning of the hearing that he had a witness he wished to call during the hearing, he did not state that he wanted to call the witness after he provided his testimony, nor at the end of the hearing when the ALJ asked him if he had other information to offer before she closed the record. Therefore, we do not find that the ALJ erred when she failed to allow claimant to present his witness' testimony.

Claimant offered other new information with his written argument that we did not consider because claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Cash & Carry Stores LLC employed claimant from May 2014 until May 7, 2018 at its store in Eugene, Oregon.

(2) The employer's company rules provided that "failure to report to work . . . without a valid reason is grounds for termination." Exhibit 1 at 5. The policy also provided the following: "If it is necessary that you be absent for any reason, you must contact your Store Manager . . . prior to the start of your scheduled work shift. Two consecutive scheduled work days of absence, without advising your Manager . . . will be considered a voluntary quit." Exhibit 1 at 5.

(3) On December 26, 2017, claimant sustained a workplace injury. Sometime after December 26, claimant filed a worker's compensation claim. Claimant continued to work for the employer until February 21, 2018. On February 22, 2018, claimant gave his manager a notice from his worker's compensation doctor stating that claimant was subject to light duty work restrictions. Claimant's manager told claimant at that time that the employer "did not do light duty." Audio Record at 12:20 to 12:26. The manager relieved claimant from work until further notice.

(4) As of April 2018, the employer had not offered claimant light duty work. Claimant moved to Portland, Oregon and told the employer that he had moved. Claimant asked the store manager if there were light duty work options available for claimant in the Portland area. The manager did not provide claimant with transfer options and was not required to do so under claimant's collective bargaining agreement.

(5) On May 1, 2018, claimant's occupational medical provider issued a release for claimant to return to work with a 10-pound weight restriction for lifting, carrying, pushing or pulling, and no overhead reaching or lifting with his left arm. EAB Exhibit 1 at 3.

(6) The employer received claimant's May 1 release to work notice with restrictions and determined that it had work to offer claimant doing sweeping, hanging tags, and doing price verifications. Claimant's manager called claimant in Portland and told him he had scheduled him to work doing light duty work on May 5 and 6, 2018 at the Eugene store. Claimant told his manager that he would not be reporting to work for the shifts scheduled on May 5 and 6, 2018, because claimant had nowhere to stay in Eugene at that time, and it would cost more for claimant to travel and stay in Eugene than he would earn working. The employer did not remove claimant from the schedule on May 5 and 6.

(7) On May 5 and 6, 2018, claimant did not report to work for the scheduled shifts because the cost of working the shifts would have been more than what he would have earned and because he did not know if the verbal offer of work met his work restrictions.

(8) On May 7, 2018, claimant received a letter from the employer stating that because claimant failed to report to work or call on May 5 and May 6, 2018, he was “considered a voluntary resignation” and “his employment is terminated effective . . . May 7, 2018.” EAB Exhibit 1.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, not for misconduct.

In Order No. 18-UI-117610, the ALJ concluded that claimant quit work when he told his manager on May 1, 2018 that he would not work on May 5 and 6. The ALJ further concluded that claimant quit work without good cause because claimant’s commute and the employer’s failure to put its offer of light duty work in writing did not constitute a grave situation such that claimant had no reasonable alternative but to quit work.¹

The first issue in this case is 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

We disagree that claimant’s refusal to work on May 5 and 6 was a quit. The employer considered an employee who failed to report to work for two consecutive shifts without notice to have voluntarily left work. However, it is undisputed that claimant told his manager on May 1, 2018 that he was not able to and would not report to work on May 5 or 6 because he was still living in Portland and did not have a place to stay in Eugene while he worked those shifts. Claimant did not tell his manager that he was unwilling to return to work other than for those particular shifts, and claimant’s unwillingness to work those shifts on short notice where claimant did not yet have lodging available in Eugene did not show an unwillingness to return to work for shifts after May 5 and 6. The employer, and not claimant, ended the employment relationship with its May 7, 2018 letter stating claimant’s employment ended that day because claimant failed to report to work on May 5 and 6. The work separation was a discharge.

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

¹ Order No. 18-UI-117610 at 2.

behavior which an employer has the right to expect of an employee. We agree with claimant's written argument that the employer carries the burden to show claimant's misconduct by a preponderance of the evidence in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he did not report to work or, apparently, call the employer on May 5 and May 6, 2018. However, the record fails to show that claimant violated the employer's attendance policy. The policy provides that an employee's failure to report to work without a valid reason is grounds for termination, and that an employee must contact the employer prior to the start of a scheduled work shift if he will be absent for any reason. The record does not show that claimant knew or should have known that his reason for refusing to work on May 5 and 6 was invalid, given the short notice for him to report to work in Eugene and the costs he would incur if he did so. The employer had not offered claimant light duty work since claimant's doctor restricted his ability to work more than two months earlier, on February 22, 2018. There is no indication in the record that claimant knew or should have known in advance to prepare to return to light duty work in Eugene beginning on May 5. Moreover, claimant advised his manager prior to the start of both shifts that he would not be reporting to work for those shifts and the reason. The record therefore fails to show claimant knew or should have known that failing to report for work on May 5 and 6, or failing to contact his manager again after May 1 about his inability to work on May 5 and 6 probably violated the employer's expectations.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 18-UI-117610 is set aside, as outlined above.

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

DATE of Service: November 20, 2018

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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