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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

2014-EAB-0574

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 17, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding that OMMP Resource Center discharged claimant but not for misconduct (decision # 130019) and the second concluding that Medical Marijuana Card Services Clinic LLC discharged claimant for misconduct (decision # 131236). The employer did not request a hearing on decision #130019 and it became final on February 6, 2014. Claimant filed a timely request for hearing on decision # 131236. On March 27, 2014, ALJ Vaughan conducted a hearing on decision # 131236, and on April 3, 2014 issued Hearing Decision 14-UI-14159, reversing decision # 131236. On April 7, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which the employer disputed the ALJ's findings and also presented new information. The employer failed to show that facts or circumstances beyond its reasonable control prevented it from offering this new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered those parts of the employer's written argument based on evidence in the hearing record.

FINDINGS OF FACT: (1) Medical Marijuana Card Services Clinic, LLC employed claimant as a medical assistant from October 31, 2010 until December 20, 2013. The employer's clinic provided medical services to patients to assist them in qualifying for the Oregon Medical Marijuana Program (OMMP).

(2) Claimant was diagnosed with Lupus when she was sixteen years old. One of the symptoms claimant experienced from Lupus was fatigue.

(3) When hired, the employer expected claimant to work approximately eight hours days on Mondays through Fridays and also to work on weekend days when the employer's clinic was open. This schedule might result in claimant working over forty hours per week. The employer also expected claimant to work all shifts she was assigned at the employer's clinic. Claimant was aware of the employer's expectations.

(4) Sometime before June 2013, the employer's owner organized a separate business entity, OMMP Resource Center (OMMPRC), to sell retail products to patients registered with OMMP. The employer's owner scheduled the work of employees at both the employer's clinic and at OMMPRC. In approximately June 2013, claimant started working at OMMPRC in addition to her work at the employer's clinic because OMMPRC was short-staffed. At that time, claimant was ostensibly hired by OMMPRC. Claimant thought that working at both locations was temporary. *See* Exhibit 1 at 12, 13. As it developed, claimant was scheduled to work at the employer's clinic on weekdays from 9:50 a.m. until 12:10 p.m., but often needed to stay until 2:00 p.m. Claimant then drove to OMMPRC to work from 2:50 p.m. until 7:00 p.m. or 8:00 p.m. Transcript at 7, 17, 22. Claimant usually worked on Saturday at OMMPRC from 11:50 a.m. until 6:10. Claimant was often scheduled also to work at the employer's clinic on Sunday. *See* Transcript at 7, 9, 23. The employer's owner estimated that claimant was regularly working approximately twenty five hours per week at the employer's clinic and approximately twenty eight hours per week at OMMPRC, for a total of fifty three combined work hours. Transcript at 7. The employer's owner scheduled claimant to work at least some hours at either the employer's clinic or OMMPRC on each of the seven days comprising a week. Transcript at 9. The employer's owner did not pay claimant overtime for her work because the owner thought that, by organizing separate business entities and limiting claimant's hours at either one to less than forty hours, both entities were separately exempt from overtime rules. Transcript at 8.

(5) By the summer of 2013, claimant was experiencing difficulty working the hours that the employer's owner scheduled her to work at both locations as a result of her Lupus. On several occasions, claimant told the employer's owner that she needed to have some regularly scheduled days off because of Lupus. The owner repeatedly promised claimant that she would arrange to hire a new employee and, after that hire, claimant would have three days off per week. Transcript at 25. However, claimant's hours were not reduced. On August 22, 2013, claimant's physician wrote a letter to the employer's owners, indicating the owner's address as the fax number at the employer's clinic. Exhibit 1 at 16. The letter stated claimant's diagnosis, that "claimant's autoimmune condition is exacerbated by stress and overexertion," and that claimant "needs to have intermittent breaks" at work. Exhibit 1 at 16. The physician recommended that claimant "have at least 2 days off work in a row, [during] each two week period." Exhibit 1 at 16. Claimant had the physician's office fax the letter to the employer's fax number. Thereafter, employer did not reduce claimant's work hours or make arrangements to provide uninterrupted days off to her.

(6) On approximately October 22, 2013, claimant sent text messages to the employer's owner about the hours she was working. Claimant objected that the most recent schedules prepared by the employer's owner required her to work seven days a week at both the employer's clinic and OMMPRC when she had understood that her work at both locations was temporary and would continue only until the

employer's owner hired another person to work at OMMPRC. Exhibit 1 at 11. In her responses, the employer's owner agreed with claimant's understanding that claimant's long work hours on several consecutive days were intended only a temporary accommodation to the needs of both businesses. Exhibit 1 at 12. The owner concluded "You [claimant] can stop helping me anytime just let me know when." Exhibit 1 at 12.

(7) In October 27, 2013, claimant was diagnosed in a hospital emergency room with two peptic ulcers. Exhibit 1 at 20. Claimant told the employer's owner of this new medical condition, and told the owner she was not able to continue working the hours the owner was scheduling her for at both the employer's clinic and OMMPRC. Sometime in fall 2013, the employer's owner reduced claimant's total hours somewhat because OMMPRC and the employer's clinic had implemented reduced fall and winter hours. However, claimant was still usually scheduled to work seven consecutive days per week when her shifts at both locations were considered. Claimant was concerned that, once both businesses implemented regular hours again in the spring of 2014, the owner would again schedule her to work more than forty hours per week when her hours at the employer's clinic and OMMPRC were combined, and she would not be given two interrupted days off per week.

(8) On December 19, 2013, claimant and the employer's owner exchanged text messages about claimant's desire to have her work hours and days limited at both businesses when they implemented regular work hours in the spring. Claimant told the owner that she was "sorry," and she "[couldn't] help you any more about working overtime. I hope you understand." Exhibit 2 at 5. Claimant told the owner that she was not quitting. *Id.* Claimant told the owner that she wanted to work only forty hours per week and she did not believe she could be lawfully required to work a combined total of over forty hours in any week. Exhibit 2 at 6. Claimant then stated that she did not want to work seven consecutive days per week for ten hours per day and it did not seem "fair" that she did not get overtime pay for her work time in excess of forty hours per week solely because the owner's businesses were separate entities. Exhibit 2 at 7. However, claimant stated that she was willing to work overtime hours at the employer's clinic because she understood that overtime was a requirement of that job when she was hired. Exhibit 2 at 10. Claimant and the owner also exchanged text messages about a schedule dividing claimant's time between the employer's clinic and OMMPRC that might be acceptable to both. Exhibit 2 at 7-10. No agreement was reached. The owner did not discharge claimant in any of the text messages that were exchanged.

(9) On December 20, 2013, claimant reported for work at OMMPRC, but discovered that her keys no longer worked in the door and left. Later on that day, the owner sent claimant a text message telling claimant to drop off her keys and to pick up her last paychecks. Exhibit 2 at 11. On December 20, 2013, the employer discharged claimant.

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

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. The employer carries the burden to establish

claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's owner contended at hearing that she discharged claimant because in the December 19, 2013 exchange of text messages about an appropriate schedule, claimant "crossed the line" and attempted to "dictate" her schedule. Transcript at 11. At the outset, it is difficult to obtain an overall sense of the conversation in the text messages because it appears that only excerpted portions highlighting claimant's responses were provided in Exhibit 2 and it appears that some of the owner's messages were omitted. However, although the employer's owner contended she never received the letter recommending reduced work time from claimant's physician, she did not dispute that claimant had told her many times that she needed more regularly scheduled time off due to her health conditions and did not dispute that she was aware of those conditions and that claimant legitimately needed to limit her total work time to a standard work week. Transcript at 12. The owner's response to the text messages that claimant sent to her on October 22, 2013 demonstrates that the owner agreed that claimant's joint work at both the employer's clinic and OMMPRC was intended to be temporary and that the owner was aware that claimant objected to working seven days per week. Exhibit 1 at 12. The owner's ultimate reply to claimant in that exchange invited claimant to refuse to work at OMMRPC, which claimant apparently did not do. *Id.* Viewing the exchange of text messages on December 19, 2013 against the backdrop of several months of repeated requests and tentative agreements to limit claimant's work hours after a new employee was hired, claimant's impatience with the owner and her insistence on the reduction of her combined work hours and days was understandable. Although claimant's position as stated in the excerpted the text messages was firm, if not demanding, it was not openly insubordinate. Nowhere in the excerpts did claimant refuse to work any shifts that been scheduled for her, or otherwise openly defy the owner's authority. Nowhere in the excerpts did the owner ever advise claimant that the firmness with which she was expressing herself was inappropriate behavior toward the owner or ask claimant if she intended not to report for work if she disagreed with her combined work schedules. On this record, it cannot be concluded that claimant's statements in the text messages she sent to the owner on December 19, 2013 violated with at least wanton negligence an expectation of the employer of which she was aware. Nor was it wantonly negligent for claimant to raise her objections to her work schedule for an ostensibly separate business, OMMPRC, with the employer's owner since that owner appeared also to own OMMPRC, control the work schedule for OMMPRC, and coordinate claimant's scheduled hours between OMMPRC and the employer's clinic. It would not be reasonable to expect claimant to abide by the artificial distinction of separate business forms when, in reality, claimant's actual work schedules for both businesses were closely associated, if not joint.

In its written argument, the employer contended that claimant should have sought relief under the Oregon Medical Leave Act or made a formal request for a workplace accommodation due to her medical conditions, and that no applicable regulation "requires an employer to arrange the business schedule to cater to an employee with a temporary or permanent disability." Employer's Written Argument at 2. However, the issue in this case is not claimant's best avenue to present her desire to have more time off. It is whether claimant engaged in willful or wantonly negligent behavior that violated the employer's standards when she stated her position to the employer's owner that she did not want to be scheduled more than forty hours per week or more than five days per week at both businesses (unless it was at the employer's clinic). As discussed above, on these facts, when viewed in context, it cannot be concluded, more likely than not, that claimant did.

The employer also contended in its written argument that the ALJ misunderstood that the owner's two businesses were separate legal entities, which "distorted the factual basis and reasoning for this decision." Employer's Written Argument at 2, 3. Because the ALJ did not base his decision on whether claimant should have been paid overtime for her combined hours working at both businesses, the relevance of this argument to the issues at hand is not readily apparent. We note, however, that claimant's stated position about overtime pay was not without merit and was not unreasonable. The federal Fair Labor Standards Act (FLSA), as interpreted at 29 CFR §791.2(a), states that ostensibly separate business forms should be disregarded, and separate businesses should be treated as a single employer for purposes of determining compliance with FSLA, if those business share the services of the same employee, have associated interests and the employee's employment by one business is not completely disassociated from employment by the other business When separately organized businesses are so related, overtime for the shared employee is calculated based on the combined hours working for both employers. 29 CFR §791.2(a), note 5. Oregon has adopted this federal standard in determining when the separate entity status of businesses is disregarded and otherwise separate entities are treated as a single employer for purposes of state wage and hour laws. *See Kurt E. Frietag*, 29 BOLI, 198-199 (July 9, 2007), *aff'd w/o opin sub nom Frietag v. Bureau of Labor & Industries,* 243 Or App 389, 256 P3d 1099 (2011). From the limited evidence at hearing, it appears that the employer's clinic and OMMPRC might be associated entities for purposes of ORS 653.210(3) and OAR 839-020-0004(15) (January 1, 2014) and might be considered a single employer for purposes of determining whether claimant was entitled to overtime pay for the combined hours that she worked for both entities if those hours exceeded forty in any given week. *See* OAR 839-020-0030(1) (January 4, 2004). However, because we do not need to reach the issue of the overtime pay to which claimant might have been entitled, we will not.

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

DECISION: Hearing Decision 14-UI-14159 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: <u>May 1, 2014</u>

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.