

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0631

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100920). Claimant filed a timely request for hearing. On April 7, 2014, ALJ Kirkwood conducted an interpreted hearing, and on April 9, 2014 issued Hearing Decision 14-UI-14718, concluding the employer discharged claimant, but not for misconduct. On April 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Yaquina Bay Hotel employed claimant and his wife as co-managers from November 26, 2008 to January 31, 2014. Claimant and his wife resided at the hotel, were the only hotel staff and performed housekeeping duties in addition to their management duties.

(2) The employer's owner (Lim) became dissatisfied with the way claimant and his wife performed their housekeeping duties. By December 2013, the hotel was generating little business and losing money which Lim believed was due, at least in part, to deficient housekeeping. At that time, Lim asked claimant and his wife to become independent contractors rather than employees which they refused.

(3) On or about January 6, 2014, Lim directed claimant to place a job advertisement with the Oregon Employment Department for a residential housekeeper. When he attempted to do so, the Department advised him to have the owner place the advertisement. On or about January 8, Lim spoke with a Department representative and directed that an ad be placed for residential managers. When claimant

reviewed the ad, he concluded the owner was advertising for residential managers to replace him and his wife.

(4) Claimant's mother was ill and in mid-January he and his wife went to visit her. On January 21, they returned to the hotel office where Lim, who resided in Portland, was conducting a job interview with a couple. Lim told claimant that he was hiring the couple to replace claimant and his wife, they needed to move out by January 31 and requested that they train them until then. Transcript at 21.

(5) On January 29, claimant informed Lim that the new couple rarely reported to the office before noon to receive training, did not think they would be good managers and offered to stay on. Lim declined claimant's invitation.

(6) On January 31, Lim came to the hotel for claimant's last and the couple's first day as acting managers. When the new couple failed to show, claimant and his wife again offered to stay on as managers. Lim declined their offer and informed them he was shutting the hotel down.

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) (August 3, 2011). 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 disputed the nature of the work separation with Lim asserting claimant quit by informing him around January 15 that he was leaving to reside with and take care of his mother. Transcript at 17. However, Lim did not dispute that he placed a job advertisement with the Department on or around January 8 and testified that when he discussed the advertisement with the Department, "they advised me to list all the areas that I need – I need for managing the hotel, so that's what I did." Transcript at 28. More likely than not, Lim was dissatisfied with claimant's performance as manager and housekeeper, intended to replace him and his wife on January 31 for that reason and notified claimant accordingly, despite claimant's offers to stay. Because claimant was willing to continue to work for the employer but was not allowed to do so, 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.

The employer asserted claimant quit and did not assert a reason for his discharge. However, on this record, it appears that the owner was dissatisfied with claimant's management and housekeeping skills, intended to replace him for that reason, and when the replacement couple did not show up on January 31 decided to close the business altogether. Regardless of the exact motivation for claimant's discharge, the employer failed to establish that he discharged claimant for willfully or with wanton negligence violating a reasonable employer expectation. Consequently, claimant was discharged, but not for

misconduct under ORS 657.176(2)(a), and he is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-14718 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 22, 2014

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.