EO: 300
BYE: 201504

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-0807

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 120055). The employer filed a timely request for hearing. On April 21, 2014, ALJ Wipperman conducted a hearing, and on April 28, 2014, issued Hearing Decision 14-UI-16283, affirming the Department's decision. On May 12, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. However, the employer's written argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) RV's Mobil World employed claimant as its office manager from April 25, 2012 to February 3, 2014.

(2) The employer had a one person office and expected claimant to take no more than 35 hours of leave annually which claimant agreed to at hire. Exhibit 2. However, in December 2013, claimant was required to undergo a medical procedure, the recovery from which she expected to last four to six weeks. The employer agreed to allow claimant up to six weeks of medical leave for the procedure and expected her to return to work no later than January 22, 2013. Claimant was aware of the employer's expectations.

(3) In early January, the employer hired a new employee to take over claimant's duties until she returned to work. However, claimant experienced complications from her medical procedure and did not receive authorization to return to work until January 30, 2014, when her physician released her to return on February 3, 2014. Claimant was aware that the employer had hired the temporary employee and on

January 30 spoke to the employer's co-owner by phone and suggested a shared work week with the temporary employee as a way to transition back to her full time position.

(4) At 3:22 a.m. on February 3, the employer's co-owner emailed claimant, declined her suggestion of a shared work week and explained, "We do not and never have had a part time daily operation position." Exhibit 2. She added, "Sorry you do not wish to come back full time. We wish you well in your future endeavors..." Exhibit 2. Later that morning, claimant responded by email to the co-owner, clarified that her suggestion regarding a shared work week was only a suggestion, and explained that she remained interested in working full time, but in light of the co-owner's email, "I will assume you have terminated my employment." Exhibit 2.

(6) On February 6, 2014, the co-owner responded by email that because claimant's time off work from her work anniversary date of April 25, 2013 "well exceeded…the 35 hours which was the agreement", the employer did not consider claimant available to work full time in violation of their "full time" employment agreement and considered the employment "terminated." Exhibit 2.

CONCLUSIONS AND REASONS: We agree with the Department and 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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist, there must be some future opportunity for the employee to perform services for the employer. *See Traci A. Hammond* (Employment Appeals Board, 97-AB-873, June 5, 1997). No continuing relationship exists if the employer does not have an expectation that a service will be performed. *See, Kimberly K. Carr-Cecotti* (Employment Appeals Board, 02-AB-2040, October 15, 2002).

The parties disagreed on the nature and timing of the work separation with the employer asserting that claimant abandoned her job "when she did not show up for work at 9:00 a.m. on January 22nd, which was the end of the maximum six-week's medical leave which had been agreed upon." Transcript at 5. However, claimant's January 30 phone call demonstrated that claimant was willing to continue to work for the employer for an additional period of time and the co-owner's responsive February 3 and February 6 emails demonstrated that the employer did not expect claimant to perform any additional service. Under the above cited rules, the work separation was discharge and occurred on February 3, 2014.

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. 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. Absence due to illness is not misconduct. OAR 471-030-0038(3)(b).

Viewing the record as a whole, the employer discharged claimant because her time off work exceeded the amount of annual leave the parties agreed to at hire and the amount of medical leave the parties agreed to on or about December 11, 2013. However, the employer failed to show that claimant's time off work was due to anything other than illness; absence due to illness is not misconduct. Accordingly, 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 her work separation.

DECISION: Hearing Decision 14-UI-16283 is affirmed.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 24, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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