

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0823

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105734). The employer filed a timely request for hearing. On April 29, 2014, ALJ Murdock conducted a hearing, and on April 30, 2014 issued Hearing Decision 14-UI-16513, affirming the Department's decision. On May 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it argued, in part, that the ALJ "misreported" the testimony of its witness and offered certain new information that was not part of the hearing record. Written Argument at 1, 3, 4. Because the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing as required under OAR 471-041-0090 (October 29, 2006), EAB did not consider that new information when reaching this decision. The employer also argued that the ALJ abused her discretion when she did not admit into evidence the seven exhibits that the employer offered at hearing, and requested that EAB enter those exhibits into evidence. Written Argument at 7-8. The documents that the employer offered related to lawsuit in which a declaration, purportedly from claimant, was filed as well as the declaration itself. Each of the offered exhibits was described in relevant detail by the employer's witness in his hearing testimony and, although the employer contended that certain of the facts set out in the declaration were false, the employer never identified how they were inaccurate. *See* Transcript at 12-19, 20-22, 23-24, 25-26. In light of the employer's testimony, the ALJ did not abuse her discretion when she determined that the preferred exhibits were either immaterial to the issues at hearing or unduly repetitious of the hearing testimony. *See* Hearing Decision 14-UI-16513 at 1. EAB denies the employer's request to admit the exhibits into evidence.

FINDINGS OF FACT: (1) Disability Law Office NW, LLC employed claimant in a support staff capacity from May 1, 2013 until December 30, 2013.

(2) For some years before May 1, 2013, claimant worked for the predecessor entity to the employer. That entity was owned and operated by an attorney, Daniel Bernath (Bernath). In June 2012, Randy Rosenblatt (Rosenblatt) entered into an agreement to purchase the predecessor entity from Bernath. Rosenblatt took over the operations of the business but continued claimant's employment. During the time that claimant worked for the employer, the only other support staff member was Rosenblatt's wife. After June 2012, Bernath remained a silent participant in the business and paid claimant's salary until approximately March 2013 to allow the employer an opportunity to generate revenues after the transition in ownership to pay its own operating expenses. In approximately April 2013, the employer took over paying claimant's salary.

(3) After Rosenblatt took over the business, Bernath remained involved in it. Claimant, on occasion, discussed the employer's operations with Bernath, including the activities of Rosenblatt. Often, when Rosenblatt and Bernath disagreed about business matters, both of them would contact claimant and tell her about the disagreement. Transcript at 35.

(4) On December 18, 2013, Bernath served a complaint on Rosenblatt arising from Rosenblatt's alleged failure to pay what he owed to Bernath under the purchase agreement for the business. As part of that lawsuit, Bernath also served on Rosenblatt a motion for a preliminary injunction. In support of that motion, Bernath served on Rosenblatt a 28 page declaration, purportedly from claimant, describing various ways in which Rosenblatt had allegedly harmed the business. Rosenblatt thought that the declaration contained several misrepresentations. The declaration that was served on Rosenblatt was missing its signature page. Although Rosenblatt thought that the declaration was principally the work of Bernath and was Bernath's "brainchild," he also thought that it contained certain facts that Bernath could only have learned from claimant. Transcript at 8. The language and content of the declaration "appalled" Rosenblatt. Transcript at 9. Claimant was not at work on December 18, 2013.

(5) On December 19, 2013, after claimant reported for work, Rosenblatt discussed the declaration with claimant and showed it to her. Rosenblatt told claimant that he had grounds to discharge her if she was Bernath's source for the information in the declaration. Transcript at 19; *see also* Transcript at 8, 40. Claimant told Rosenblatt that she had never seen the declaration before and it was submitted to the court without her knowledge. Claimant told Rosenblatt that she had not told Bernath "most" of the things stated in the declaration, although claimant admitted she had spoken to Bernath about the business on occasion during the past year. Transcript at 20. Of the parts of the declaration that were based on statements claimant thought she had made to Bernath, claimant told Rosenblatt that many of her statements were "blown out of proportion." Transcript at 20. Rosenblatt perceived that claimant was "obviously shaken" by the declaration that Bernath had submitted to the court. Rosenblatt told claimant that he wanted her to take the rest of the work week off, December 19 and 20, 2013, to review the declaration paragraph-by-paragraph and "avow or disavow" in detail its various parts for him. Transcript at 22, 27. Rosenblatt told claimant that he wanted a rebuttal document in a "formal format" to "set the record straight for this lawsuit." Transcript at 22. Rosenblatt also advised claimant to retain an attorney to "protect her from Bernath," because, if claimant had not made the statements in the declaration, Bernath had "stole[n] her identity and committed fraud" on her. Transcript at 21. Claimant told Rosenblatt she did not want to prepare a response to the declaration that Bernath had submitted, although she was willing to testify about it in the ongoing proceeding. Transcript at 31. Claimant was "tired of being put in the middle" of business disputes between Rosenblatt and Bernath. Transcript at

31. On either December 19 or 20, 2013, Rosenblatt checked the court file and learned that Bernath had filed the declaration without claimant's signature and, on the signature line, had written that "[claimant] will testify at hearing or by deposition to support the facts contained in this declaration." Transcript at 22.

(6) On Saturday, December 21, 2013, claimant sent Rosenblatt an email to notify him that she was taking off December 23 and 24, 2013 to be with her family during the holidays. The employer's office was closed the remainder of the work week, December 25, 2013 through December 27, 2013. On December 27, 2013, claimant sent an email to Rosenblatt telling him that her husband would be picking up her paycheck that day from him. Claimant's husband went to the employer's office that day and picked up claimant's paycheck.

(7) On Saturday, December 28, 2013, Bernath served on Rosenblatt additional documents that he had filed in the matter of the preliminary injunction. The filings referred to Rosenblatt's conversation with claimant on December 19, 2013 as an "ambush" of claimant and accused Rosenblatt of witness tampering or obstruction of justice by threatening or intimidating claimant. Transcript at 21, 24. The filings also stated that claimant had told Bernath that the statements in the previously filed declaration were all truthful. Transcript at 24. Based on these filings, Rosenblatt concluded that claimant was continuing to communicate with Bernath and providing information to Bernath that Bernath could use as "ammunition" against him. Transcript at 25. On December 28, 2013, Rosenblatt had a locksmith change the locks at the workplace because it was not clear to him "whose side [claimant] was on in the lawsuit." Transcript at 25. Rosenblatt did not contact claimant to tell her that he had changed the locks or that he expected claimant to arrive for work at other than her usual time.

(8) On December 29, 2013, claimant saw that the employer had posted on Craigslist that it had an opening for a position that, as described, appeared to be the one that claimant occupied. On December 30, 2013, claimant reported for work at 9:00 a.m. Claimant discovered that her keys did not work in the locks and, since no one else was at the office, she could not enter it. Claimant sent a text message to her coworker, Rosenblatt's wife, about being locked out, but did not receive any reply from either the coworker or Rosenblatt. Claimant left and assumed she had been discharged.

(9) On January 2, 2014, Rosenblatt sent a text message to claimant asking her to meet him at a café to "see if we can't work this out." Transcript at 27. On January 2, 2014, claimant and Rosenblatt met. They discussed the declaration and that Rosenblatt had changed the locks at the workplace. Claimant understood Rosenblatt to tell her she could contact him and return to work when she was willing to change the declaration and sign an agreement that prohibited her from communicating with Bernath. Claimant was not willing to be further dragged into the dispute between Bernath and Rosenblatt and did not comply with Rosenblatt's terms.

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

The first issue this case presents is the nature of claimant's work separation. If the claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

It is not disputed that on December 19, 2013 Rosenblatt discussed in detail with claimant the declaration purporting to be from her that Bernath had filed in the pending lawsuit. From the level of emotion expressed at hearing by Rosenblatt, it can only be surmised that Rosenblatt communicated his outrage to claimant and also his suspicions that claimant was colluding with Bernath to ensure that Bernath prevailed in the lawsuit. Transcript at 8, 12-23, 25, 28. Although Rosenblatt disputed that he instructed claimant to prepare a new declaration rebutting the one that Bernath had submitted, he did agree that he told claimant to prepare a detailed document addressing (and thereby, as appropriate, rebutting) paragraph-by-paragraph the truth of the statements in the first declaration. Transcript at 22, 30. Rosenblatt also did not contest that he told claimant on December 19, 2013, that he had grounds to discharge her for supplying information to Bernath, and he did not dispute that claimant told him that she did not want to be dragged into the ongoing dispute by preparing a rebuttal document on Rosenblatt's behalf, although she would testify about the declaration if called as a witness in the proceeding. On these facts, when, without any notice to claimant, Rosenblatt locked her out of the office on December 30, 2013 and advertised what appeared to be an immediate opening for claimant's position, it was not unreasonable for claimant to assume that, by his actions, Rosenblatt had discharged her because she refused to prepare the rebuttal document. Rosenblatt also did not dispute that claimant promptly attempted to contact either his wife or him when she discovered she was not able to enter the office on December 30, 2013 and neither of them responded to claimant's communication, further corroborating Rosenblatt's intention to discharge claimant. That Rosenblatt was unwilling to allow claimant to continue working on December 30, 2013 until she prepared a rebuttal to the declaration is further corroborated by Rosenblatt's posting of an apparent notice for claimant's position on Craigslist on December 29, 2013, the day before claimant was locked out. Although Rosenblatt testified that he posted the notice for the purpose of hiring an additional part-time employee and not to replace claimant, it is highly unlikely that such a need would coincide so closely in time to claimant's reluctance to prepare the rebuttal to the declaration. Transcript at 42. In addition, while Rosenblatt contended at hearing that claimant quit work when she stopped reporting to work, that does not explain why he sent claimant a text message on January 2, 2014 to ask her to meet with him to "see if we can't work this out." Transcript at 27. Something had obviously happened between December 19, 2013 and January 2, 2014 that Rosenblatt thought needed to be addressed in person and, most likely, that was the terms on which Rosenblatt was willing to allow claimant to continue working after barring claimant from the office, rather than Rosenblatt thought claimant had voluntarily quit work. *See* Transcript at 27, 41. In sum, the conclusion that Rosenblatt was unwilling to allow claimant to continue work after December 30, 2013 is most consistent with Rosenblatt's undisputed actions on and after December 19, 2013, his reaction to Bernath's lawsuit and his suspicions that claimant was in collusion with Bernath to harm his interests. More likely than not, claimant's work separation was a discharge on December 30, 2013, when Rosenblatt locked claimant out of the office without notice and neither he nor his wife replied to claimant's inquiries about her status. Rosenblatt's attempt on January 2, 2014 to work out claimant's possible return to work does not change the nature of the earlier work separation.

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 a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although Rosenblatt contended at hearing that he did not discharge claimant, he testified that he had grounds to do so because claimant had provided to Bernath confidential information about the business, about his and his wife's real estate holdings and also certain unspecified "trade secrets." Transcript at 16, 19, 38-40. To the extent that the employer discharged claimant for this reason, Rosenblatt did not present any evidence that any misrepresentations in the declaration that Bernath filed had actually come from claimant, or that, if they did, claimant should reasonably have known that the information she had supplied to Bernath was confidential. Rosenblatt admitted that he did not have claimant sign any confidentiality agreement, and did not show that he ever informed claimant of the employer's standards for confidentiality. Transcript at 38, 39. If claimant provided information to Bernath, no evidence supports that she obtained this information other than through presumably non-confidential means or that her behavior was a willful or wantonly negligent violation of the employer's expectations. However, as best can be discerned from the record, the most likely reason that Rosenblatt discharged claimant was that she refused to prepare the document that he wanted to rebut the declaration that Bernath had filed. Because claimant agreed to provide sworn testimony about the truthfulness of the declaration that Bernath had filed, it was unreasonable for Rosenblatt to require that she nonetheless prepare the rebuttal document as a condition of her continued employment. A conscious decision to not to comply with an unreasonable expectation of an employer is not misconduct. OAR 471-030-0038(1)(d)(C). Claimant's unwillingness to prepare the rebuttal document, and to become further enmeshed in the dispute between Rosenblatt and Bernath, was not misconduct.

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

DECISION: Hearing Decision 14-UI-16513 is affirmed.

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

DATE of Service: June 26, 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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