

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1091

Modified
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On April 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 152447). The employer filed a timely request for hearing. On January 31, 2014, ALJ Monroe conducted an interpreted hearing, and on June 5, 2014, issued Hearing Decision 14-UI-18989, concluding that no work separation occurred between claimant and the employer because there was never any employment relationship. On June 24, 2014, the Department filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Delicate Orchid Care Home (Delicate Orchid) operated adult care home facilities in Multnomah County and was required to comply with the county's administrative rules pertaining to such facilities.¹ Among other requirements, the rules required caregivers employed to be "sole caregivers" to be able to effectively communicate in English or the primary language of the residents of the facilities in which they worked.²

(2) In March 2014, Delicate Orchid sought job candidates for a "sole caregiver" position for English speaking residents in an adult care home and invited claimant to participate in a 2-day interview for the position. The purpose of the interview was to determine whether claimant could adequately perform the services required of the position such as cleaning, cooking, administering medications and preparing progress reports relating to the residents. On March 22, 2014, claimant attended the first day of her

¹ Multnomah County Administrative Rules for the Licensure and Operation of Adult Care Homes, MCAR 023-010-100 through 023-180-100.

² *Id.*

interview and was asked to go through some “basic training” with the Delicate Orchid manager and a care home operator. Transcript at 9. A “few hours” into the interview, the two Delicate Orchid representatives made a joint decision to discontinue it because they concluded claimant was not able to communicate in English to the extent required under the administrative rules. Transcript at 7. Although claimant was not offered the job, Delicate Orchid paid claimant for her time in attending the interview.

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

In Hearing Decision 14-UI-18989, after finding “Delicate Orchid never extended claimant an offer of employment and claimant did not perform any services for the employer”, the ALJ concluded that there was no work separation, reasoning that because no services were performed there was no employment relationship without which there could be no work separation. Hearing Decision 14-UI-18989 at 2-3. We disagree.

ORS 657.030 states, in relevant part:

...“employment” means service for an employer...performed for remuneration ...

Delicate Orchid invited claimant to participate in a 2-day interview, which its witness asserted required claimant to go through some “basic training” which she reportedly did for “a few hours” before the decision was made to discontinue the interview due to her English language deficiencies. Training is part of any job and there was no dispute that claimant was paid for her time. Although claimant apparently did not perform the training exercises well enough to receive an offer of permanent employment, on this record, claimant performed services for Delicate Orchid for which she received remuneration. Accordingly, under ORS 657.030, claimant had an employment relationship with Delicate Orchid on March 22, 2014.

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). There was no dispute that claimant was willing to continue with her interview when the Delicate Orchid ended it and decided not to offer her a permanent position. Because claimant was willing to continue to work for the employer beyond March 22, 2014 but was not allowed to do so by Delicate Orchid, 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.

Delicate Orchid discontinued the interview and ended the employment relationship because it concluded that claimant did not speak English well enough to satisfy the requirements of relevant administrative rules. Although the employer may have justified in doing so, it did not meet its burden to establish that

it 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 is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-18989 is modified, as outlined above. *Decisión de la Audiencia 14-UI-18989 se modifica, de acuerdo a lo indicado arriba.*

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

DATE of Service: July 25, 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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NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en court.oregon.gov. En este sitio web, haga clic en “Help” para acceso a información en español.*

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