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BYE: 201508

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-1106**

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On April 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 152937). The employer filed a timely request for hearing. On June 3, 2014, ALJ Lohr conducted a hearing, and on June 11, 2014 issued Hearing Decision 14-UI-19364, concluding claimant voluntarily left work without good cause. On June 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument but failed to certify that it provided a copy of its argument to the other party as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer's argument also contained information that was not part of the hearing record and the employer did not show that factor's or circumstances beyond its reasonable control prevented it from offering the new information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB considered the employer's written argument only to the extent it was based on information received into evidence at the hearing.

Claimant submitted a written argument that she certified she had served on the employer. However, that argument contained new information that was not part of the hearing record, and claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering the new information during the hearing. Under OAR 471-041-0090, EAB considered claimant's written argument only to the extent it was based on information received into evidence at the hearing.

**FINDINGS OF FACT:** (1) Ariel's Skin Care employed claimant as a receptionist from August 14, 2013 until March 6, 2014. Claimant also performed work for the employer as an aesthetician, giving skin care treatments to clients. Claimant's regular workdays were Tuesdays through Saturdays. The employer's spa was closed on Sundays and Mondays.

(2) At the time she was hired, claimant entered into an employment contract with the employer. The contract stated that claimant agreed to remain employed for one year and that, after 30 days, claimant's pay would be raised to $10 per hour for her work as receptionist. The contract also stated that claimant was to work for "full time" during the year that she was employed and that if claimant left before that year was completed and "broke" the contract she would give 60 days' notice of her intention to leave work. Exhibit 1 at 2. Claimant and the employer's owner signed the contract on August 17, 2013. Exhibit 1 at 2.

(3) Sometime before February 22, 2014, claimant started looking for a second job to supplement her income because she thought her earnings from the employer were insufficient to meet her living expenses. On Saturday, February 22, 2014, while at work, claimant told the employer's owner that she had a "working interview" scheduled for Monday, February 24, 2014 at a chiropractor's office. Transcript at 22, 23. Claimant also told the owner that if she was offered a job by the chiropractor, she might need to limit her work for the employer to one to three days per week at the spa. The owner thought claimant was going to leave work if the chiropractor offered claimant a job and that claimant was going to violate the employment contract. The owner proposed that she and claimant enter into mediation to resolve these issues. Claimant agreed to mediate, but stated she was not able to do so until the next work week, beginning on February 25, 2014. Claimant also told the owner that she wanted to mediate certain changes to the August 17, 2013 employment contract, including that a new contract specify the number of hours of work that she was guaranteed each week and the pay rate she would receive for aesthetician's services. Transcript at 30. Claimant worked her complete shift on Saturday, February 22, 2014, attended the working interview for the second job on Monday, February 24, 2014, and reported for work on February 25, 2014. On February 25, 2014, the owner notified claimant that the owner had scheduled the mediation session for Wednesday, February 26, 2014 during claimant's work hours.

(4) On Wednesday, February 26, 2014, claimant and her boyfriend attended the scheduled mediation. The mediation was very upsetting and emotional for both claimant and the owner. Transcript at 10, 25, 28, 29, 43, 73. After the mediation session was concluded, the mediator was going to prepare a revised employment contract for both claimant and the owner to review. Claimant was given the remainder of the day off due to the emotional impact of the mediation. At some point shortly after February 26, 2014, the mediator contacted claimant and told claimant that he was going to act as a "buffer" or "go-between" between her and the owner, and that neither she nor the owner should contact each other directly. Transcript at 33, 72. The owner than canceled all of claimant's appointments that had been scheduled for Thursday, February 27, 2014 and the mediator notified claimant, who had been otherwise intending to report for work on that day. Transcript at 45, 75. Claimant was in contact with the mediator after her work was canceled on February 27, 2014 to learn if she should report for work on succeeding days and each time the mediator responded by telling her that the owner had rescheduled her aesthetics clients and had taken over claimant's duties at the reception desk. Transcript at 45.

(5) On approximately March 3 or 4, 2014, claimant filed a claim for unemployment benefits because she had not received any pay from the employer since February 27, 2014 and was in a financially difficult position. Claimant told the Department that she thought she was still employed but had not been getting any work. A Department representative told claimant she might be eligible for benefits, even if she was still employed, since it appeared that claimant had been "furloughed" by the employer. Transcript at 33. In one of their conversations after February 27, 2014, claimant told the mediator she was going to make

a claim for unemployment benefits to substitute for the wages she was losing from the employer during the time she was awaiting the preparation of the new employment contract. Transcript at 36.

(6) On March 5, 2014, the mediator emailed to claimant a new employment contract that he had prepared. The new contract was seven pages long when the original contract had been only a single page and the language of the revised contract was confusing to claimant. On March 5, 2014, claimant told the mediator that she was not comfortable with the new contract because she did not understand it. The mediator told claimant that he would simplify it and send her a new version of it. Transcript at 44.

(7) On approximately March 6, 2014, the employer's owner received a "notice of claim filed" inquiry from the Department, dated March 4, 2014, telling the employer that claimant had made a claim for unemployment benefits. The notice stated on its first page that claimant's claim might not be due to a work separation and, if not, the employer did not need to respond to the notice. Exhibit 3 at 4. On March 6, 2014, the mediator sent claimant a text message stating that the owner was "just done" with her since she had filed for unemployment benefits, and did not want claimant to come back to work. Transcript at 34, 35, 44. Claimant sent a text message response to the mediator stating that she had not intended to end her employment by filing a claim for unemployment benefits. The mediator replied by telling claimant in a text message not to come back to work. Transcript at 35. Claimant next received a message instructing her to come to the workplace to pick up her personal items and to drop off her key. *See* Exhibit 3 at 3.

(8) On March 6, 2014, the employer discharged claimant.

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

The first issue that this case presents is the nature of claimant's work separation. If 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 was a discharge. OAR 471-030-0038(2)(b).

In Hearing Decision 14-UI-19364, the ALJ concluded that claimant voluntarily left work. To support this conclusion, the ALJ relied principally on the fact that claimant applied for unemployment benefits in early March 2014, which the ALJ implicitly assumed was not consistent with the actions of a person who wanted to continue working for the employer. Hearing Decision 14-UI-19364 at 3. The ALJ also concluded that the testimony of the employer's owner that she had done nothing to prevent claimant from continuing to work was more persuasive that claimant's testimony that she had been discharged. Hearing Decision 14-UI-19364 at 3. We disagree.

At the outset, an individual who is employed but who is earning less than the individual's weekly benefit amount may be eligible to receive benefits without any separation from employment. *See* ORS 657.100(1). No reliable inference about claimant's willingness to work can be drawn from the fact that she applied for benefits. The employer's owner did not dispute claimant's testimony that, having been without any income for approximately one week, she needed benefits to meet her living expenses. The paperwork that the employer received from the Department did not show that claimant had applied for benefits due to a work separation and plainly stated that claimant's application might have been due

simply to a lack of work. Exhibit 3 at 4. It was not reasonable for the ALJ or the employer's owner to assume that claimant's application for benefits was an objective demonstration that, more likely than not, claimant had quit work.

Much of the other evidence about the work separation, particularly the parties' testimony, was in conflict. However, it was not disputed that the employer's owner and claimant met to try to mediate their differences on February 26, 2014 and that, thereafter, claimant was instructed not to contact the owner directly. Transcript at 11, 12, 21, 22, 33, 72. It also was not disputed that, after the mediation, the owner unilaterally and abruptly canceled claimant's work appointments scheduled for February 27, 2014, without conferring with claimant and when claimant intended to come in to work that day. Transcript at 14, 33, 46. Although the owner contended that claimant quit work before or during the February 26, 2014 mediation, this is unlikely since the owner testified that she had the mediator send two proposed new contracts to claimant after February 26, 2014 and testified that she asked claimant to work after February 26, 2014. Transcript at 6, 12, 13, 70, 72, 73, 75, 86. The owner also did not rebut claimant's testimony that, during the week after the mediation, claimant remained in steady contact with the mediator awaiting a draft of a new employment contract, which is not the behavior of a person who had quit work. Transcript at 14, 33, 43, 44, 46, 70. The employer's owner did not present any evidence from the mediator that rebutted claimant's contention of regular contact with him on behalf of the owner although the ALJ held open the record specifically to allow the employer to submit an affidavit from the mediator. Transcript at 58, 87. While the owner contended that claimant objectively manifested an intention to quit work when she refused to work after February 26, 2014, after the owner sent text messages to claimant about various appointments for her with clients on February 28, 2014 and March 1 and 3, 2014, claimant appeared to contend that the text messages she had received about work were for appointments scheduled on her day off when the spa was closed. Transcript at 12, 13, 14, 55, 56, 75. After averring that she had copies of the text messages to corroborate her contention that she repeatedly asked claimant to report for work, the owner submitted to the ALJ only two text messages, with no apparent response from claimant, asking her to handle two clients' appointments on Monday, March 10, 2014. Transcript at 60-61, 78, 81, 85; Exhibit 3 at 3. The owner's failure to supply any other corroborating evidence for these purported text messages suggests, more likely than not, that the owner did not ask claimant to perform any other work and the fact that there were no responses to the two messages that the owner submitted is an insufficient ground to conclude that claimant refused to perform that work. In addition, since it was not disputed that Monday was claimant's regularly scheduled day off, that claimant did not respond to those text messages is weak evidence, at best, of any intention to quit work. The owner's further contention that claimant demonstrated a refusal to continue working when she rejected two alleged contract offers after February 27, 2014 is also not supported by reliable evidence in the record that is sufficient to rebut claimant's contention that she received only one revised contract to review on March 5, 2014 and, rather than flatly rejecting it, she asked and the mediator agreed to simplify it so she might better understand its implications. Transcript at 12, 13, 16, 43, 44, 55, 86. Because the owner was unable to provide any specific information about the terms of the two alleged contracts that were purportedly were rejected, there is no evidence from which it can be reliably inferred that claimant's unwillingness to sign the contract the mediator presented to her on March 5, 2014 demonstrated an intention to quit rather than being simply a request for a further revision in the middle of negotiating a new contract. The weight of the reliable evidence in the record does not support a conclusion that, by claimant's words or actions, she demonstrated an unwillingness to continue working for the employer.

As can best be inferred from this record, on March 5, 2014, the date a proposed new contract was presented to claimant for her review, the employment relationship was intact. Based on the owner's testimony, the mediator told the owner that claimant had filed for unemployment benefits shortly after the draft of the new contract was given to claimant, which was likely on March 5 or March 6, 2014. Transcript at 13. The owner did not rebut claimant's testimony that, on March 6, 2014, the mediator told claimant that, in light of the owner's receiving the notice of claim filed form from the Department, the owner did not want her to return to work. Transcript at 34, 44, 54. Nor did the owner rebut claimant's testimony that, on March 6, 2014, the owner or the mediator told claimant to pick up her personal belongings from the workplace and to leave her work keys. Transcript at 35, 44; *see also* Exhibit 3 at 3. These communications from the owner or the mediator on the owner's behalf were the first definitive actions of either party to sever the employment relationship. By the actions of the mediator or owner on March 6, 2014, claimant's work separation was a discharge on that day.

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 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).

The evidence in the record does not support that the employer discharged claimant for any willful or wantonly negligent misconduct. That claimant might have wanted a second part-time job, and interviewed for one, was not misconduct. Nor was it misconduct for claimant to discuss with the owner changing her hours of work if she was hired for the second job. The employer did not present evidence showing, more likely than not, that as of the date that claimant was discharged she had violated any known employer standards or any terms in the August 17, 2014 employment contract. For the reasons addressed above, it was not misconduct for claimant to have filed for unemployment benefits to supplement her income while still employed. Viewing the record as a whole, the employer did not meet its burden to show that it discharged claimant for misconduct.

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

**DECISION:** Hearing Decision 14-UI-19364 is set aside, as outlined above.

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

**DATE of Service: <u>July 30, 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 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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