EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

326
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1168

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120400). Claimant filed a timely request for hearing. On June 18, 2014, ALJ Lohr conducted a hearing, and on June 18, 2014 issued Hearing Decision 14-UI-19905, affirming the Department's decision. On July 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

The ALJ admitted Exhibit 1 into evidence at the hearing, but, probably due to inadvertent error, did not mark the exhibit. Therefore, as a clerical matter, we have marked the document the ALJ identifies as Exhibit 1. See Hearing Decision 14-UI-19905, Audio Record ~ 3:55 to 4:31.

Claimant submitted written argument to EAB. EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Thunder Elite All-Star Cheerleading, Inc. employed claimant from April 1, 2013 to March 30, 2014 as a cheerleading coach.

(2) On March 5, 2014, claimant told the employer's president she was quitting work at the end of the cheerleading season. The season ended April 30, 2014. Claimant told the employer's president she was willing to work until the last day of the season. At the time claimant gave notice, claimant understood the employer expected her to work until April 30, 2014.

(3) The employer's staff was available to begin work during April 2014, before the new season began on May 1, 2014. On March 25, 2014, the employer sent claimant a text message stating, "I won't need you for April. I have [another employee] full-time now so we're all good. If your [sic] going to have any

[private lessons] this week I would like you to leave the keys. Otherwise you can give them to me over the weekend." EAB Exhibit 1.

(4) On March 30, 2014, the employer discharged claimant because it hired a replacement for her position to work during April 2014.

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

The first issue is the nature of the work separation. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

In Hearing Decision 14-UI-19905, the ALJ found that the work separation was a quit, reasoning that "[t]he record as a whole shows that claimant and the employer mutually agreed on March 25, 2014, to accelerate claimant's departure date to March 30, 2014."[1] However, claimant was willing to work until the initial planned quit date of April 30. The employer unilaterally ended the employment relationship before claimant's planned quit date when the president sent claimant a text message stating that the employer no longer needed claimant to work in April. Thus, the record does not show that claimant's employment ended on March 30 due to mutual agreement. Claimant's employment ended on that day because the employer terminated claimant's employment more than fifteen days before her planned quit date of April 30. Because claimant was willing to continue working for the employer for an additional period of time, but was not allowed to do so by the employer, 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on March 30, 2014, rather than allowing her to continue to work until April 30, because claimant's replacement was available to begin working earlier than the employer had anticipated when claimant gave notice on March 5. The employer's preference to have claimant's replacement perform claimant's duties for the last month of the season was not attributable to claimant as a willful or wantonly negligent violation of the standards of behavior an employer has the right to expect of an employee. Thus, it was not misconduct.

[1] Hearing Decision 14-UI-19905 at 2.

We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-19905 is set aside, as outlined above.

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

DATE of Service: August 5, 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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