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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-1830

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72930). Claimant filed a timely request for hearing. On November 14, 2014, ALJ Monroe conducted a hearing, and on November 20, 2014, issued Hearing Decision 14-UI-29050, concluding claimant voluntarily left work without good cause. On December 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Answer Page employed claimant, last as a manager, from January 20, 2013 to September 15, 2014.

(2) On August 12, 2014, the employer's general manager believed claimant told one employee confidential information about a disciplinary action the employer had taken against another employee and warned claimant that such conduct violated the employer's expectation and if it occurred again would constitute grounds for termination. Claimant understood the employer's expectation.

(3) On September 14, 2014, while at work in an area that was occupied by coworkers, claimant received a telephone call from another manager in which the manager informed her that an employee that claimant managed was about to be terminated for a no-call, no-show. Claimant listened to the information but did not make any statements concerning the employee during the conversation and did not share any of the information she received with other employees. However, the general manager listened to a recording of the conversation on September 15, 2014 and concluded claimant had made statements that were capable of being overheard by surrounding coworkers. The general manager decided to terminate claimant's employment for conduct he believed constituted sharing confidential information about an employee with non-managers and directed that claimant's final paycheck be

prepared. When claimant arrived at work that day, she immediately went to speak to the general manager and inquired if her staff was going to be short-handed that day, which was a problem she had complained about in the past. Before informing claimant she was being discharged, he responded that there would be two fewer employees. She then stated "I quit." Transcript at 6. The manager then handed claimant her final paycheck and claimant responded, "So you were going to terminate me anyway?" Transcript at 55. The general manager then confirmed that he had intended to terminate her employment that day. Claimant gathered her personal belongings and left the employer's premises.

(4) On September 15, 2014, the employer discharged claimant for sharing confidential information with non-managers on September 14, 2014.

CONCLUSIONS AND REASONS: We disagree with the 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. 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). 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); *Deborah J. Naone* (Employment Appeals Board, 11-AB-0939, March 31, 2011). No continuing relationship exists if the employer does not have an expectation that a service will be performed. *Kimberly K. Carr-Cecotti* (Employment Appeals Board, 02-AB-2040, October 15, 2002).

Claimant and the employer disagreed on the nature of the work separation. The employer asserted that on September 15 claimant quit work and claimant asserted she was discharged that day. The ALJ agreed with the employer and concluded that claimant quit work, reasoning,

> At hearing, the general manager testified that the employer had made the decision to discharge claimant and he planned to inform claimant of the employer's decision on September 15, 2014. However, before the general manager had the opportunity to notify claimant of the impending discharge, claimant asked the general manager about the number of employees working the shift that day and stated, "I quit."…[T]he conversation between claimant and the general manager that day thus amounts to a mutual agreement to end the employment relationship. When parties mutually agree that the employment relationship will end, the work separation is a voluntary leaving of work. *Employment Department v. Shurin***,** 154 Or App 352 (1998).

Hearing Decision 14-UI-29050 at 2, 3. However, it was undisputed that before the conversation in question took place, the employer had decided to terminate claimant's employment and had claimant's final check prepared. Thus, by the time the conversation took place, there was neither an employer expectation that claimant would perform additional services for the employer nor any future opportunity for claimant to perform such services and the employment relationship had been severed. Because claimant could not have continued to work an additional period of time, 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.

The employer's general manager asserted that he discharged claimant because claimant "conduct[ed] [her]self unlike a manager should conduct themselves, by sharing confidential information with people that should [not] have confidential information." Transcript at 5-6. The manager explained that he reached his conclusion after listening to a recording of the September 14 conversation and speaking to employees who were within earshot of claimant while the conversation took place. Transcript at 14-17. However, neither the recording nor employee testimony was offered into evidence at hearing. Consequently, claimant was denied the critical opportunity to contest the general manager's interpretation of the recorded conversation or question the employer's alleged witnesses regarding their observations, recollections, truthfulness or potential bias.[1] On this record, the employer had the alternative of presenting live testimony to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. That claimant had the opportunity to question the general manager regarding what he had been told was insufficient to test the source of those statements. That claimant had the same opportunity as the employer to call witnesses was immaterial, because claimant did not have the burden to prove misconduct. The ALJ considered claimant a credible witness. Hearing Decision 14-UI-29050 at 3. Absent a basis for concluding otherwise, we find that her first-hand testimony is not outweighed by the employer's hearsay. The evidence as to whether claimant shared confidential information about an employee in front of non-managers was, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to meet its burden of proving that claimant violated the employer's expectation regarding confidentiality; much less that she did so willfully or with wanton negligence.

The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-29050 is set aside, as outlined above.[2]

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

DATE of Service: <u>January 29, 2015</u>

[1] *See*, *Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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