EO: 200
BYE: 201544

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
2015-EAB-0373

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71540). Claimant filed a timely request for hearing. On March 11, 2015, ALJ Murdock conducted a hearing, and on March 16, 2015, issued Hearing Decision 15-UI-35165, affirming the Department's decision. On April 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sterling Jewelers Inc. employed claimant, last as a district manager, from November 20, 1997 to October 31, 2014.

(2) The employer knew claimant was not "tech savvy" when it first promoted her to district manager around 2010. Transcript at 7. During her first three years in that position, the employer provided training and she was able to navigate her way through the technology and adequately perform her job. Thereafter, as the technology advanced and claimant experienced increased difficulty completing computerized forms that were part of her job duties. In addition, the employer denied her requests for continued training at other district offices or the home office, even at her own travel expense.

(3) In early 2014, claimant was assigned a new supervisor, the employer's senior vice-president (Kidman). Claimant began to experience severe digestive health problems and became the subject of an employer investigation concerning her "communication style." Transcript at 11. Her health problems worsened to an extent that they qualified as a serious health condition under the Family and Medical Leave Act (FMLA), entitling her to a three month leave of absence which began around June 2014, before the employer's investigation was completed.

(4) After claimant returned to work in September, she was criticized about her delay in completing computerized forms required by new processes and realignments that had taken place since the beginning of the year. Because of this criticism and her continuing health problems, claimant asked

Kidman, at an October 29, 2014 meeting, that she be allowed to leave her position, though not the company. Kidman agreed to get back to her and later that day told her that her final paycheck was in the process of being prepared. Claimant was "stunned" and attempted to clarify "well I'll just take my job back...if I can't be moved out of it." Transcript at 8. Kidman denied her request without explanation and directed her to speak only with the human resources supervisor (Parks) concerning work separation paperwork. When claimant spoke to Parks, she told him what had transpired, but he said nothing to her about options she might have had to keep her job.

(4) On October 31, 2014, claimant's employment ended when she received her final paycheck.

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

At hearing, claimant asserted she was discharged; the employer, however, presented hearsay evidence that claimant resigned. Transcript at 4, 24. Accordingly, the first issue to be addressed 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; 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) (August 3, 2011). In Hearing Decision 15-UI-35165, the ALJ accepted the employer's evidence and concluded claimant quit, reasoning,

> [C]laimant's testimony was largely illogical or implausible and she inserted unsolicited testimony regarding matters that suggested a motivation to quit work …

Hearing Decision 15-UI-35165 at 2-3. However, the ALJ did not explain how claimant's testimony was illogical or implausible or otherwise suggested a motivation to quit rather than merely step down from the position of district manager. Although claimant asserted that on October 29 she felt overwhelmed by the demands being placed on her in light of her poor health and the dearth of her computer training, she also asserted that she asked Kidman why she was being discharged rather than moved to another position when he told her that her "check" was being prepared, and received no response. Her testimony that Parks offered her no options for keeping her job when she met with him and told him what had transpired was not disputed by Parks, the employer's only witness. Based on the totality of the record, we conclude claimant's first hand testimony was more persuasive than the employer's hearsay. Because claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so, the work separation was a discharge.

ORS 657.176(2)(b) 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 bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Stated another way, the employer must show, more likely than not, that it discharged claimant because she engaged in conduct that she knew or should have known would violate an employer expectation.

Here, although the employer apparently had its reasons for terminating claimant's employment, it failed to present any evidence that it did so for reasons that constituted misconduct under ORS 657.176(2)(a). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-35165 is set aside, as outlined above.[1]

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

DATE of Service: May 22, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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[1] 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.