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BYE: 201607

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-0429

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85559). Claimant filed a timely request for hearing. On April 9, 2015, ALJ Triana conducted a hearing, and on April 13, 2015 issued Hearing Decision 15-UI-36772, affirming the Department's decision. On April 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she offered new information for EAB's consideration. Claimant did not certify that her written argument was served on the other parties as required by OAR 471-041-0080(1) (October 29, 2006). Claimant did not explain why she did not present the new information during the hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Wildhorse Casino & Resort employed claimant in beverage service from October 1, 2014 until November 17, 2014.

(2) Claimant lived in Athena, Oregon, approximately 15 miles from the employer's work location in Pendleton, Oregon. Claimant customarily drove her car to work. There was no public transportation between Athena and Pendleton. Claimant generally worked a graveyard shift, starting at approximately 9:00 p.m. or 10:00 p.m. and ending at approximately 5:00 a.m. or 6:00 a.m. Sometimes claimant worked from 4:00 p.m. to 11:00 p.m. and sometimes she worked from approximately 7:00 p.m. until approximately 3:00 a.m. Claimant was scheduled to work on November 12, 13, 14, 15 and 16, 2014.

(3) On November 12, 2014, while claimant was driving home after her shift, the steering in her car stopped working and the car was no longer drivable. Claimant called in her son and he came from Starbuck, Washington to pick her up and tow the car to her home in Athena. Early the next morning, on Thursday, November 13, 2014, claimant contacted the only automobile mechanic doing business in

Athena and the mechanic told her that he would not be able to start working on her car for four or five days, or until approximately November 17 or 18, 2014. On November 13, 2014, after she spoke to the mechanic, claimant called her supervisor to explain that she lacked transportation and would not be able to report for her shift later that day and needed to be absent from work until her car was repaired in about four or five days. The supervisor told claimant to call the mechanic again to confirm that he was not going to be able to work on her car for four or five days. Claimant did so, and then contacted her supervisor and told her that the mechanic was unwilling to expedite the repairs to her car. The supervisor told claimant that the employer might be required to "replace" her if she could not report for work for four or five days. Audio at ~8:22.

(4) After claimant contacted her supervisor she tried unsuccessfully to get her car repaired faster or obtain alternative transportation to work. Claimant asked a coworker for a ride, but their schedules were not alike. Claimant called a coworker who lived in Dayton, Washington and travelled past Athena on his way to work to ask whether he was willing to transport her to the workplace but the coworker did not return claimant's calls. Claimant's son looked for a repair shop in a larger town to try to get her car repaired faster, but the estimated costs of repairs in the larger town were prohibitive, more than twice what the Athena mechanic would charge, and claimant did not have enough money to pay the extra cost. Claimant asked two acquaintances with mechanical knowledge to repair her car but neither had the time. Claimant did not have family who could transport her to work or temporarily loan a car to her, and did not have any friends for whom transporting her to work for her scheduled shifts was feasible.

(5) On Friday, November 14, 2014, claimant called her supervisor before her shift began to tell the supervisor that she was unable to make arrangements that would allow her to arrive for that shift. Claimant's supervisor told her that she "really needed [claimant] here at work" and told claimant that she needed to make arrangements that allowed her to report for work. Audio at ~19:08. When claimant stated that she was unsuccessful in doing so, the supervisor told claimant that she would be required to "replace" claimant if she did not report for work, or that she was "going to have to let [claimant] go." Audio at ~8:52, ~24:27. Claimant told the supervisor that she "understood [the supervisor] could not hold [her] position open for [her]" if could not report for work. Audio at ~9:18. Claimant interpreted the supervisor's statement to mean that she was going to be discharged if she failed to report for any more scheduled shifts. Audio at ~9:42.

(6) Claimant was not able to make arrangements that allowed her to commute to work for her scheduled shifts on Saturday, November 15, 2014 and Sunday, November 16, 2014. On Monday, November 17, 2014, claimant's supervisor called claimant to learn whether her car was repaired and, if not, whether she had made arrangements that enabled her to report for work. Claimant told the supervisor that she did not have any transportation, and did not know when the repairs on her car were going to be completed other than what the mechanic in Athena had told her. Audio at ~24:32; Exhibit 1 at 8. The supervisor then asked claimant "if she was going to quit or if she was going to get a ride to work." Audio at ~24:32. Claimant told the supervisor "she was going to have to quit because she did not have a ride to work." Audio at ~24:35. Claimant's work ended on November 17, 2014. Claimant's car was repaired and again operable on November 18, 2014 or November 19, 2014.

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

In Hearing Decision 15-UI-36772, the ALJ concluded that claimant's work separation was a voluntary leaving and that claimant was disqualified from benefits because she left work without good cause. We disagree with the ALJ's conclusion about the nature of the work separation, and find it to have been a discharge rather that a voluntary leaving. We also conclude that the circumstances that lead to claimant's discharge were not misconduct, and claimant is not disqualified from unemployment benefits.

The Department's regulations set out the standards for determining whether a work separation is a discharge or a voluntary leaving. 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 same 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).

The reasoning underlying the ALJ's determination that claimant voluntarily left work is not set out in Hearing Decision 15-UI-36722. It appears that the ALJ concluded that claimant voluntarily left work because, after the supervisor presented to claimant only the alternatives of somehow getting to work (which she could not do) or quitting, claimant capitulated to the supervisor's selection of options and agreed that she would call the separation a voluntary leaving. However, the parties' characterizations do not determine the nature of the work separation. From the words that the supervisor agreed that she had stated to claimant, the only reasonable interpretation of the supervisor's statements to claimant about "replacing" her or "laying [her] off" was that the employer was unwilling to allow claimant to continue working if she did not report for work after November 17, 2014. On November 17, 2014, the day that those words were spoken to her, claimant had no transportation and the date that her car would be repaired remained uncertain. From the undisputed evidence, the employer was the moving force behind this work separation, and gave claimant no alternative other than expressing that she was quitting in response to the supervisor's statement that the employer was unwilling to allow claimant to continue working if she was unable to report for work for after November 17, 2014. Claimant was not unwilling to continue working for the employer, and made concerted efforts to retain her job, but the employer would not allow her to do so. Claimant's work separation was discharge on November 17, 2014.

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 has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had a reasonable right to expect that, absent exigent circumstances, claimant would report for work as scheduled. It was not disputed at the hearing that claimant's car was inoperable and not drivable when she was not able to report for work from November 13, 2014 through November 16, 2014, and did not know when it would be repaired when her supervisor spoke to her on November 17, 2014. It also was not disputed that claimant made sustained efforts to arrange for alternate ways to report for work on those days despite her lack of personal transportation, including contacting coworkers to get rides, trying to expedite the repairs on her car so she would miss fewer days, and trying to arrange

for the repair of her car by others who conceivably could make those repairs more quickly than the mechanic in Athena. Although claimant's supervisor testified that she told claimant that the employer allowed her five taxi tickets each month that she could use for cab transportation to travel to and from work for $5 each way, claimant testified that the supervisor did not tell her about the tickets and she had no knowledge that such tickets were available. Audio at ~20:03, ~20:53, ~28:32. Assuming this benefit was available to claimant, there is no reason to disbelieve either party's testimony about whether claimant was aware or not aware of the availability of the tickets. Where the evidence on a disputed issue in a discharge case is evenly balanced, as here, the uncertainty must be resolved against the employer, the party who carries the burden of proof. *See Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976). Since the employer did not establish that claimant was aware of the taxi tickets, her failure to pursue obtaining them for purposes of commuting to work when her car was disabled was not a willful or wantonly negligent violation of the employer's attendance expectations.

With respect to her efforts to address her lack of transportation, claimant's supervisor also testified at hearing that she would have changed claimant's shift temporarily from graveyard to days if claimant had asked for it, and claimant agreed that if she worked days when her car was not drivable it would have been easier for her to obtain transportation from coworkers or friends. Audio at ~13:43, ~26:28. However, when she described the substance of her conversations with claimant, the supervisor never stated that she mentioned to claimant that her shift could be changed temporarily to accommodate her transportation difficulties. Audio at ~ 19:08, ~20:59, ~21:50. The supervisor's description of the conversations showed that the supervisor was insisting that claimant needed to report for work as scheduled, stating that claimant was going to be laid off if she did not, and did not invite a renegotiation of claimant's work schedule when her car was not drivable and she was unable to commute to work. Audio at ~ 19:08, ~19:35, ~20:59, ~21:22. Under these undisputed circumstances, when the supervisor was focused on claimant reporting for her already scheduled shifts, claimant's failure to ask her supervisor to change her work schedule did not make her failure to report to work wantonly negligent. Claimant made reasonable, persistent efforts to report to work despite her transportation problems, and explored all the alternatives reasonably known to her. That claimant was not able to report for work during the period of November 13, 2014 through November 17, 2014 was due to exigent circumstances outside her control, and was not the result of any willful or wantonly negligent behavior on claimant's part.

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

DECISION: Hearing Decision 15-UI-36772 is set aside, as outlined above.[1]

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: June 15, 2015

[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.

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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