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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1112

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 140954). The employer filed a timely request for hearing. On August 27, 2015 and August 28, 2015, ALJ R. Davis conducted a hearing, and on September 4, 2014 issued Hearing Decision 15-UI-43979, affirming the Department's decision. On September 21, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) ComForCare Home Care Services employed claimant from February 20, 2014 until April 3, 2015, last as a human resources generalist.

(2) In February 2015, claimant was earning $12 per hour and was allowed to use a car that the employer owned for business and personal purposes. Claimant was displeased with her compensation and thought she deserved a higher wage. Based on communications claimant had with the employer's director of operations and one of the employer's owners, claimant understood that her wage was going to be raised to $14 per hour.

(3) By March 2015, the employer had not implemented the pay increase that claimant thought she had been promised. In early March 2015, claimant was performing some filing and noticed that a newly hired scheduler was going to earn $14 per hour. Claimant thought she should earn more than a newly hired employee and was upset. On March 18, 2015, claimant met with the employer's human resources manager, told her what the newly hired employee was earning and expressed her displeasure. The human resources manager suggested that she and claimant raise the matter of claimant's compensation immediately with the employer's director of operations. That day, they met with the director of operations. The director told claimant that the employee newly hired as scheduler had a great deal of experience, and that the employer had decided that employee deserved $14 per hour. The director told

claimant that, calculating in the value of her use of the employer's car, claimant's effective compensation exceeded $14 per hour. Claimant told the director of operations that she "didn't need the car [and] give me the [increased] money." Transcript of August 28, 2015 Hearing (Transcript 2) at 6. Sometime after this meeting, the director of operations discussed increasing claimant's compensation with one of the employer's owners. They discussed whether the employer should raise claimant's hourly wage, create an incentive bonus for claimant's recruitment efforts or provide some combination of the two if the decided to increase claimant's compensation.

(4) On March 27, 2015, claimant sent an email to the employer's payroll person about missing income verification documents. At the end of the email, relying on her understanding that the director of operations had previously authorized it, claimant stated that the director of operations "bumped [her pay] up to $14 an hour a couple of weeks ago." Exhibit 6 at 7. Shortly thereafter, the payroll person asked the director of operations the effective date of claimant's increased wage. On April 1, 2015, in an email addressed to claimant and the payroll person, the director of operations stated, "This raise has not taken place. I will send you [claimant's] new pay structure when we have worked it out." Exhibit 6 at 8. When claimant received this email she told the director of operations that they needed to discuss the issue of her pay immediately.

(5) On the afternoon of Wednesday, April 1, 2015, the director of operations met with claimant and the employer's human resources manager. The employer's co-owner participated in the meeting by telephone. At the meeting, claimant was upset. Claimant stated that the director of operations had already agreed to raise her pay to $14 per hour and the director denied that she had done so. The atmosphere during the meeting was tense, emotional and confrontational. Transcript 2 at 30, 31, 56, 57. After the meeting, the participants discussed claimant's compensation for some time. Claimant and the human resources manager were then asked to leave the room so that the director of operations could discuss matters privately with the co-owner. When claimant returned to the room at the request of the director of operations, claimant was told that the employer proposed to raise her wage to $14 per hour and provide to her an incentive bonus based on her performance in recruiting, in return for which claimant needed to relinquish the employer's car and her use of it. Claimant asked for the raise in hourly wage to take retroactive effect and it was agreed that it would be effective as of February 9, 2015. Claimant asked when she was required to turn the car over to the employer and the co-owner stated on Friday, April 3. Claimant asked for a day to think over whether she was going to accept this offer. The co-owner and the director of operations agreed.

(6) On April 1, 2015 at 4:39 p.m., the human resources manager sent an email to all participants in the earlier meeting summarizing the employer's compensation proposal. The email ended by stating "[claimant] would like a night to think about this and will get back to us [the employer] Thursday April 2, 2015." Exhibit 6 at 9.

(7) On April 2, 2015, claimant reported for work, and was occupied with duties that took her away from the workplace. At 7:49 p.m. on April 2, 2015, claimant sent an email addressed to the co-owner, the director of operations and the human resources manager. In the email, claimant noted that some questions about the employer's proposal had occurred to her because some issues had not been discussed at the April 1, 2015 meeting. Claimant set out the issues that remained open. Claimant ended the email by stating that she accepted the employer's proposal "as per our discussion of 4/1/2015."

Exhibit 6 at 9. Claimant also stated, “I will return the company vehicle to ComForCare on 4/3/2015 at the departure of my work day and I have received my retro[active] pay.” *Id.*

(8) On April 3, 2015, when claimant reported for work, the human resources manager asked claimant to meet with her. On April 3, 2015, the employer discharged claimant.

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

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) (August 3, 2011) 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer’s witnesses vacillated on the reasons that the employer discharged claimant when it did, sometimes suggesting that it was based on claimant’s behavior during the week before she was discharged and sometimes suggesting (and then denying) that it was based on her accepting its April 1, 2015 proposal after the close of business on April 2, 2015 and the conditional nature of that acceptance. Transcript of August 27, 2015 Hearing (Transcript 1) at 5-13, 16, 18, 10; Transcript 2 at 7-9, 11, 56-60, 62-64. However, at the time the employer made the April 1, 2015 offer to claimant to increase her compensation (and thereby to continue her employment), the employer was aware of claimant’s behavior up to that date. That the employer, with full knowledge, made the compensation proposal to claimant demonstrates that it did not consider any aspect of claimant’s behavior before approximately 4:00 p.m. on April 1, 2015 to have been a sufficient violation of its standards to have discharged her. While with hindsight, the employer might now be displeased with some aspects of claimant’s behavior before it made that offer, the salient issue is what the employer’s reasoning was when it discharged claimant. Given the clear implications of the April 1, 2015 proposal, it is most likely that the employer discharged claimant for events or behaviors that occurred after the proposal was made.

After the employer made the compensation proposal to claimant, there is little evidence about claimant’s behaviors other than the acceptance that she emailed to the employer on April 2, 2015. Although the employer’s witnesses referred to some emails that were exchanged with claimant during the work day on April 2, 2015, it is impossible to conclude that they evinced a willful or wantonly negligent violation of the employer’s standards because no evidence was presented about their content. Transcript at 17-18, 28-29. Similarly, the employer’s witnesses referred to claimant causing “discord” in the workplace, which could have occurred on April 2, 2015, and missing a scheduled appointment on April 2, 2015, but did not provide sufficient detail about claimant’s alleged behavior on that day to support a conclusion that it was a willful or wantonly negligent violation of the employer’s standards and therefore misconduct. Transcript 1 at 28-29; Transcript 2 at 58.

With respect to claimant's email acceptance of the employer's proposal, it is undisputed that it was sent to the employer at 7:49 p.m. on April 2, 2015, and nothing in the written summary of it that the employer prepared can reasonably be construed as requiring claimant's response during business hours on April 2, 2015. Exhibit 6 at 9; Transcript 1 at 16, 18. The employer did not contend or present evidence that, despite the open ended time frame for a response on April 2, 2015, claimant orally agreed to provide her response by the close of business on April 2, 2015. Based on a literal reading of the employer's written summary, claimant's response accepting the employer's proposal was timely. The employer did not meet its burden to show that claimant's response to its proposal at 7:49 p.m. on April 2, 2015, after the end of the business day, was a willful or wantonly negligent violation of its standards.

With respect to the content of claimant's emailed acceptance, its language was professional in tone and nothing in it can reasonably be construed as hostile, insubordinate or defying the employer's authority. Exhibit 6 at 10. Fairly construed, claimant's email accepted the employer's offer and principally identified issues that the employer's offer had overlooked and which remained to be resolved. The employer did not demonstrate that its April 1, 2015 offer was a final offer and that the only acceptable response to it from claimant was to take it or leave it. Furthermore, when parties are negotiating a business agreement, it is not uncommon to identify issues that were left open and to conditionally accept an offer subject to a good faith negotiation on the open issues that remain. It was not willful or wantonly negligent for claimant to point out those unresolved issues in her acceptance. Claimant's acceptance can also be reasonably construed to make her return of the employer's vehicle on April 3, 2015 conditioned on her lump sum receipt of the retroactive pay that was owed to her as of April 3, 2015. Exhibit 6 at 10. However, for the same reason as above, the employer did not demonstrate that further negotiations on its proposal were precluded. Absent additional evidence, it cannot be concluded that claimant was doing more than simply attempting to guarantee that she received the agreed-upon retroactive pay by withholding the car until she had the pay in hand. Taking such negotiating positions to ensure that a party receives the agreed upon benefits of a negotiated deal is not an uncommon business practice and does not necessarily connote an insubordinate attitude. Nor can this type of negotiating be construed as a violation of a reasonable employer standard. On this record, the employer failed to demonstrate that the content of claimant's response to the employer's offer was a wantonly negligent violation of an employer standard of which she was reasonably aware.

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

DECISION: Hearing Decision 15-UI-43979 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

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