EO: 200
BYE: 201622

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

048
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1126

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct within 15 days of a planned voluntary leaving without good cause (decision # 140344). Claimant filed a timely request for hearing. On September 11, 2015, ALJ Vincent conducted a hearing, and on September 18, 2015, issued Hearing Decision 15-UI-44521, concluding the employer discharged claimant, not for misconduct, within 15 days of a planned voluntary leaving with good cause. On September 25, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The employer offered Exhibit 1 into evidence at the outset of the hearing but the ALJ did not admit it because claimant did not receive the exhibit prior to the hearing and the employer's owner could testify to its contents. The employer testified about portions of the exhibit at hearing. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by the employer are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, the employer's documents, marked as Exhibit 1, are admitted into the record. Any party that objects to the admission of Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

WRITTEN ARGUMENT: The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Although the employer's owner also contended the ALJ "did not ask me if I had any witnesses," which she contended she had, the ALJ asked the owner near the end of the hearing if there was "any other evidence" she wanted to offer, to which

she replied, "No." Audio Record ~ 44:15 to 45:00. Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) B&B Family Dining and Spirits employed claimant as a bartender and grill cook from April 12, 2014 to April 7, 2015.

(2) The employer employed claimant full time and paid her an hourly wage of $9.25 plus tips.

(3) In April 2015, claimant received an offer of full time work as a bartender from another employer starting April 19, 2015. The other employer offered to employ claimant full time and pay her $9.25 per hour plus tips. The work was expected to continue indefinitely. Claimant's weekly benefit amount was $254.[1]

(4) On April 4, 2015, claimant gave the employer two weeks' notice of her intent to quit work on April 18, 2015.

(5) On April 5, 2015, claimant gave and signed for a draw of $20 to another employee she believed she had the authorization to issue. On April 6, 2015, claimant went to a doctor for an alleged work injury to her feet and was given a work restriction to remain off her feet for an indefinite period of time.

(6) On April 7, 2015, the employer's owner discharged claimant for allegedly issuing the personal draw of $20 to another employee without receiving her prior authorization. Shortly after receiving her final paycheck, claimant notified the owner of her alleged work injury and her doctor's visit the prior day.

(7) Claimant did not begin her new employment on April 19 because she remained unable to work due to the condition of her feet.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

The record shows that on April 4, 2015, claimant gave the employer two weeks' notice that she intended to quit on April 18, 2015 and it was undisputed that the employer terminated claimant's employment on April 7, 2015, less than 15 days prior to claimant's planned voluntary leaving date. Exhibit 1. ORS 657.176(8) provides that when an individual has notified an employer that she (or he) will quit work on a specific date, and the employer discharges her, not for misconduct, no more than fifteen days prior to that date, and the planned voluntary leaving would have been without good cause, the work separation shall be adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual disqualified from receiving benefits, except that she would be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date. As this statute is potentially applicable to claimant's work separation, the first

[1] We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

issue to be determined is whether claimant's planned voluntary leaving would have been with, or without, good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Where an individual leaves work to accept an offer of other work, good cause exists if the offer is definite, the work is to begin in the shortest length of time as can be deemed reasonable under the individual's circumstances, the offered work is reasonably expected to continue and will pay an amount equal to or in excess of the weekly benefit amount or an amount greater than the work left. OAR 471-030-0038(5)(a) (August 3, 2011).

The hearing record shows that claimant's offer of other work was definite, scheduled to start April 19, the day after claimant's planned voluntary leaving date, was full time, and expected to pay the same hourly wage that she earned with the employer, $9.25, which would have resulted in weekly wages of $370 ($9.25 x 40), exceeding claimant's weekly benefit amount of $254. Although the employer's owner contended in written argument that claimant's prospective new employer "[n]ever heard of her", she offered no evidence at hearing in support of that contention and never disputed claimant's testimony to that effect. Accordingly, under OAR 471-030-0038(5)(a), claimant's planned voluntary leaving on April 18, 2015, would have been with good cause, making ORS 657.176(8) inapplicable. Because ORS 657.176(8) is inapplicable, the only issue remaining is whether the employer discharged claimant for misconduct under ORS 657.176(2)(a).

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) (November 1, 2009) 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case without reason to further investigate what the expectation was. *Accord Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006).

The employer discharged claimant for allegedly issuing a personal draw of $20 to another employee without receiving the owner's prior authorization. Exhibit 1. However, claimant asserted that she believed she had the owner's prior authorization and the record shows that she recorded the advance in the employer's records, which supports claimant's assertion. Audio Record ~ 40:45 to 42:45. The owner denied that she gave claimant authorization to issue the advance. On this record, we find no reason to doubt either witness's credibility and conclude the evidence regarding whether claimant consciously violated the employer's expectation on this issue is no more than equally balanced. Although claimant's issuance of the $20 draw in the final instance may have violated the employer's expectation, on this record claimant issued the draw because she sincerely believed she had the owner's permission to do so. Accordingly, we agree with the ALJ that her conduct was the result of a good faith error, which is not misconduct. Hearing Decision 15-UI-44521 at 4. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-44521 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 20, 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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