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

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1348

Hearing Decision 16-UI-71431- Affirmed – Ineligible Week 35-16
Hearing Decision 16-UI-71461 - Reversed – Eligible Week 38-16
Hearing Decision 16-UI-71489 - Reversed – No Disqualification

PROCEDURAL HISTORY: On October 7, 2016, the Oregon Employment Department (the Department) served notice of the following three administrative decisions: decision # 120203 concluded that claimant did not actively seek work from August 28 through September 3, 2016 (week 35-16), decision # 121757 concluded that claimant did not actively seek work from September 18 through 24, 2016 (week 38-16), and decision # 113251 concluded that claimant voluntarily left work at Great Western Leasing & Sales without good cause. Claimant filed timely hearing requests. On, November 17, 2016, ALJ Shoemake conducted a consolidated hearing regarding decisions # 120203 and # 121757, and a separate hearing at which the employer failed to appear regarding decision # 113251. On November 18, 2016, ALJ Shoemake issued Hearing Decisions 16-UI-71431 and 16-UI-71461, affirming decisions # 120203 and # 121757, respectively. On November 21, 2016, ALJ Shoemake issued Hearing Decision 16-UI-71489, affirming decision # 113251. On November 29, 2016, claimant filed an application for review of all three hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-71431, 16-UI-71461, and 16-UI-71489. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 16-EAB-1346, 16-EAB-1347, and 16-EAB-1348).

EAB considered the parties' written arguments in reaching these decisions.

FINDINGS OF FACT: (1) Great Western Leasing & Sales (Great Western) employed claimant part time from July 18, 2016 to August 9, 2016 to perform bookkeeping and accounting duties.

(2) On July 15, 2016, Great Western purchased a business owned by Bob Grover, Inc. As a condition of the sale, Great Western agreed it would hire the Bob Grover, Inc. employees to perform the same jobs they had performed for Bob Grover, Inc.

(3) At the time of the purchase, claimant had worked for Bob Grover, Inc. for 19 years. Unlike the other employees who had worked for Bob Grover, Inc., claimant still had up to eight more weeks of full time work with Bob Grover, Inc. after the July 15 sale.

(4) On July 19, 2016, Great Western's CEO visited the job site it had purchased on July 15. At that time, claimant told Great Western's CEO that she was willing to work for the employer, but would not be able to work full time for Great Western until she completed approximately eight more weeks of full time work for Bob Grover, Inc. Great Western's CEO told claimant that it would hire another bookkeeper because it needed a full time bookkeeper immediately, and asked claimant if she would work part time for Great Western until it hired a full time bookkeeper. Claimant agreed and worked full time for Bob Grover, Inc. and part time for Great Western until August 9, 2016, when Great Western hired a full time bookkeeper, and told claimant it had no more work available for her.

(5) Claimant continued to work full time for Bob Grover, Inc. until August 26, 2016. After August 26, 2016, Bob Grover, Inc. continued to have occasional, part time work for claimant, and told claimant it would continue to have such work for her until January 2017.

(6) On August 28, 2016, claimant filed an initial claim for unemployment insurance benefits. She claimed and was denied weekly benefits for the weeks of August 28 through September 3, 2016 (week 35-16) and September 18 through 24, 2016 (week 38-16). These are the benefit weeks at issue.

(7) During week 35-16, claimant did not seek work.

(8) After week 35-16, claimant made weekly direct contact with Bob Grover, Inc. During week 38-16, claimant also made direct contact with the employer, Three Rivers Home Care. On September 19, 2016, claimant looked for accounting and bookkeeping jobs on Craigslist. On September 20, 2016, claimant looked for work through job listings in newspapers. On September 22, 2016, claimant contacted a previous employer for a letter of recommendation.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that Great Western discharged claimant, but not for misconduct. We agree that claimant was not actively seeking work from August 28, 2016 through September 3, 2016, but disagree with the ALJ and conclude that claimant was actively seeking work from September 18 through September 24, 2016.

Work Separation. The first issue is the nature of the work separation between claimant and the employer, Great Western. 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). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 16-UI-71489, the ALJ concluded that claimant quit work with Great Western to continue working with [Bob Grover, Inc.] and because claimant was unwilling to work full time for

Great Western until she completed her full time work for Bob Grover, Inc.¹ Based on that reasoning, the ALJ concluded that claimant did not have good cause to quit because she had the reasonable alternative of continuing to work full time for Great Western.² However, it was Great Western, and not claimant, that ended the employment relationship. Claimant was willing to work full time for Great Western once she completed her work for Bob Grover, Inc., and was willing to continue working part time for Great Western until it hired her replacement. Great Western did not allow claimant to continue working due to its immediate need for a full time bookkeeper. Thus, it was Great Western that severed the employer-employee relationship with claimant when it hired a full time employee and no longer had work for claimant. The work separation therefore was a discharge, and not a quit.

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

Great Western discharged claimant because claimant was not willing to quit a full time job with Bob Grover, Inc., her regular employer of 19 years, to work full time for Great Western. It was not reasonable to expect claimant to quit her job of 19 years when she still had almost two months of full time work available to her, or to work two full time jobs. A conscious decision not to comply with an unreasonable employer expectation is not misconduct. OAR 471-030-0038 (1)(d)(C). Because Great Western discharged claimant for violating an expectation that the employer did not have a reasonable right to expect, the employer discharged claimant not for misconduct. Claimant is thus not disqualified from receiving unemployment insurance benefits based on her work separation from Great Western.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). The Department defines "actively seeking work" as "doing what an ordinary and reasonable person would do to return to work at the earliest opportunity," specifically, conducting "at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." OAR 471-030-0036(5)(a). The Department further defines "work seeking activities" to include things like registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer." OAR 471-030-0036(5)(a)(A). The Department defines "direct contact" as "making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

That claimant failed to actively seek work during week 35-16 is not disputed by the parties. Regarding week 38-16, the Department asserted and the ALJ concluded that claimant's work search was

¹ Hearing Decision 16-UI-71489 at 2.

² *Id.*

inadequate because claimant had applied for work before with Bob Grover, Inc. and needed to seek work from “new and different employers” each week, and because Bob Grover, Inc. had allegedly “dissolved” and claimant applied “for a business that’s not even there.” Hearing Decision 16-UI-71461 at 3; Audio Record at 15:11-15:18, 26:16-26:40, 29:49-30:00. We disagree.

There are no provisions in Oregon law or the Department’s administrative rules requiring that every direct employer contact be with a new employer or for only permanent work. *See generally* ORS chapter 657, OAR chapter 471. Nor are there such requirements in the Department’s Claimant Handbook.³ Rather, the law requires, and the Handbook states, that any work seeking activities, including direct contacts, must be what an ordinary and reasonable person would do to return to work at the earliest opportunity, including seeking “full-time, part-time, permanent and temporary work,” and “must reflect a genuine desire to obtain employment immediately.”⁴

Claimant applied for work to Bob Grover, Inc. during week 38-16 because Bob Grover, Inc. told her it would have ongoing work opportunities for her on an “as needed” basis until January 2017. Moreover, claimant testified that Bob Grover, Inc. sold its business, but did not dissolve as alleged by the Department’s witness at hearing. Audio Record at 30:48-30:56. Nor is it particularly relevant in this case whether the corporation dissolved. Employment Department Law defines an “employer” as an organization or person for whom services are performed. ORS 657.020, 657.025. “Employment” is defined generally as service for an employer performed for remuneration. ORS 657.030. Despite Bob Grover, Inc.’s corporate status, it was an employer as defined by Employment Department Law, and it told claimant it would have occasional employment for her until January 2017. Applying for work, even if it is only temporary work, to one’s regular employer that had told her it would have additional work opportunities was what an ordinary and reasonable person would do to obtain employment immediately.

We agree with the ALJ that the record shows that claimant did not actively seek work during week 35-16 and was ineligible for benefits for that week. However, the record also shows that claimant conducted five work-seeking activities, including at least two direct employer contacts, during week 38-16. Therefore, for the reasons explained herein, the record establishes that claimant actively sought work during that week and was not ineligible for benefits for week 38-16 as a result.

DECISION: Hearing Decision 16-UI-71431 is affirmed, and Hearing Decisions 16-UI-71461 and 16-UI-71489 are set aside, as outlined above.

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

³ We take notice of this fact, which is which is generally cognizable and contained in Employment Department records. *See* http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/default.aspx. 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.

⁴ We take notice of this fact, which is generally cognizable and contained in Employment Department records. *See* http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/Section-3-Maintaining-Eligibility.aspx. 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.

DATE of Service: December 23, 2016

NOTE: This decision reverses hearing decisions 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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