

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

*Reversed
No Disqualification*

PROCEDURAL HISTORY: On November 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154233). Claimant filed a timely request for hearing. On November 30, 2016, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for December 14, 2016. On December 14, 2016, ALJ S. Lee issued Hearing Decision 16-UI-72973, dismissing claimant's hearing request for failure to appear at the hearing. On December 23, 2016, claimant filed a timely request to reopen. On February 2, 2017, ALJ Micheletti conducted a hearing, and on February 6, 2017, issued Hearing Decision 17-UI-76339, granting claimant's request to reopen and affirming administrative decision # 154233. On February 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 17-UI-76339 allowing claimant's request to reopen the hearing. EAB therefore confined its review to whether claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

EVIDENTIARY MATTER: Hearing Decision 17-UI-76339 states that Exhibits 1 and 2 were admitted into evidence, but no documents were marked in the record or were admitted into evidence. The ALJ identified the November 30, 2016 Notice of Hearing for the first hearing and claimant's December 23, 2016 motion to reopen as the two documents comprising Exhibit 1. Audio Record at 3:13 to 3:40. The ALJ stated that he intended to admit those documents into evidence. Because these documents are readily identifiable from the hearing and are necessary to complete the record under OAR 471-041-0090(1) (October 29, 2006), EAB admits the two documents into the record as EAB Exhibit 1. A copy of EAB Exhibit 1 is served to each party along with this decision. Any party who objects to our admitting EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record. Claimant also submitted copies of text messages at hearing and those documents may have been the subject of the reference to Exhibit 2 in Hearing Decision 17-UI-76339. Those documents were not identified during the hearing, marked or

admitted into evidence. Because the content of the documents was read into the record during the hearing, it is not necessary to admit those documents as an exhibit.

FINDINGS OF FACT: (1) Dungarvin Oregon, LLC employed claimant from March 23, 2016 until October 3, 2016 as a residential trainer in a group home.

(2) Claimant originally worked in the employer's group homes in Eugene, Oregon. In July 2016, claimant requested to transfer to the employer's group homes in Portland, Oregon. In August 2016, the employer granted claimant's request. The employer's Portland program director asked claimant to contact her when she was available to begin training for her job. The employer expected claimant to maintain communication with the employer and begin work in Portland within a reasonable time after leaving Eugene. Claimant understood the employer's expectation as a matter of common sense. The initial agreed start date was September 1, 2016.

(3) During August 2016, claimant arranged housing and childcare for her minor son in Portland, and moved out of her home in Eugene. Claimant needed daycare to work in Portland because she was to work a shift from 3:00 p.m. to 11:00 p.m. At the end of August, claimant learned that the housing and childcare she had arranged was not available. Claimant moved in with her mother temporarily. Claimant was not able to secure childcare at that time.

(4) On August 30, 2016, the employer's Portland program director sent claimant a text message asking claimant if she was still interested in the Portland position. Claimant responded on September 2, 2016 that she was still interested in the Portland position, but was "running around crazy" and "feeling overwhelmed" while trying to enroll her son in school and find permanent housing in Portland. Claimant texted that she would "let [the director] know" when she was available. The director texted to claimant, "Please keep me posted." Audio Record at 38:49 to 39:28.

(5) On September 14, 2016, the program director sent claimant a text message stating, "Just checking in wondering if you have a date on when you can begin employment up here. Based on policy . . . I have to either put in a leave of absence or terminate employment so let me know what your plan is as soon as you possibly can." Audio Record at 26:59 to 27:14. Claimant responded that day, "Leave of absence I'm sorry this trying to find a place is stressing me all the way out." Audio Record at 27:15 to 27:33.

(6) To request a leave of absence, the employer required employees to complete paperwork requesting the leave through the employer's human resources department. The employer did not respond to claimant's text message on September 14 regarding a leave of absence, did not inform claimant at that time that she had to complete a formal request through human resources, or tell claimant that her request was denied.

(7) During September 2016, claimant continued to look for permanent housing and daycare in the Portland area. Claimant was homeless for two weeks during September until she returned to live with her mother. Claimant was suffering from depression. She was unable to secure daycare during September 2016.

(8) On October 3, 2016, the project director sent claimant a text message stating, “Unfortunately due to the amount of time that has gone by we will be processing your termination today.” Audio Record at 27:24 to 27:34.

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

In Hearing Decision 17-UI-76339, the ALJ concluded that claimant quit work, and was not discharged, reasoning that “the employer was willing to allow claimant to continue her employment, but claimant was unwilling or incapable of returning to work.”¹ Having found that claimant voluntarily left work, the ALJ further concluded that claimant was disqualified from receiving benefits because she failed to show good cause for leaving work when she did, having failed to pursue the reasonable alternative of formally requesting a leave of absence from the employer. We disagree with the ALJ’s determination that claimant voluntarily left work and that she was disqualified from receiving benefits.

Work Separation. The standard for characterizing a work separation as a discharge or a voluntary leaving is set out at OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the 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). “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.*

On September 14, 2016, when given the choice between ending her employment or taking a leave of absence, claimant chose to request a leave of absence. Based on the text message exchange with the director on September 14, claimant believed she was on a leave of absence as of that date. Audio Record at 46:40 to 47:02. Thus, claimant’s failure to contact the employer between September 14 and October 3 was due to her misunderstanding, and not an unwillingness to continue the employment relationship. The employer’s text message on October 3, 2016 stated that it was processing claimant’s termination that day, showing that it would not allow claimant to continue working after that date. Claimant’s work separation therefore was a discharge on October 3, 2016.

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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v.*

¹ Hearing Decision 17-UI-76339 at 4.

Employment Division, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she failed to contact the employer in a timely manner regarding her start date for work in Portland. Although the employer may have had concerns about claimant's lack of communication prior to September 14, 2016, it continued to employ her without interruption until October 3, after she failed to contact the employer from September 15 through October 3. Claimant's failure to contact the employer after September 14 was, therefore, the final incident that led to claimant's discharge, and the initial focus of the discharge analysis. Only if EAB concludes that conduct was willful or wantonly negligent would EAB analyze prior incidents to determine if that conduct was excused under the provisions of OAR 471-030-0038(3)(b).

The employer reasonably expected claimant to maintain contact with it regarding her start date in Portland, and claimant knew or should have known that expectation based on her conversations with the Portland program director and as a matter of common sense. Although the employer's program director testified that claimant knew from training at hire that she had to request a leave of absence by completing paperwork with the human resources department (Audio Record at 41:05 to 41:56), claimant testified that she believed she was on an employer-approved leave of absence beginning on September 14 (Audio Record at 46:40 to 47:02). We find more likely than not that claimant reasonably believed she was on a leave of absence, and not required to contact the employer between September 14 and October 3 because, during that time period, the employer did not tell claimant that she needed to take additional steps to request a leave of absence or that her request was denied. The employer thus failed to show that claimant knew or should have known she needed to do more to request a leave of absence or that her request was denied. Absent such a showing, the employer failed to establish that claimant's lack of communication was misconduct, and not a good faith error. Moreover, the record shows that claimant's unavailability for work was based on exigent circumstances, and not misconduct, because she was suffering from depression and did not have permanent housing or childcare during the time she missed work.

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

DECISION: Hearing Decision 17-UI-76339 is set aside, as outlined above.²

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

DATE of Service: March 23, 2017

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,

² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.