

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0273

Reversed
No Work Separation
No Disqualification

PROCEDURAL HISTORY: On December 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131109). Claimant filed a timely request for hearing. On February 9, 2017, ALJ Lohr conducted a hearing at which the employer failed to appear, and on February 9, 2017 issued Hearing Decision 17-UI-76943, affirming the Department's decision. On February 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Advantage Home Care, Inc. employed claimant as a caregiver beginning on September 13, 2013.

(2) Sometime around July 2016, another of the employer's caregivers was unable to perform work and claimant took over some of that caregiver's assigned duties. After claimant assumed those duties, claimant worked Mondays, Tuesdays, Wednesdays and Fridays from 11:00 a.m. to 8:00 p.m. and from 9:00 to 10:00 p.m., or forty hours per week. On Sunday, October 2, 2016, the employer's office manager told claimant that the caregiver whose duties claimant had taken over was returning to work and claimant would no longer be working the shifts she had been assigned on Mondays, Tuesdays, Wednesdays and Fridays. The manager told claimant that, beginning that week, she would be working only twelve hours per week. When claimant told the manager she needed to work more hours, the manager told claimant that the employer did not have any additional hours to give her.

(3) On Tuesday, October 4, 2016, claimant was scheduled to work a three hour shift for a client. Claimant was scheduled to work another three hour shift for the same client later that week. During the shift on October 4, 2016, the client's wife called the employer and told the office manager that she was sending claimant home because she did not think claimant had the physical strength to shower her husband or provide necessary care for him. The wife told the employer that she did have any other work for claimant to perform. With the loss of this client, claimant's weekly hours would be reduced to six.

(4) Claimant left the client's residence and went directly to a local employment office to apply for benefits. Claimant applied for benefits because her hours had been reduced to six per week and not because the work relationship had been terminated. When claimant called the office manager to inform her that she was applying for unemployment benefits, the manager asked claimant if she wanted to remain in the employer's system to be available for work as it came up. Claimant replied "absolutely." Audio at ~17:28. After October 4, 2016, claimant continued to work six hours per week and remained in touch with the employer in the event it had work for her. After October 14, 2016, the employer did not have any more hours to give to claimant.

CONCLUSIONS AND REASONS: There was no work separation and claimant is not disqualified from benefits based the circumstances surrounding a work separation.¹

ORS 657.176(1) provides that an individual is not disqualified from benefits if a separation or suspension from employment was on terms that are not disqualifying. An individual is disqualified from benefits if, among other things, the individual was discharged for misconduct connected with work or voluntarily left work without good cause. ORS 657.176(2)(a); ORS 657.176(2)(c). In Hearing Decision 17-UI-76943, the ALJ concluded for unspecified reasons that claimant and the employer's work relationship had been severed by claimant's voluntarily leaving, and claimant was disqualified from benefits because she left work without good cause. Hearing Decision 17-UI-76943 at 2. We disagree that there was any work separation between claimant and the employer and, disagree that claimant was, or could have been, disqualified from benefits due to the circumstances of an alleged work separation.

The standard for determining if a work separation occurred is set forth in OAR 471-030-0038(2) (August 3, 2011). If the claimant could have continued to work for the employer for an additional period of time after the work separation occurred, 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).

Claimant did not contend that the employer discharged her or that that the employer was unwilling to allow her to continue working for it, but only that the employer reduced her hours due to circumstances beyond its control. Audio at ~16:36. Indeed, claimant asked and the employer agreed to keep claimant in its system so it could give her more work as it became available after October 4, 2016. Audio at ~17:28. Claimant did not contend that she quit work, but expressed her willingness to continue working for the employer on and after October 4, 2016. In fact, claimant continued working for the employer after October 4, 2016 until the employer had no additional hours available. Audio at ~23:45. On this record, applying the standard in OAR 471-030-0038(2), there was no work separation. Claimant did not apply for unemployment benefits because there had been a work separation initiated either by her or the employer, but to obtain replacement income for the hours she had lost. Because there was no work

¹ Despite that claimant might not be disqualified from benefits due to the circumstances surrounding a work separation, she might not be eligible to receive benefits for other reasons, including, for example, that she was not unemployed or she had earnings greater than her weekly benefit amount. *See e.g.*, ORS 657.100(1), ORS 657.150(6).

separation, claimant may not be disqualified from benefits based on the circumstances surrounding a purported work separation.²

DECISION: Hearing Decision 17-UI-76943 is set aside, as outlined above.³

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

DATE of Service: April 13, 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, 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.

² *See* footnote 1.

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.