

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0410

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133335). Claimant filed a timely request for hearing. On March 16, 2017, ALJ S. Lee conducted a hearing, and on March 22, 2017 issued Hearing Decision 17-UI-79430, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On April 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information that was not part of the hearing record, but the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing. Under OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Edible Arrangements employed claimant as a manager and an arranger from June 16, 2014 until January 13, 2017. The employer's business picked up significantly around holidays associated with gift-giving.

(2) Sometime before Christmas 2016, claimant had some discussions with one of the co-owners about wanting a raise in pay.

(3) Sometime around December 22, 2016, claimant informed one of the co-owners that she could not continue "doing this" for the employer at her current rate of pay. Audio at ~27:10. Claimant notified the co-owner that she was giving her 30 days' notice. *Id.* Sometime between December 26 and December 31, 2016, both co-owners visited the workplace to distribute bonus checks to employees, including claimant. At that time, claimant made statements to the co-owners that led them to think she

intended to quit before the next big holiday for the employer, which was Valentine's Day 2017. Subsequently, other employees told at least one of the co-owners that claimant was going to leave work at the end of January 2017.

(4) On January 13, 2017, both co-owners met with claimant and discharged her. At that time, the co-owners believed that claimant's plan was to leave work on January 31, 2017. The co-owners discharged claimant on January 13, 2017 because they wanted ample time to make staffing arrangements necessary for the employer to have a new team, without claimant, trained and ready before the Valentine's Day holiday, February 14, 2017.

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

At hearing, the employer's witnesses, the two co-owners, contended that claimant informed them and other staff members that she intended to quit work on January 31, 2017, two weeks before Valentine's Day 2017 and that, as a consequence, the employer discharged claimant on January 13, 2017. Audio at ~16:04, ~17:08, ~17:15. Claimant contended that, while she had complained about the hours she worked during Christmas season 2016, she told neither the co-owners nor other staff that she was quitting work before Valentine's Day 2017 or on January 31, 2017 and that, inexplicably, the employer discharged her on January 13, 2016 for unknown reasons. Audio at ~9:43, ~22:36, ~22:45. Both parties strenuously disputed the testimony of the other party about whether claimant had planned to leave work and their respective testimony on this matter is not reconcilable. However, we need not resolve this matter since the employer agreed with claimant that it discharged claimant on January 13, 2017 more than 15 days in advance of the date that the employer's witnesses both testified was claimant's planned date of leaving of January 31, 2017. While ORS 657.176(8) sets forth certain circumstances when a discharge that intervenes between an announced voluntary leaving and the planned date of the leaving may be disregarded and the work separation treated as if the discharge had not occurred, that exception requires that the discharge occur no more than 15 days before the date of the planned voluntary leaving. ORS 657.176(8)(c). Given that claimant's discharge occurred 18 days before the date the employer contended would have been claimant's last day, the exception of ORS 657.176(8) would not be applicable even if the employer's account of the circumstances surrounding the work separation is accepted. Accordingly, whether claimant is or is not disqualified from benefits depends upon the reason(s) that claimant was discharged.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. 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 co-owners testified that the employer discharged claimant on January 13, 2017 because it needed ample time to organize and make staffing arrangements before Valentine's Day, 2017 that took into account what the employer thought was claimant's upcoming departure from work. However, it was not a willful or a wantonly negligent violation of the employer's standards for claimant to have announced, as the employer contended, that she planned to leave work by a particular date, even if that date would

occur immediately before a particularly busy time for the employer. Because the employer raised no other reasons for discharging claimant, and none are discernible on this record, the employer did not meet its burden to show that it discharged claimant for misconduct.

The employer discharged claimant but it did not show that claimant engaged in misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-79430 is affirmed.

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

DATE of Service: May 1, 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.

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