EO: 200
BYE: 201749

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0434

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 11181). Claimant filed a timely request for hearing. On April 5, 2017, ALJ Snyder conducted a hearing, and on April 10, 2017 issued Hearing Decision 17-UI-80657, concluding the employer discharged claimant, but not for misconduct. On April 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but did not certify that it provided a copy of that argument to claimant as required by OAR 471-041-0080 (October 29, 2006). The employer's written argument also contained information that was not offered into evidence at the hearing, but the employer did not state why it did not offer this information during the hearing or otherwise show that factors or circumstances beyond tis reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For both of these reasons, EAB did not consider the employer's written argument or the new information it sought to present.

FINDINGS OF FACT: (1) Nookie's Restaurant & Sports Bar employed claimant from April 6, 2014 until July 5, 2016.

(2) Throughout her employment, claimant generally worked week day evenings. Sometime before July 2016, claimant had issues with her ex-husband that sometimes required the employer to change her schedule on short notice to accommodate her needs. Claimant perceived that she generally had a "positive relationship" with the employer's manager.

(3) On July 1, 2016, claimant reported for a scheduled shift. The manager noticed that claimant appeared "distracted" and asked her if she wanted to end her shift and go home. Claimant said she did not want to go home. Shortly thereafter, claimant thought the manager was trying intentionally to aggravate her. Claimant then told the manager that she needed to go home and, with the manager's permission, she did so. When claimant left the restaurant, she did not know her schedule for the work week beginning on Monday, July 5, 2016 because the employer had not yet posted it.

(4) On July 2, 2016, claimant called the restaurant and informed the manager that she was unable to work her shift scheduled for July 3, 2015 because she lacked child care. Between July 2, 2017 and July 5, 2016, claimant called the restaurant to determine the shifts she was expected to work in the work week beginning July 5, 2016, but was told that the schedule had not yet been posted and her work schedule was not known.

(5) On July 5, 2016, the employer's manager called claimant shortly after 12:00 noon and left a message asking why claimant had not reported for a scheduled shift beginning at noon. Claimant called the manager sometime around 12:15 p.m. and told the manager she had not yet seen the schedule and had not known she was expected to work that day. Claimant told the manager that she would come in to work immediately. The manager told claimant in a harsh and peremptory tone, "I'm sick of your excuses. Don't bother to come in," and then informed claimant that she would not be allowed back on the restaurant premises. Audio at ~21:41, ~29:05. Immediately after making these statements, the manager hung up the phone, which did not allow claimant to say anything in response. Audio at ~21:41. Claimant interpreted the manager's statements, the tone of her voice and her action in abruptly hanging up the phone to mean that claimant was discharged. Although claimant was scheduled to work on July 6 and 7, 2017 and the manager knew that claimant had not seen the schedule and did not know that she was expected to work on those days, the manager did not inform claimant of that scheduling. Shortly after the manager had hung up on her, claimant sent a text message to the manager stating, "Good, after the way you treated me, I'm not coming back there. Audio at ~29:20.

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

Claimant contended at hearing that the manager discharged her in their July 5, 2016 phone conversation. Audio at ~21:55, ~24:00, ~25:50, ~27:00, ~29:05. In contrast, the employer contended that claimant quit work by the text message she sent to the manager shortly after their phone conversation was ended by the manager's hanging up on her. Audio at ~11:54, ~12:44, ~16:02, ~46:20. Because of this conflict in the parties' positions, the first issue this case present is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). However, 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).

The employer did not dispute claimant's account of her phone conversation with the manager on July 5, 2016 and claimant did not dispute the substance of the text message she sent to the employer following that call. Nor did the employer's witnesses dispute that up until the July 5 call, the manager had been lenient and understanding in accommodating claimant in the work schedules that were created. While the manager might have been as stern, harsh and abrupt as she was with claimant on July 5 because she had already arranged for another employee to cover claimant's shift and did not actually intend to discharge claimant by what she said, her subjective intention is not dispositive on the work separation issue. The issue is whether, on these facts, a reasonable person in claimant's position would have concluded that the manager's words were words of discharge regardless of what the manager subjectively intended. *See Van Rijn v. Employment Department*, 237 Or App 39, 238 P3d 414 (2010) (where manager told claimant to "fucking leave" when he was a few minutes late to work, claimant was

discharged if a reasonable person would have concluded based on those words that he or she would not be allowed to continue to work for the employer).

Here, the manager's tone and approach to claimant were uncharacteristically harsh, her statements were unqualified, included a prohibition against claimant ever again being allowed on the restaurant premises and were followed up by her hanging up on claimant before claimant was able to respond in any way. That the manager intended by her statements to discharge claimant is supported by her failing to inform claimant of her next supposedly scheduled work days, when she knew claimant had not seen the work schedule for that week, and by the stridency with which she testified at hearing that it was an employee's responsibility to know her own work schedule and not the manager's responsibility to inform employees of the schedule on an ad hoc basis. Audio at ~39:04. While the employer's witnesses seized on the text message that claimant sent to the manager very soon after the manager had hung up on claimant as evidencing claimant's affirmative intent to leave work, viewed against the backdrop of the conversation that had just ended, claimant's text message most reasonably appears to be an attempt to continue that conversation and an expression of claimant's anger at what she interpreted as an unfair discharge of her and an acknowledgement that she thought she had been fired. That the manager did not respond to the text message, and did not attempt to disabuse claimant of what she thought had just occurred is telling evidence that the manager indeed meant to discharge claimant by the words she spoke during the July 5 conversation with claimant. On this record, the weight of the evidence shows that claimant did not quit, but that the manager intended to and did discharge her on July 5, 2016.

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 has the burden to show claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On this record, the only discernible reason for the employer discharging claimant on July 5, 2016 was that claimant did not show up for her scheduled shift. The employer did not dispute that its work schedule for the work week beginning on July 5, 2016 had not been posted as of July 1, 2016, the last day claimant worked prior to July 5, 2016. The employer also did not dispute that claimant called two coworkers after July 1, 2016 to learn when she was scheduled to work in the upcoming work week and they were unable to tell her. The employer further did not dispute that claimant typically did not work afternoon shifts as she was scheduled for on July 5, 2016. In light of these facts, claimant took reasonable steps to ascertain her work schedule for the work week beginning July 5, 2016 and that she did not know she was on the schedule to begin work at 12:00 noon on July 5, 2016 and her failure to timely report that day was not the result of any willful or wantonly negligent behavior on her part. On this record, the employer did not meet its burden to show that claimant engaged in misconduct.

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

DECISION: Hearing Decision 17-UI-80657 is affirmed.

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

DATE of Service: May 12, 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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