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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
2017-EAB-0638

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92445). Claimant filed a timely request for hearing. On April 28, 2017, ALJ Amesbury conducted a hearing, and on May 4, 2017 issued Hearing Decision 17-UI-82550, concluding the employer discharged claimant, but not for misconduct. On May 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Core Communications Group, Inc. employed claimant from April 1, 2014 to February 28, 2017. Claimant was employed as a co-owner, secretary and vice president of the employer's business.

(2) The employer's three co-owners, including claimant, initially agreed each would work approximately six hours per day and 30 hours per week. They did not enter into any written agreements to that effect or create any attendance policies requiring that they each do so. They agreed that "as long [as] you get your work done and everybody pulls their own weight that if you had time off you could take the time off." Transcript at 20.

(3) In 2016, claimant missed 58 days of work for personal and medical reasons. The other co-owners felt that they were covering a disproportionate amount of office hours as compared to claimant, and that claimant's attendance was causing him to inadequately perform his work. In mid-2016, the co-owners hired employees to assist claimant with his duties. In mid- and late-2016, the co-owners warned claimant that his performance was inadequate and he was not spending adequate time working. They thought claimant's personal life had overtaken his ability to fulfil his responsibilities at the company.

(4) In January 2017, the other co-owners began the process of figuring out how to relieve claimant of his duties and co-ownership of the business. It took approximately six weeks to "finalize that process and come up with a date that we were actually going to relieve [claimant] of his duties." *Id.*

(5) At approximately 10:30 a.m. on February 27, 2017, a co-owner told claimant that the co-owners "no longer wanted to do business with me" because he was "not acting like an owner." Transcript at 5. The co-owner presented claimant with a letter that stated, "We are informing you that your employment . . . is being terminated, with the effective date of February 28, 2017. Your termination is the result of poor performance . . ." Exhibit 1. The co-owners offered to purchase claimant's shares in the business. Claimant collected his personal items from the workplace and left.

(6) On February 27, 2017 at 1:59 p.m., the employer emailed claimant a "Proposal for Continued Work." The proposal was an outline of the kinds of duties claimant could perform if he accepted the proposal, and remuneration rates for those duties. The employer had not defined whether the new position would involve claimant working as a contractor or employee, determined the hours of work, or established a start date and other conditions of the work. Claimant did not accept or reject the proposal.

(7) The other co-owners believed claimant was going to cover the office hours on February 28, 2017 by working remotely, but claimant did not understand that to be the case. On March 1, 2017, claimant came to the office to collect his final check; claimant indicated at that time that he was going to continue to work with a particular client, but the other co-owner said he was not.

(8) Claimant did not work for the employer after February 27, 2017, and his discharge was effective February 28, 2017. Claimant and the employer never again communicated about the employer's "Proposal for Continued Work."

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, but not for misconduct.

"Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a) (August 3, 2011). 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). 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).

There is no dispute that the employer unilaterally decided to end claimant's employment, as set forth in a termination letter the employer presented to claimant on February 27th, which makes the work separation a discharge. The termination letter was not conditional and did not purport to end the employment relationship unless claimant agreed to continue working in a different capacity; rather, it unambiguously ended claimant's employment, effective on a particular date. It was not until after the employer notified claimant of his discharge that the employer presented claimant with its "Proposal for Continued Work." The "Proposal" set forth an outline of a possible array of duties and remuneration rates but did not define whether the proposal was for employment or work as a contractor, nor did it set forth other conditions of any possible "continued work," such as a start date or other indication that the employer intended that the employment relationship with claimant continue uninterrupted despite claimant's discharge. It therefore appears on this record that the employer ended claimant's employment by discharging him, and the "Proposal for Continued Work" amounted to a potential offer of a new relationship between claimant and the employer rather than a demotion, transfer or continuation of the existing employment relationship. For those reasons, the fact that the employer later

presented claimant with a "Proposal for Continued Work" that claimant neither expressly accepted nor rejected did not change the work separation from a discharge to a voluntary leaving.

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) 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 discharged claimant based upon the conclusion of two co-owners that claimant was not spending enough time at work and, therefore, was not adequately performing his duties. Although the co-owners had come to an understanding about the amount of work they were each expected to do and how much time they were expected to do it, the understanding was informal and subject to the discretion of each co-owner as to how and when to perform the work, whether the co-owner felt his work was caught up, or whether each co-owner wanted to take time off work. The employer did not have an attendance policy applicable to the co-owners, nor does the record show that claimant was required to work any particular set of scheduled hours or accomplish particular tasks by any particular deadlines. In a discharge case, the employer bears the burden to prove by a preponderance of the evidence that claimant acted willfully or with wanton negligence to violate the standards of behavior the employer had the right to expect of him. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Although it is apparent that the co-owners reached consensus that claimant's performance and attendance were substandard, in the absence of evidence that claimant was both aware of the employer's specific expectations and acted willfully or with wanton negligence in failing to meet those expectations, we cannot conclude that his discharge was for misconduct. Claimant is not, therefore, disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-82550 is affirmed.

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

DATE of Service: <u>June 14, 2017</u>

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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