

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0678

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83907). The employer filed a timely request for hearing. On May 25, 2017, ALJ Lohr conducted a hearing, and on June 1, 2017 issued Hearing Decision 17-UI-84636 affirming the Department's decision. On June 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer's argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) All StarZ Technical Services employed claimant as a senior recruiter and account manager from February 27, 2013 until December 31, 2016. The employer was a staffing agency that arranged temporary job placements for professionals, such as engineers and surveyors. The employer placed professionals in jobs in several states.

(2) When the employer hired claimant, she lived in Gresham, Oregon. After hire, claimant worked remotely from her home in a "virtual office." Transcript at 9. The states in which claimant placed employees were Oregon, Washington, California and Tennessee. Claimant was the employer's only representative in Oregon and claimant's home was the employer's principal place of business in Oregon. The employer made a financial investment to establish its Oregon operations based on the location of claimant's home in Oregon. The employer's owner was claimant's supervisor.

(3) The employer expected claimant to notify the employer of any changes to her contact information, including her home address and telephone number. Claimant understood the employer's expectations. There was no employment contract between claimant and the employer setting forth conditions of

claimant's employment. Claimant thought she was permitted reside outside the geographic boundaries of Oregon because she worked remotely and made placements in several states.

(4) Sometime in September 2016, claimant mentioned to the owner that she was trying to sell her house in Oregon and wanted to move somewhere in Washington so she could avoid state income taxes. Afterward, claimant kept the owner informed about her progress in selling her home and locating a property in Washington. The owner did not express any concerns about claimant leaving Oregon and moving to Washington. On approximately September 22, 2016, claimant received an offer on her house in Gresham. Sometime before approximately November 21, 2016, claimant made an offer on a house located in Vancouver, Washington. On November 21, 2016, the employer required, and claimant completed, a current "contact information form." Exhibit 1 at 2. Because claimant was still residing in the house in Gresham as of that date and the purchase of the Vancouver house had not yet closed and could still fall through, claimant listed her address as that of the Gresham house on the contact information form.

(5) Sometime shortly before November 23, 2016, claimant mentioned to the staffing administrator she was moving to Vancouver. Claimant asked the staffing administrator not to tell the owner until the move was "official" and the purchase of the Vancouver house had closed. Transcript at 32. On approximately November 23, 2016, the transactions in which claimant sold the Gresham house and purchased the Vancouver house both closed. On that day, claimant changed her address with the employer for payroll purposes and told the owner it was definite that she was moving to Vancouver. Neither employer representative expressed concern about claimant's planned move from Oregon to Washington. On approximately November 27, 2016, claimant took possession of the Vancouver house and moved into it. Claimant planned to continue working for the employer on the same accounts as she had from the Gresham house after she relocated to Vancouver.

(6) On December 6, 2016, the employer sent claimant a final warning letter. Although the owner acknowledged in the letter that claimant had told her about selling her house in Oregon and moving to Vancouver, Washington, the owner noted that claimant having a physical residence address in Oregon was required for the employer to conduct business in Oregon and that she had not authorized claimant to work out of a residence in Vancouver. Exhibit 1 at 2. However, the letter did not express any intention to discharge claimant, but stated that the employer would allow claimant to work in its Kent, Washington office, which was several hundred miles from Vancouver, if she so chose. *Id.* at 3.

(7) On December 6, 2016, while speaking with the director of human resource, claimant referred to the director as "dear." Exhibit 1 at 6; Transcript at 24. Sometime before December 12, 2016, claimant told the person who would be her supervisor if she accepted the position in Kent that she thought the owner was trying to push her out by offering that position and wanted to force her to quit. Exhibit 1 at 6; Transcript at 25.

(8) On December 12, 2016, the employer sent claimant a letter notifying her that the employer had rescinded its offer of the position in Kent. The letter stated that the employer had the following objections to claimant's behavior: she did not openly communicate to the employer that she intended to move from Oregon to Washington before she did so; she asked a coworker in which she confided that she planned to leave Oregon not to inform the owner, which the employer considered "deceptive;" she gave her Gresham address in the "contact information form" that she completed on November 21, 2016

as being her current address, which the employer also considered deceptive; she called the human resources director “dear,” which was “disrespectful;” and she made “negative, complaining comments” to the supervisor in Kent about the owner. Exhibit 1 at 5-6. The letter further stated that claimant’s employment would end on December 31, 2016. Exhibit 1 at 5. On December 31, 2016, the employer discharged claimant.

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

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).

While the employer’s witness contended either that claimant was obliged to seek permission from the employer before moving from Oregon or, at the very least, to let the owner know in advance, the witness did not cite how the employer communicated this expectation to claimant. Transcript at 7, 13, 16, 22. It appears the employer thought claimant should have inferred the expectations from the fact that she was the only employee working in Oregon, and from the investment the employer made to conduct business in Oregon. Transcript at 6, 16. However, claimant did not have an employment contract setting out any prohibition against moving, and, absent a clear prohibition, it did not occur to her that she was prevented from moving out of state since she worked remotely from her home and could continue working on the same accounts whether from a home in Oregon or Washington. Transcript at 17, 36, 39-40. On this record, the employer did not demonstrate that claimant was conscious or should have been aware that she was not allowed to move without the employer’s permission. Nor, on this record, did the employer demonstrate that claimant did not provide the employer with advance notice, since claimant had spoken with the employer about her desire and efforts to move from Oregon since September 2016. As such, the employer did not show that claimant’s moving without giving advance notice to the employer or its owner was a willful or wantonly negligent violation of the employer’s expectations.

The employer’s witness also contended that claimant was deceitful, and trying to keep information from the employer about her move, when she asked her coworker not to tell the owner that she was moving and when she completed the “contact information form” on November 21, 2017 giving her Gresham address rather than the address she would have after she moved to Vancouver. Transcript at 13, 17. Assuming claimant was aware of an employer expectation against deception, the employer did not show that claimant was dishonest or had dishonest motives in either incident. With respect to the contact information form, the employer did not dispute that as of November 21, 2016, claimant was still living at the Gresham address and did not dispute that claimant did not at that time have a new address to include on the form because she had yet to take ownership and possession of the Vancouver house. Transcript at 28, 30-31, 33. With respect to claimant’s request that the coworker not inform the owner at that time that she was definitely moving to Vancouver, claimant stated she did not want to give specific information to the owner until the move was “official” and she was actually residing in the Vancouver house. Transcript at 32. Significantly, the employer’s witness did not dispute that claimant had been speaking openly to her about moving to Washington since early fall, and had been keeping the

owner updated on her progress in selling her Oregon residence and purchasing a new residence in Washington. Transcript at 29-33. Nor did the employer's witness dispute that sometime around November 23, 2016, the date that claimant closed on the Vancouver house, claimant told the owner she was definitely moving to Vancouver and changed her address with the employer for payroll purposes. Transcript at 31. Because the owner was informed that claimant was planning was planning to move to Washington significantly before the end of November 2016 and claimant told the owner her move was definite as of the date her purchase of the Washington house closed on November 23, 2016, it is difficult to conclude that claimant was attempting to deceive the employer, either by the manner in which she completed the contact information form or when she asked the coworker not to inform the owner until the move was "official." The employer did not show that claimant willfully or wantonly violated the employer's standards against deception.

With respect to the employer's final two contentions, it is not apparent why claimant's supposed reference to the human resources director as "dear" would, in and of itself, constitute misconduct. Absent information about the context in which the reference was made from which we could reasonably infer that claimant's use of that term was anything more than inadvertent on claimant's part, which the employer did not provide, there is insufficient evidence to show that claimant engaged in misconduct by the manner in which she referred to the human resources director. From the scant detail the employer provided about claimant's supposed "negative, complaining comments" about the owner, those comments plausibly were expressions of concern about her prospects of continued employment, and did not appear to have been disparaging toward the owner. The employer did not demonstrate that claimant's comments about the owner constituted willful or wantonly negligent violations of the employer's expectations.

Although the employer discharged claimant, it did not show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-84636 is affirmed.

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

DATE of Service: July 14, 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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