

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0786

Hearing Decision 17-UI-85765 Affirmed
No Disqualification
Hearing Decision 17-UI-85775 Affirmed
Eligible

PROCEDURAL HISTORY: On May 9, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding the employer discharged claimant but not for misconduct (decision # 144725) and the second concluding that claimant was available and actively sought work during the weeks of March 26, 2017 through April 29, 2017 (decision # 153050). The employer filed timely requests for hearing on both decisions. On June 14, 2017, ALJ Janzen conducted two hearings, the first at 2:30 p.m. on decision # 153050, at which claimant did not appear, and the second at 3:30 p.m. on decision # 144725, at which claimant appeared. On June 15, 2017, the ALJ issued two hearing decisions, the first affirming decision # 144725 (Hearing Decision 17-UI-85775) and the second affirming decision # 153050 (Hearing Decision 17-UI-85765). On July 3, 2017, the employer filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-85765 and 17-UI-85775. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0786 and 2017-EAB-0787).

EAB considered the employer's written argument when reaching these decisions.

FINDINGS OF FACT: (1) Trail Blazing Corporation employed claimant to perform various office duties from September 16, 2013 until January 20, 2017.

(2) During claimant's employment, she entered into a relationship with one of the employer's owners, who became her significant other. Sometime in December 2014, claimant gave birth to a child, whose father was the co-owner with whom she was involved. After giving birth, claimant's hours of work became "casual" and "flexible," and she began to work as needed and as the significant other requested. Audio of 2:30 p.m. Hearing at ~37:36. After December 2014, claimant's work hours decreased and claimant most often worked from home. During that time, claimant often did not report the hours that she worked for payroll purposes because the employer's business was slow and she did not want the employer to incur payroll expenses or because she worked only in very short increments of time. After December 2014, claimant continued to remain the principal email contact for many of the employer's vendors, performed the employer's credit card reconciliations and, as needed, performed marketing tasks and coordinated employee meetings and employee events.

(3) In August 2016, claimant reported she worked six hours. In September 2016, claimant requested that the employer pay her for some paid time off she had accrued to allow her to finance an upcoming vacation. Claimant did not tell the employer that she was cashing out her paid time off because she intended to leave work. In September 2016, claimant did not report any hours for payroll purposes. On October 5, 2016, the employer paid claimant for paid time off she had accrued. For October and November 2016, claimant did not report that she worked any hours for payroll purposes. In December 2016, the employer asked claimant to cover for the office manager, who was going to be absent on vacation. During that month, claimant reported 13.32 hours for payroll purposes. In addition to the office management work she performed during December 2016, claimant assisted in organizing the employer's holiday party and in issuing and mailing a marketing flyer for the employer's business.

(4) Sometime in early to mid-January 2017, claimant's significant other sold his ownership interest in the employer. Before January 20, 2017, the employer did not inform claimant if her employment would continue after the sale of the significant other's ownership interest. On January 20, 2017, the employer's office manager sent an email to claimant informing her that the employer needed to delete her work email account. In response, claimant sent an email stating, "Does this mean I'm being terminated as an employee?" Exhibit 2 at 2. The office manager replied on January 22, 2017, "Haha yes." *Id.* Claimant interpreted the office manager's message to mean that she was discharged.

(5) On January 22, 2017, the employer informed claimant that she was discharged, presumably as of sometime around January 20, 2017.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct. Claimant actively sought work during the weeks of March 26, 2017 through April 29, 2017.

The Work Separation. The first issue this case presents is the nature of claimant's work separation. The employer contended that claimant voluntarily left work at the time she cashed out paid time off she had accrued on October 5, 2016. Audio of 3:30 p.m. Hearing at ~10:56, ~13:02. In contrast, claimant contended the employer discharged her when the office manager notified her that her employment was terminated on January 22, 2017. Audio at 3:30 p.m. Hearing at ~30:26. The standard for properly characterizing a work separation is set out at OAR 471-030-0038(2) (August 3, 2011). 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). 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).

While claimant's hours may have decreased after December 2014 and claimant might have cashed out her accrued time off in October 2016, it is significant that the employer did not contend that claimant ever told any employer representative that she was quitting work, or that she did or said anything that manifested an unambiguous intention to quit work. Indeed, the employer asked claimant to cover for the absent office manager in December 2016, which strongly suggested that the employment relationship was continuing as of that time, and did not dispute that claimant might well have been working for the employer in September, October and November 2016 even if she was not reporting those hours for payroll purposes. Audio of 3:30 p.m. Hearing at ~54:09. The first objective manifestation of an intention by either party to sever the employment relationship was the office manager's communication to claimant on January 22, 2017, in response to claimant's inquiry, that claimant's employment had been terminated. Although the employer's witnesses testified that because the office manager did not have the authority to hire or fire any employees the implications of her email should be disregarded, it seems obvious that, by virtue of her position, the office manager did at least have the apparent authority to relay to claimant that the then-members of the employer's management had terminated the claimant's employment. Audio of 3:30 p.m. Hearing at ~17:23, ~53:22, ~56:15. The weight of the evidence in the record establishes that claimant's work separation was a discharge as of January 22, 2017, the date of the email confirming that claimant's employment had been terminated.

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 employer's witness testified that the employer had never issued any disciplinary warnings to claimant at any time during her employment. Audio at 3:30 p.m. Hearing at ~20:37. There is no discernible reason in the record for claimant's discharge that would constitute misconduct. On this record, the employer did not meet its burden to establish that it discharged claimant for misconduct and that she is disqualified from receiving unemployment insurance benefits.

Available and Actively Seeking Work. Based on a *de novo* review of the entire record underlying Hearing Decision 17-UI-85765, and pursuant to ORS 657.275(2), the ALJ's findings and analysis in Hearing Decision 17-UI-85765 are **adopted**.

DECISION Hearing Decision 17-UI-85775 is affirmed.
Hearing Decision 17-UI-85765 is affirmed.

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

DATE of Service: August 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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