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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-0854

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 114412). The employer filed a timely request for hearing. On June 28, 2017, ALJ Meerdink conducted a hearing, and on June 29, 2017, issued Hearing Decision 17-UI-86862, concluding that claimant voluntarily left work without good cause. On July 1, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

After the record closed, claimant submitted a copy of an April 26, 2017 letter from her chiropractor regarding restrictions on her work hours. This information was not offered into evidence at the hearing, and claimant did not ask that the ALJ to keep the record open after the hearing ended so she could submit the letter. EAB may consider new information that was not offered into evidence at the hearing only if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090(2) (October 29, 2006). Because claimant presented no reason why she was unable to offer the April 26 letter into evidence at the hearing, her request to have EAB consider this new information is denied.

EAB considered the employer's written argument to the extent that it was relevant and based on information received into evidence at the hearing.

FINDINGS OF FACT: (1) Castparts Employees Federal Credit Union employed claimant as a full time customer service representative from January 3 until May 2, 2017. Claimant was scheduled to work Monday through Friday, from 8:15 a.m. until 5:15 p.m.

(2) As a result of injuries incurred in a November 2016 vehicle accident, claimant suffered from neck, back and hip pain, and daily headaches. On April 27, 2017, claimant sent an email to her supervisor in which she explained that her chiropractor had restricted her to working 24 hours a week and that she could work on Tuesday, Wednesday and Thursday. In support of her request, claimant attached an April

26, 2017 letter from her chiropractor that explained why it was medically necessary for claimant to reduce her work hours to 24 per week.

(3) After receiving claimant's email, the employer asked that claimant contact it to discuss her request to reduce and change her work hours. Claimant did not report for work on April 28 or May 1, 2017.

(4) On May 2, 2017, claimant reported for work and met with her supervisor and the employer's chief executive officer (CEO) to discuss her work schedule. The employer explained that they could not accommodate claimant's request to work Tuesday, Wednesday and Thursday; because Monday and Friday were the busiest days of the week at the employer's credit union, the employer needed to have claimant work on those days. Claimant indicated a willingness to work on Monday and Friday, as long as her total scheduled work hours for the week were no more than 24. Claimant left the worksite after the meeting and performed no work for the employer after May 2.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

Work Separation: The employer's CEO testified that she believed claimant quit her job. Claimant, however, contended that the employer discharged her. As a result, it is necessary to determine the nature of claimant's work separation. 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) (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) (August 3, 2011).

The CEO testified that claimant "parted ways" with the employer after the May 2 meeting because she was not willing to commit to working on Monday and Friday. The ALJ then questioned the CEO as follows about the work separation:

> ALJ: Was it that [claimant] wasn't willing to commit to Monday Friday, so the employer said well, we're done' or the employer said will you commit to Monday Friday and she said no, I won't do that, I'm done.
>
> CEO: It would be more on the employer side although it wasn't real clear. It was a little bit of I'm not sure, I don't know…she couldn't commit, so there wasn't anywhere else to go. Audio recording 7:47 to 8:18.

Based on this record, we find that the employer was unwilling to allow claimant to continue working for it because it concluded that she would not agree to work on Monday and Friday. Claimant's work separation was therefore a discharge.

Discharge: 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.

As discussed above, we find that he employer discharged claimant because it concluded that she would not agree to work on Monday and Friday. Claimant, however, testified that the Tuesday, Wednesday, Thursday schedule she offered in her April 27 email was an "idea," and that at the May 2, meeting, she told the employer representatives that she was willing to work on Monday and Friday, so long as the total hours she worked each week did not exceed 24. Audio recording at 13:19, 14:40, 15:18. On this record, claimant's testimony that she indicated a willingness to comply with the employer's schedule requirements is equal to the employer's evidence that she refused to agree to work on Monday and Friday. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233(1976). Because the evidence regarding claimant's alleged unwillingness to work on Monday and Friday was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant engaged in misconduct by refusing to agree to the work schedule the employer required of her.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-86862 is set aside, as outlined above.

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

DATE of Service: <u>August 9, 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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