EO: 200
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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-1127

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 143126). The employer filed a timely request for hearing. On August 24, 2017, ALJ Micheletti conducted a hearing, and on August 30, 2017 issued Hearing Decision 17-UI-91536, affirming the Department's decision. On September 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB that contained information that was not part of the hearing record. The employer did not explain why it did not present this information during the hearing or show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the employer's new information, and considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Kidspire, a not-for-profit preschool, employed claimant as its head preschool teacher from November 1, 2014 until March 24, 2017. For the employer to provide preschool services to children, the head teacher was required to have a license issued by the Office of Childcare of the Oregon Department of Human Services (DHS). Claimant obtained and maintained the necessary license.

(2) The employer expected claimant to provide at least 90 days' advance written notice if she intended to resign her position as head teacher. Exhibit 1 at 2. Sometime around January 2017, claimant decided to resign because she was nearing completion of a course of graduate study and wanted to pursue employment opportunities related to the field in which she had studied.

(3) On January 27, 2017, claimant sent an email to the employer's director of operations to which a resignation letter was attached. The email and the letter stated that claimant's last day of work would be Friday, April 28, 2017. Exhibit 1 at 3, 4. On January 31, 2017, the director responded to claimant's email, stating that he would inform claimant of "what the transition will look like" after claimant's replacement had been identified and the re-licensing process for claimant's replacement had been commenced with the Office of Childcare. Exhibit 1 at 5. The email stated, "The goal [for the transition] will [be] no disruption of families and children." *Id.*

(4) By approximately the end of February 2017, the employer had settled on a replacement for claimant, contacted the Office of Childcare about the need for re-licensing, and learned that the Office of Childcare would conduct an on-site re-licensing visit on March 16, 2017. On March 1, 2017, the director of operations sent an email to claimant notifying her of these developments and identifying Friday, March 24, 2017 as a "possible proposed last working day" for claimant, but noting that April 7 and April 14 were also possible dates for claimant's final working day. Exhibit 1 at 6. On March 2, 2017 at 10:04 a.m., the director of operations sent another email to claimant stating that claimant's "last official working day" would be March 24, 2017. Exhibit 1 at 7; Exhibit 2 at 8. The email further noted that claimant should turn in her keys on March 31, 2017 and claimant would be paid through March 31, 2017. Exhibit 1 at 7.

(5) On March 2, 2017 at 10:59 a.m., claimant responded to the director's emails of March 1 and 2, 2017, stating that she had previously settled on April 28, 2017 as the effective date of her resignation and further noting that "based on the timeline you have provided [in the email of March 2, 2017] you are choosing to terminate my employment early – is that correct?" Exhibit 2 at 8. The director of operations did not directly reply to claimant's email.

(6) On March 6, 2017 at 5:33 p.m., claimant sent another email to the director of operations inquiring about whether the employer intended to discharge her earlier than the effective date of her resignation. Claimant stated in this email, "Please confirm that you are choosing to end my position March 31, a month earlier than the notice of April 28th that I provided." Exhibit 2 at 8. On March 6, 2017 at 6:19 p.m., the director replied to claimant by email, stating that because the employer had identified a replacement, and spring break was a natural time to effectuate a transition between claimant and her replacement, "it wouldn't have made much sense for us to transition at the end of April as you proposed." Exhibit 2 at 8. The director noted that "[w]e are accepting your resignation and replying with a modified date that will create a better opportunity for a transition." *Id.* On that same day, March 6, 2017, at 8:46 p.m., before claimant responded to the director's email, the director copied claimant on an email he sent to all of the parents of the children enrolled in the employer's preschool notifying them that claimant's last day was going to be March 24, 2017, and introducing claimant's replacement.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, on March 24, 2017.

The first issue in this case is the nature of the work separation. 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). 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). "Work" means "the continuing relationship between an employer

and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

It is undisputed that claimant notified the employer in an email sent on January 27, 2017 that she was resigning from work effective April 28, 2017, and that the date of the actual work separation was much earlier than the effective date that claimant announced, on either March 24 or 31, 2017. At hearing, the employer took the position that rather than discharging claimant in late March 2017, claimant and the employer mutually agreed to accelerate the date claimant would voluntarily leave work from April 28, 2017 to a date in late March 2017. Audio at ~11:13, ~16:48, ~17:40, ~20:50, ~35:30. While it is correct that if a claimant notifies the employer that claimant intends to resign from work on a particular date, and the claimant and the employer subsequently agree to accelerate the separation date, the separation remains a voluntary leaving, the facts in this case do not support that such a mutual agreement was reached between claimant and the employer. *See J. R. Simplot Co. v. Employment Division,* 102 Or App 523, 795 P2d 579 (1990); *Smith v. Employment Division,* 34 Or App 623, 579 P2d 310 (1978).

Here, in the notice of resignation that claimant submitted to the employer she identified April 28, 2017 as her planned leaving date, and when the director of operations notified her that March 24, 2017 better met the employer's transition needs for her last day at work, rather than acquiescing, claimant responded by asking twice if the employer meant to discharge her on that date. The employer's response to claimant's inquiry was only to reiterate that March 24, 2017 better met its transition needs and, before claimant could reply, to notify the preschool students' parents that March 24, 2017 would be claimant's last day of work. This sequence of events is far different from that in *J. R. Simplot* where, after claimant gave an effective date for his resignation of June 23, claimant asked his supervisor how long the supervisor wanted him to work, the supervisor told claimant he wanted claimant to work only until June 9 and claimant did not object. 102 Or App 523 at 527-528. It is also different from that in *Smith,* where claimant did not specify an effective date for her resignation, and after the employer met with her to discuss setting a firm date for her leaving, a date acceptable to both was explicitly agreed upon. 34 Or App 623 at 626-627.

By contrast in this case, claimant unequivocally selected a resignation date in her notice of resignation, never discussed alternate dates with the employer, never agreed to the alternate date selected by the employer, and never made statements that arguably could be interpreted as delegating to the employer the right to select the separation date. The employer's unilateral imposition of a last day for claimant's employment, its failure to discuss with claimant if she agreed to the date it had selected despite her inquiries of March 2 and March 6, 2017, and its publicizing that date to the students' parents without consulting claimant show that the employer imposed the date of March 24, 2017 as the effective date of claimant's work separation. On this record, claimant's work separation was a discharge on March 24, 2014.[1]

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

[1] The fact that the employer might have paid claimant through March 31, 2017 does not make March 31, 2017 the effective date of the work separation. On these facts, the date of the work separation remains March 24, 2017 because of the employer's unwillingness to allow claimant to continue working after that date. *See J. R. Simplot,* 102 Or App 523 at 527.

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 record shows the employer discharged claimant when it did because the employer had hired a replacement for claimant, that replacement had been licensed by the Office of Childcare and, in the employer's judgment, discharging claimant on March 24, 2017 would cause a lesser disruption to its operations than if it permitted claimant to continue working until April 28, 2017. Although the employer's reasoning was understandable, none of the factors on which it was based show that claimant engaged in disqualifying misconduct, and the record fails to show any other circumstances that would constitute misconduct on claimant's part. Accordingly, the employer did not meet its burden to show that it discharged claimant for misconduct.

At hearing, however, and relying on *Ennis v. Employment Division*, 37 Or App 281, 587 P2d 102 (1978), the employer argued that even if the employer was determined to have discharged claimant not for misconduct, claimant should receive benefits only for the period between the discharge date and claimant's planned voluntarily leaving date of April 28, 2017. Audio at ~36:23. The employer is correct that, considered in isolation, *Ennis* might be read to suggest that such a result would be appropriate. However, *Ennis* was superseded by the legislative enactment of ORS 657.176(8), which sets forth the circumstances under which the legislature determined that a discharge occurring between an announcement of a voluntary leaving and the planned date of the voluntary leaving may be disregarded.[2] It provides that if the discharge occurred no more than 15 days before a planned voluntarily leaving that would not have been for good cause, the work separation shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred, except that the individual is eligible for benefits for the period including the week in which the discharge occurred through the week prior to the week of the planned voluntary leaving date.

In ORS 657.176(8), the legislature specified the precise and limited circumstances under which an intervening discharge may be disregarded for purposes of adjudicating a work separation under the statutory scheme that was legislatively devised to govern unemployment insurance. The enactment of ORS 657.176(8) thus pre-empts the applicability of *Ennis* to claimant's situation, and ORS 657.176(8) does not apply because claimant's discharge occurred on March 24, 2017, more than 15 days before claimant's planned voluntary leaving date of April 28, 2017. And because claimant's discharge was not for misconduct, he is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-91536 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: <u>October 19, 2017</u>

[2] ORS 657.176(8) did not exist when *Ennis* was decided in 1978 and was not enacted until 1983. *See and compare* https://archives.oregonlegislature.gov/ORS_Archives/1977-Chapter657.pdf and https://archives.oregonlegislatue.gov/ORS_Archives/1983-Chapter657.pdf.

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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