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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-1261

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154044). Claimant filed a timely request for hearing. On October 10, 2017, ALJ Frank conducted a hearing, and on October 18, 2017, issued Hearing Decision 17-UI-94878, affirming the Department's decision. On November 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on information contained in the record.

FINDINGS OF FACT: (1) New Beginning Salon Spa employed claimant as a cosmetologist from July 26, 2008 to June 12, 2017.

(2) On February 10, 2016, claimant sustained a disabling injury to her wrist which was processed and accepted as a bona fide work injury under the Oregon Workers' Compensation Law, Oregon Revised Statutes (ORS) Chapter 656.

(3) In early June 2016, claimant filed a complaint with the Oregon Bureau of Labor and Industries (BOLI) against the employer for its refusal to allow lawfully required break and meal periods. After the complaint was filed, the employer continued to deny such break periods to claimant. Exhibits 8 and 9.

(4) On August 31, 2016, claimant was restricted from performing any work by her attending physician. Several times between August 31, 2016 and June 2017, claimant's attending physician released her to return to light duty work, each with changes in her work duty restrictions. Each time claimant was released to light duty work, claimant requested a return to employment with the employer within her

specified restrictions. Each time claimant requested such a return to employment, the employer denied the request. Consequently, claimant remained off work during that entire period.

(5) Between December 2016 and January 2017, a vocational rehabilitation consultant assessed claimant's job duties with the employer in part by speaking with a co-owner of the employer to obtain a job analysis. The co-owner provided inaccurate information to the consultant about claimant's job by minimizing the duties, difficulty, lifting and hourly requirements of the position. After claimant learned of the misinformation, she corrected it with the consultant before the final job analysis was completed.

(6) On June 6, 2017, claimant's attending physician released her to return to work, restricting her to no more than 20 hours per week with no duty restrictions. Claimant contacted the co-owner in question via email to request a return to work in accordance with the restrictions. On June 7, 2017, the co-owner asked claimant to contact her at the place of employment and when claimant did so, she was orally advised that she could work four five-hour shifts beginning on June 12, 2017. Claimant told the co-owner she was looking forward to returning but needed speak with her worker's compensation attorney "to make sure that everything was in line." Exhibit 1.

(7) On June 8, 2017, claimant spoke with her attorney who told her the employer was obligated under the Workers' Compensation Law to present a "bona fide job offer" in writing to claimant for approval by her physician before returning her to modified work after a workplace injury. Exhibits 1 and 7. He instructed claimant to request such a document from the employer. Claimant did so and also told the co-owner, per instructions from her attorney, that the employer's worker's compensation carrier would know exactly what was required under the Workers' Compensation Law before she could return to modified work. Exhibit 1.

(8) Claimant did not receive any response or the required "bona fide job offer" from the employer and consequently did not report for work on or after June 12, 2017. At no time subsequent did claimant, her attorney or her treating physician receive the required document.

(9) However, in July 2017, claimant's attorney notified her that the employer's worker's compensation carrier had contacted him, informed him that the employer did not want claimant to return to work and that it wanted to settle her worker's compensation claim. Exhibit 1. In August 2017, claimant and the employer settled claimant's worker's compensation claim which was accompanied by an agreement memorializing claimant's separation from employment. Exhibit 10.

(10) Continuing work with the employer was not available to claimant on or after June 12, 2017.

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

Work Separation. OAR 471-030-0038(2) (August 3, 2011) provides, in relevant part, as follows:

> (2) The distinction between voluntary leaving and discharge is:
>
> (a) If the employee could have continued to work for the same employer for an additional period of time the separation is a voluntary leaving of work;

> (b) 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.

"Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist, there must be some future opportunity for the employee to perform services for the employer; no continuing relationship exists if the employer does not have an expectation that a service will be performed. *See e.g.* Employment Appeals Board, 02-AB-2040, October 15, 2002, *citing* Employment Appeals Board, 97-AB-873, June 5, 1997.

In Hearing Decision 17-UI-94878, the ALJ concluded that claimant quit work without good cause, reasoning,

> Detailed evidence at hearing…shows that [claimant] was unwilling to continue working for the employer well prior to the [worker's compensation settlement]. By her own admissions at hearing and in writing, claimant refused to report for work as scheduled on and after June 12, 2017. Having already provided claimant with a work schedule, the employer's failure to furnish a "bona fide offer" of work did not serve to nullify this schedule or otherwise signify that continuing work was not available to claimant. An unwillingness to accept continuing employment [] is defined as a voluntary leaving.

Hearing Decision Hearing Decision 17-UI-94878 at 3. However, viewing the record as a whole, it appears that the employer was obligated under ORS 656.268 and OAR 436-060-0030 to comply with the law and provide claimant with a written "bona fide job offer" of modified work consistent with the attending physician's restrictions for the physician to sign off on before claimant was obligated to accept it. Exhibit 2. As claimant's attorney explained by affidavit, "The procedure is set forth specifically to ensure that the employer has work available that fits the employee's restrictions, as too many employees who return to work and are pushed by their employer to do their normal duties, when they have not been cleared to do so – the fear in [claimant's] case. Exhibit 2.

The record also shows that claimant was off work for almost a year due to her injury, had justifiable reasons for doubting the employer's business practices would comport with medical or legal restrictions, and had inquired about returning to work at least 3 times over many months and was repeatedly refused. When the employer finally said she could return to work and claimant asked for what appears from this record to be a standard written bona fide job offer setting forth the terms of her modified employment, the employer failed to respond, did not provide one and instead presented claimant with the separation agreement ending her employment and incentivizing claimant's signature with a payoff, albeit a small one. More likely than not, the employer was not willing to allow claimant to return to work even though claimant was willing to return if the employer complied with its legal requirements under the Worker's Compensation Law. Under OAR 471-030-0038(2)(b), the work separation was discharge that occurred on or about June 12, 2017.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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.

As the employer did not appear at hearing, the record fails to show why it chose to discharge claimant in the manner described. The employer may have had legitimate business reasons for its termination decision. However, it did not show that it discharged claimant because she willfully, or with wanton negligence, violated a reasonable employer expectation or willfully or wantonly disregarded the employer's interests.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-94878 is set aside, as outlined above.[1]

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

DATE of Service: December 7, 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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[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.