EO: 200
BYE: 201842

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
2018-EAB-0091

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80752). Claimant filed a timely request for hearing. On December 21, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 8, 2018. On January 8, 2018, ALJ S. Lee conducted a hearing at which the employer failed to appear, and on January 10, 2018 issued Hearing Decision 18-UI-100640, concluding the employer discharged claimant, not for misconduct. On January 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

In written argument, the employer presented new information that was not presented at hearing. The employer's application for review containing new information is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The record shows that OAH mailed notice of the hearing to the employer at its address of record with the Department. We therefore presume the employer received notice of the hearing. The employer did not explain why it failed to appear for the hearing or otherwise present the information contained in its application for review to OAH for consideration at the hearing. Because the employer did not show that circumstances beyond its reasonable control prevented it from presenting the information at the hearing, their requests to have EAB consider new information is denied.

FINDINGS OF FACT: (1) Mercy Med Transit LLC employed claimant as a medical transportation driver from January 17, 2015 until October 27, 2017. Claimant's duties included driving the employer's vehicle to transport clients to and from medical appointments.

(2) At hire, claimant attended a methadone clinic six days per week. Claimant's health insurance reimbursed the employer for its costs associated with claimant attending the methadone clinic. By

October 2017, claimant was only required to attend the methadone clinic two days per week because she had remained drug free for three years.

(3) On October 19, 2017, the employer suspended claimant from work while it investigated a complaint a client had made regarding claimant.

(4) On October 26, 2017, claimant tried to contact the employer's owner by text and telephone to ask if she could return to work. On October 27, 2017, the owner called claimant and told her the investigation regarding the complaint against claimant was completed and that she could return to work, but only if she reported to her health insurance that she attended the methadone clinic six days per week. Claimant told the owner she would only report two visits to the clinic per week because she only went to the clinic twice per week. Claimant believed the employer wanted to receive compensation for costs based on six trips to the methadone clinic even though claimant only went to the clinic two days per week. The owner never told claimant that she could return to work if she only reported two visits to the methadone clinic per week.

(5) During the week of October 29, 2017, claimant called the employer's owner repeatedly asking to return to work, but the owner never responded to claimant's calls.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant not for misconduct.

Work Separation. 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 was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee was willing to continue to work for the same 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

The record shows that the employer approved claimant to return to work after her suspension, but only if she agreed to report false information to her health insurance regarding the number of trips she made to a methadone clinic each week. Claimant refused to do so, and thereafter the employer did not respond to claimant's repeated requests to return to work. Claimant contacted the employer's owner regarding her return to work during her suspension and after the owner told her she had to report six trips to the methadone clinic even though claimant told the owner she only went to the methadone clinic two times per week. Claimant's conduct in repeatedly contacting the employer regarding her return to work showed her willingness to continue working. By failing to call claimant back when she contacted the employer after October 27, the employer showed it was not willing to allow claimant to continue working. Because claimant was willing to continue working but was not allowed to do so by the employer, we conclude that the work separation was 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) 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

Absent other information at hearing regarding the employer's reason for failing to contact claimant regarding her return to work, we presume that the employer discharged claimant because she refused to report false information to her health insurance. Although claimant apparently violated the employer's expectation that she report six weekly visits to the methadone clinic rather than two, because claimant completed only two visits per week, the employer's expectation that claimant report more than two visits per week to her insurance was an unreasonable expectation. Claimant's conscious violation of the employer's unreasonable expectation was not misconduct under OAR 471-030-0038(1)(d)(C).

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-100640 is affirmed.

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

DATE of Service: <u>February 22, 2018</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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