

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0537

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 80746). Claimant filed a timely request for hearing. On May 15, 2018, ALJ Amesbury conducted a hearing, and on May 16, 2018, issued Order No. 18-UI-109453, affirming the Department's decision. On May 25, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ability Plus Roofing employed claimant as its office manager from October 1, 2017 to March 15, 2018.

(2) Claimant had been the office manager for the employer's predecessor business for more than three years, and continued in that position after ownership changed to the employer on October 1, 2017. Claimant worked part-time, from 8:30 a.m. to 2:00 p.m., as she had under the prior owner, but the new owners had a different "ownership style," and her work duties were modified in that she no longer performed estimating work. The two new owners were also attempting to take the business in a different direction using spreadsheets and other more detailed work tools which were outside of claimant's skill set. Audio Record ~ 28:00 to 30:00. On February 7, 2018, the new owners also told claimant that they wanted an office manager who would work from 8:00 a.m. to 5:00 p.m., which claimant was unable to do because of a combination of needed, regular physical therapy for a chronic neck condition, some family obligations, and volunteer work for an elderly person. The new owners concluded claimant was "no longer a good fit" for the position and asked claimant to prepare a written description of her job duties, which she did. Audio Record ~14:10 to 15:00.

(3) On Wednesday, March 14, 2018, claimant attempted to perform her banking duties for the employer, but was unable to log in to the employer's accounts because the login codes had been changed by the new owners without notice to claimant. Claimant then suspected she was being replaced, and on March 15, 2018, contacted one of the owners who "confirmed" that a new office manager was "starting Monday." Audio Record ~ 31:30 to 34:30. Later that day, when she spoke with the other owner, she

began to request that her last day be March 23rd, but was cut off and that owner said, “Let’s make it today...and we will pay you through the rest of the week,” after which claimant replied, “Okay.” *Id.*

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

Work Separation. In Order No. 18-UI-109453, the ALJ found that on March 15, when claimant learned her replacement had been hired, she “started to suggest that her final day be March 23 . . . [but] . . . the employer cut her off and suggested that her last day be that very day, March 15,” to which claimant “agreed.” The ALJ concluded that the work separation was a voluntary leaving, reasoning that “claimant and the employer mutually agreed that March 15, 2018 would be claimant’s last day of employment,” and that under *Employment Department v Shurin*, 154 Or App 352 (1968), a mutual agreement to terminate employment is treated as a voluntary leaving. Order No. 18-UI-109453 at 2-3. However, the record does not support the conclusion that the work separation was by mutual agreement.

OAR 471-030-0038(2)(a) (January 11, 2018) states that 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. 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). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.* For a continuing employment relationship to exist there must be some future opportunity for the employee to perform services for the employer. See Appeals Board Decision 97-AB-873, June 5, 1997; Appeals Board Decision 11-AB-0939, March 31, 2011. No continuing relationship exists if the employer does not have an expectation that a service will be performed. Appeals Board Decision 02-AB-2040, October 15, 2002.

The ALJ’s conclusion that claimant’s work separation on March 15 was by “mutual agreement” ignores the undisputed facts that the employer eliminated claimant’s access to its banking accounts on March 14 without telling her, one owner then told her that a new office manager was starting work on Monday, March 19, and the other owner then cut claimant off as she began to request that her last day occur at a later date, before abruptly stating, “Let’s make it today...and we will pay you through the rest of the week,” only after all of which occurred, claimant replied, “Okay.” The record also shows that claimant never offered to quit, was willing to continue to work for an additional period of time after March 15 but was not allowed to do so. Viewed objectively, the employer had no expectation that any additional service would be performed by claimant after March 15, 2018, and claimant’s reply of “Okay” was, more likely than not, merely an acquiescence to the employer’s decision to sever the employment relationship. Accordingly, under the above-referenced rules and cases, the work separation was a discharge which occurred March 15.

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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or

a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

Here, the record shows that the employer discharged claimant after concluding she was “not a good fit” because of her limited skill set in relation to the employer’s use of spread sheets and other advanced office tools, and because she was unable to work full time due to her other commitments. The employer therefore did not discharge claimant for a willful or wantonly negligent violation of the standards of behavior which the employer had the right to expect of her, or an act or series of actions that amounted to a willful or wantonly negligent disregard of the employer’s interests. Accordingly, claimant’s discharge was not for misconduct under ORS 657.176(2)(a), and she is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 18-UI-109453 is set aside, as outlined above.¹

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

DATE of Service: June 27, 2018

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 an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.