

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0568

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145038). Claimant filed a timely request for hearing. On March 23, 2018, ALJ Snyder conducted a hearing, and on March 30, 2018 issued Order No. 18-UI-106299, affirming the Department's decision. On April 3, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On May 2, 2018, EAB issued Appeals Board Decision 2018-EAB-0329, reversing and Order No. 18-UI-106299 and remanding to the Office of Administrative Hearings (OAH) for further proceedings regarding the nature of the work separation and whether claimant would be disqualified from the receipt of benefits under ORS 657.176. On May 21, 2018, ALJ Snyder conducted a hearing, and on May 29, 2018 issued Order No. 18-UI-110252 concluding the employer discharged claimant, not for misconduct. On June 2, 2018, the employer filed an application for review with EAB.

FINDINGS OF FACT: (1) Comfort Suite Albany employed claimant until February 7, 2018.

(2) In late 2017, claimant began to experience lower back and sciatic pain caused by pregnancy. Claimant was not able to bend over without pain. She had difficulty standing back up when she bent over because her back would "lock." Audio Record at 12:06 to 12:10 (May 21, 2018). She was therefore unable to safely perform cleaning duties such as cleaning bathtubs and toilets.

(3) Sometime before January 2018, the employer promoted claimant from housekeeper to executive housekeeper. Claimant supervised the housekeepers and did laundry and was able to do so without complications from her sciatica.

(4) By January 2018, claimant's manager had become dissatisfied with claimant's performance as executive housekeeper. During her performance review in January 2018, the manager asked claimant to train a new employee to replace claimant as the new housekeeping supervisor. The manager told claimant she might have to return to a regular housekeeping position. Claimant told the manager she

was unable to perform regular housekeeping duties while she was pregnant due to lower back and sciatic pain caused by her pregnancy.

(5) On February 1, 2018, the employer hired the new executive housekeeper and told claimant that she would continue to be the acting executive housekeeper until March 1, 2018, and that the employer expected claimant to train the new employee for at least one day. Claimant understood the employer's expectations.

(6) On February 3, 2018, claimant trained the new executive housekeeper. The new executive housekeeper was unwilling to accept additional training from claimant. Claimant continued to supervise the housekeepers and do laundry.

(7) During the first week of February 2018, some housekeepers told the manager they were uncertain if they should report to claimant or the executive housekeeper who was still being trained. The manager decided the housekeepers should report to the new executive housekeeper.

(8) On February 7, 2018, claimant's manager called her into his office along with the new executive housekeeper. The manager told claimant she would no longer be a supervisor because the housekeepers were confused about whether to report to claimant or the new executive housekeeper. The manager did not offer claimant a position other than to return to a housekeeping position with regular cleaning duties. Claimant told the manager she wanted to continue working but could not do cleaning duties until after she gave birth due to the sciatic pain from her pregnancy. The manager did not offer claimant another alternative and told claimant, "Okay, well you leave me no other choice." Audio Record at 18:13 to 18:15 (May 21, 2018). Claimant left the workplace and the employer did offer claimant additional work.

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

Nature of the work separation. Claimant contended that she was discharged, but the employer asserted that claimant quit. Thus, the first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(b) (January 11, 2018) states that 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. 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). "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 employer's manager testified that claimant could have performed laundry, breakfast or housekeeping duties, but "walked out" on February 7, 2018 before he could discuss work alternatives with her, thus foreclosing his ability to offer her continuing work. Audio Record at 19:12 to 19:18, 29:08 to 29:14 (May 21, 2018). The manager's assertion is belied, however, by the undisputed evidence in the record, including his own testimony that he told claimant during his final meeting with her that she left him "no other choice." The record also shows that claimant was willing to continue working, was already doing laundry duties, was never offered breakfast duties, and was unable to do most

housekeeping cleaning duties due to her sciatica. As well, there was no apparent reason in the record that the manager could not have contacted claimant after the February 7 meeting to offer her work other than housekeeping duties she was unable to perform. Based on the undisputed evidence in the record, claimant was willing to continue working for the employer, but was not permitted to do so. Claimant's work separation was a discharge on February 7, 2018.

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. The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On this record, the employer likely ended claimant's employment because the employer did not have work available for claimant that she was able to perform while she was pregnant and suffering from sciatica. To the extent the employer discharged claimant due to a lack of work she was able to perform, the discharge was not for misconduct because the unavailability of work is not attributable to her as willful or wantonly negligent misconduct. To the extent the employer discharged claimant because her services were no longer needed because she was no longer training the new executive housekeeper, the discharge was also not for misconduct. The record shows claimant agreed to train the new employee for one day, and that she complied with that expectation. The record also shows that the new employee was not willing to continue training with claimant, and that employer did not require the new employee to continue training with claimant. Because claimant's discharge was not for misconduct, claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-110252 is affirmed.

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

DATE of Service: July 10, 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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