EO: 200
BYE: 201445

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

313
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0267

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 12, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 93704). The employer filed a timely request for hearing. On February 12, 2014, ALJ Kirkwood conducted a hearing, and on February 13, 2014 issued Hearing Decision 14-UI-10329, affirming the Department's decision. On February 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Best Western Dallas Inn employed claimant from November 24, 2012 until August 21, 2013. Claimant was last employed as the housekeeping manager.

(2) In 2012, claimant and her husband lived in Colorado, but decided to return to Oregon. After claimant was offered a job with the employer, she and her youngest son moved to Oregon. Claimant's husband remained in Colorado. Claimant and her husband intended that the husband would move to Oregon soon, after their finances improved. By August 2013, claimant's husband still had not been able to reunite with claimant in Oregon. The separation between claimant and her husband placed a strain on their marriage. By August 2013, claimant was concerned that her marriage was in significant jeopardy if she did not move to Colorado to join her husband.

(3) Claimant's fifteen year-old son has Asperger's Syndrome and Obsessive Compulsive Disorder. Although the son is high functioning, he requires substantial supervision. The son is also "a little bit off." Transcript at 40. He sincerely believes he is Jewish, although neither claimant nor her husband is of that ethnic heritage. During summer 2013, claimant's son went to stay with claimant's husband in Colorado. Claimant was worried about her husband's ability to take good care of the son while the son was staying with him. During summer 2013, claimant and her husband's finances worsened. By August 2013, claimant realized that she and her husband could not afford to pay for the son to return to

Oregon to resume living with claimant. Claimant was "extremely worried" over her son's well-being and how her son would adjust to living with her husband, and not her, during the upcoming school year. Transcript at 40.

(4) Claimant has experienced attacks of vertigo for most of her life, and takes medicine to control them. After approximately August 1, 2013, claimant experienced serious bouts of vertigo and the employer found her at least twice prostrate on the floor of the hotel. Claimant thought that her vertigo was triggered by some chemicals and sprays that the employer used to clean and deodorize the hotel.

(5) On August 11, 2013, claimant left a letter for the hotel manager telling him that August 31, 2013 was going to be her last day at work. Claimant decided to quit because she thought that, as a result of her family situation, she needed to move to Colorado to reunite with her husband and son.

(6) Claimant was next scheduled to work on August 14, 2013. On August 13, 2013, the hotel manager sent an email to claimant notifying her that, after the recent vertigo attacks when claimant was found on the hotel floor, the employer was not going to allow claimant to work during her final two weeks unless she brought in a note from a physician releasing her to work. Claimant could not afford to pay for a medical examination and she told the manager. Claimant did not report for work on August 14 or August 15, 2013 because she did not have a release. On August 16, 2013, the employer's owner sent an email to claimant inquiring about her health and the status of the medical release. Claimant responded that day to the owner's email, stating her understanding that she could not return to work without a medical release and further stating she did not have the money to pay for the medical examination she would need to obtain the medical release. The owner did not respond to claimant's email and did not advise her that the employer would pay the cost for the examination.

(7) After August 16, 2013, claimant did not report for work because she still had not obtained the medical release. On August 21, 2013, the employer discharged claimant, rather than allowing her to work until her intended leaving date on August 31, 2013, because she did not bring in the medical release. Transcript at 8.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

This case involves a claimant who was discharged after she had clearly informed the employer she intended to quit. At hearing, the employer contended that claimant's work separation should be treated as a voluntary leaving rather than as a discharge based on her intention to quit as stated in her August 11, 2013 resignation letter. Transcript at 5. ORS 657.176(8) delineates the limited circumstances under which a discharge which intervenes before an announced quit date will be disregarded, and the work separation will be adjudicated as if the voluntarily leaving had occurred. It allows the discharge to be ignored if the voluntary leaving would be for reasons that do not constitute good cause, the discharge was not for misconduct and the discharge occurred no more than 15 days before the planned voluntary leaving. ORS 657.176(8)(a)-(c). This statute is potentially applicable to claimant's work separation since claimant's planned leaving date was August 31, 2013 and the employer discharged her on August 21, 2013, which was ten days before her announced quit date. The next issue needed to determine whether the statute is applicable to claimant's work separation is whether claimant's planned voluntary leaving was or was not for good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Although claimant's vertigo appeared severe at approximately the time that she decided to leave work, we infer from the record that the proximate cause of her decision to quit was her family circumstances and not her health. Transcript at 32, 38-40. Since claimant's husband and son were then in Colorado she needed to leave work in Oregon to rejoin them. In view of the depth of claimant's stated concerns about the survival of her marriage if she did not end the geographic separation between her and her husband, and her worry about the welfare of her disabled son if she was not able to supervise his activities in Colorado, claimant's reasons to leave work were reasonable and compelling. Transcript at 32, 38-40. We have previously found good cause for a claimant to leave work under OAR 471-030-0038(4) when claimant reasonably concluded that her marriage would not survive if she remained geographically separated from her husband. *See Sara Daniels* (Employment Appeals Board, 2013-EAB-2155, February 6, 2014). On this record, a reasonable and prudent employee with a disabled son in Colorado, who reasonably thought her marriage would not survive a continued geographic separation from her husband and who had reasonable concerns about her son's well-being without her supervision, would have concluded she had grave reasons to leave work in order to move to Colorado to reunite with her family. Because claimant had good cause to leave work, the requirements of ORS 657.176(8) are not met, and claimant's work separation should be adjudicated as a discharge and not as a voluntary leaving.

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) (August 3, 2011) 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).

The employer discharged claimant because she did not obtain a medical release and did not report for work after she was directed to obtain one. Transcript at 7, 14. The employer did not dispute that claimant was told not to return to work until she had a medical release and did not dispute claimant's testimony that she could not afford to pay for the medical examination to obtain that release. The employer's owner contended that claimant should have asked him to pay for the examination. Transcript at 8, 20, 34. However, it is undisputed that claimant told the owner in her October 16, 2013 email to him that she was not reporting to work because she could not pay to obtain the release and the owner still did not offer to pay for the needed medical examination. Transcript at 19. Because claimant had already communicated to the owner that she was unable to afford the required medical examination, it was not unreasonable for her not to make a second, more explicit request for payment from the owner.

Claimant's inability to pay to obtain the medical release was an involuntary circumstance that was not caused by willful or wantonly negligent behavior. Claimant's failure to report for work after she was directed not to return until she had a medical release was at the instruction of the employer and, on this record, her resulting absences from work were not caused by any willful or wantonly negligent behavior.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-10329 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: March 17, 2014

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.