

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0384

*Modified
Disqualification*

PROCEDURAL HISTORY: On December 6, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110641). Claimant filed a timely request for hearing. On February 12, 2014, ALJ Vincent conducted a hearing, and on February 28, 2014 issued Hearing Decision 14-UI-11439, affirming the Department's decision. On March 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: 1) Dex One Service, Inc. employed claimant from February 14, 1993 until October 4, 2013, last as a district sales manager in its Eugene, Oregon office. The employer sold advertising in the phone book and on the internet.

2) In approximately 2012, claimant was promoted to sales manager. Claimant was responsible for supervising the representatives who sold advertising. As manager, claimant coached the representatives and rode with them on sales calls.

3) Before claimant was promoted to manager, the employer cut costs by eliminating the position of receptionist and clerical person for the Eugene office. As a manager, claimant performed some the tasks previously performed by the receptionist and clerk. Claimant thought that these clerical duties interfered with her responsibilities to supervise sales representatives.

4) At the end of August 2013, claimant discharged one of the representatives she supervised. After this discharge, claimant only had four representatives working in the Eugene office. Because the employer evaluated claimant's performance based on the total sales of the representatives she supervised, claimant thought she was at a disadvantage since she had lost one representative. Although claimant could hire a

replacement for the discharged representative, claimant thought the hiring and training processes were too lengthy to have an appreciable impact on the short-term sales figures for the Eugene office. Sometime in September 2013, the employer removed responsibility for the Roseburg, Oregon campaign from the Eugene office. Claimant thought that the loss of the Roseburg business caused the total sales figures for the Eugene office to decrease further. After both of these events, the Eugene office failed to meet its sales quotas. The performance of each of the employer's offices, including the Eugene office, was published company-wide and claimant thought that other offices knew that the performance of the Eugene office did not meet the employer's standards.

5) In September 2013, the employer assigned two representatives from the Eugene office to work in Bend, Oregon through the end of November 2013. Claimant remained responsible for supervising these representatives when they were in Bend. Claimant thought that she would need to travel from Eugene to Bend every two weeks to provide this supervision. The road between Bend and Eugene crossed some mountain passes. Claimant was concerned that, during the winter, it might be snowy on this road and unsafe to drive. Claimant did not tell her manager of this concern.

6) In mid-September 2013, one of the representatives temporarily assigned to Bend and whom claimant was supervising in Bend asked claimant if he could take some time off to travel from Bend to Eugene to take his very ill wife to some medical appointments. The representative's permanent home was in Eugene and his wife had remained there. Claimant informed her manager of the representative's request. Claimant's manager told claimant to tell the representative that, if he wanted time off for a purpose that required him to travel to Eugene from Bend, he would be reassigned to the Eugene office. A reassignment to the Eugene office would cause the representative to lose commissions on sale that he had generated while in Bend, and would result in a loss of income to him. Claimant disagreed with the decision made by her manager and was uncomfortable informing the representative of it. When claimant told the representative of her manager's decision, the representative became very angry. The representative filed a complaint against the employer with his union over his reassignment to Eugene. Claimant's manager told the union that he had actually reassigned the representative to Eugene because of his poor sales performance in Bend. Claimant thought the manager was inconsistently communicating his reasons for the representative's reassignment and claimant disliked defending the manager's decision to the representative and to the union. At some point, claimant told the manager she was concerned about the representative's reaction to his reassignment to the Eugene office. Claimant's manager then spoke to the representative and told the representative that it had been the manager's decision to reassign him to the Eugene office and not claimant's. After he returned to the Eugene office, the representative's sales performance decreased.

7) On October 1, 2013, claimant had scheduled her first trip to supervise the representatives in Bend. It was raining very heavily that day. Claimant had also just received the September 2013 sales figures for the Eugene office and its performance was poor. On October 1, 2013, claimant sent an email to her manager telling him she was resigning effective in two weeks, or on October 15, 2013. Claimant resigned because of her concerns about driving to Bend, the recently poor sales performance of the Eugene office and the events surrounding the reassignment of the representative from Bend to Eugene. After he received claimant's letter of resignation, the manager told claimant to be done with her work by Friday, October 4, 2013 and to not come to the workplace after that.

8) On October 4, 2013, the employer discharged claimant before the October 15, 2013 date that she had planned to leave work.

CONCLUSIONS AND REASONS: On October 4, 2013, the employer discharged claimant not for misconduct within fifteen days of claimant's planned voluntarily leaving without good cause on October 15, 2013. Claimant is eligible to receive benefits during the weeks beginning September 29, 2013 and October 6, 2013, but is thereafter disqualified from benefits based on her work separation.

The ALJ adjudicated claimant's work separation as a voluntary leaving. Hearing Decision 14-UI-11439 at 3. However, the employer discharged claimant on October 4, 2013, which was three days after claimant notified the employer on October 1, 2013 that she planned to leave work on October 15, 2013. When an individual is discharged after the individual has informed the employer that the individual intends to quit work, ORS 657.176(8) sets out the circumstances under which an intervening discharge can be disregarded. ORS 657.176(8) states that when 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 prior to the planned voluntary leaving, the work separation is adjudicated as if the discharge had not occurred and the voluntary leaving had occurred, except that the individual is eligible to receive benefits for the week in which the discharge occurred through the week prior to the week of the planned voluntary leaving date. ORS 657.176(8)(a)-(c). Since claimant was discharged within 15 days of the date she announced that she intended to quit, the ALJ should have considered the applicability of ORS 657.176(8) to claimant's work separation. To determine if claimant's work separation meets the additional requirements of ORS 657.176(8), we must assess whether claimant's voluntary leaving was for good cause and whether claimant's discharge was for misconduct.

To show good cause for leaving work, claimant must prove 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.

At hearing, claimant presented a laundry list of complaints against the employer to justify her decision to quit. However, none of these complaints appeared to be other than the usual and normal stresses that accompany a management position in the field of sales. That a representative might be discharged and that claimant's performance productivity might be temporarily impacted by that discharge was to be expected, at least until claimant hired and trained a replacement. Transcript at 22. That claimant's productivity might be negatively affected after the employer decided to remove her office from a particular campaign also does not appear to constitute an unusual circumstance in the employer's operations. Claimant presented no evidence that either of these occurrences was out of the norm, that they would not be rectified in the future when claimant hired a new representative or was able to establish a customer base in a new campaign area, or that the employer had done anything to suggest it intended to penalize claimant for the lack of productivity of the Eugene office. That claimant might disagree with her manager's decision to reassign a particular representative to the Eugene office and might have been uncomfortable in implementing that decision does not appear to be a grave reason to

leave work, particularly when claimant conceded there were likely good business reasons for the manager's decision and the manager told the representative that he, and not claimant, had made the decision. Transcript at 12, 28. That claimant might have been expected to drive to Bend from the employer's workplace in Eugene, when the drive might sometimes involve a snowy and icy road, also does not reasonably rise to the level of a grave reason when claimant presented no evidence that the employer was actually going to require her to drive in hazardous conditions or that the employer would not suspend any such driving requirement during inclement weather conditions. At a minimum, a reasonable and prudent sales manager would have raised her concerns about driving this road with her manager and determined that the manager actually intended to require her to drive the road in unsafe conditions before concluding she had no alternative other than to quit. Furthermore, that claimant might have had to perform some clerical duties at the Eugene office in addition to her supervisory duties also does not appear to be a grave reason for her to leave work when claimant presented no evidence that the clerical duties were unusually burdensome or onerous, and it appeared that the employer had implemented the cuts to the clerical staff at most of its offices before claimant was promoted to a management position. Transcript at 31. Finally, although the employer published sales figures company-wide, it does not appear that claimant's chagrin over the disclosure of the performance of the office she supervised reasonably constituted a grave circumstance, particularly when some of the reasons for the performance level of that office were temporary and might be rectified by future events. On this record, a reasonable and prudent sales manager, exercising ordinary common sense and who wanted to remain employed, would not have concluded that the circumstances claimant described were grave reasons leaving her no choice but to quit work when she did. Claimant did not show she had good cause to leave work.

To determine under ORS 657.176(8) whether claimant remains eligible for some benefits despite the circumstances of her leaving, we must also evaluate claimant's discharge to determine whether the employer showed it was 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. When a discharge is at issue, the employer must prove, more likely than not, that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer presented no evidence at hearing that showed any misconduct on the part of claimant for which it discharged her on October 4, 2013. Claimant's manager testified at hearing that claimant was a good employee and did not refer to any reasons for the discharge. Transcript at 32. It appears from the record that the employer discharged claimant only because claimant had notified the employer of her planned leaving date. Transcript at 21. This record does not support a conclusion that the employer discharged claimant for misconduct. Although the employer discharged claimant, that discharge was not for misconduct.

Because claimant's planned voluntary leaving on October 15, 2013 was without good cause and the employer discharged claimant, not for misconduct, on October 4, 2013, which was within 15 days of her planned leaving, ORS 657.176(8) requires that her work separation be adjudicated as a voluntary leaving and as if the discharged had not occurred. However, ORS 657.176(8)(c) further states that, under these circumstances, claimant is eligible to receive benefits for the period including the week in which the October 4, 2013 discharge occurred through the week prior to the week of the planned voluntary leaving

date of October 15, 2013. Applying this statutory provision to claimant's work separation, claimant is eligible to receive benefits, despite her otherwise disqualifying work separation, for the week of September 29, 2013 through October 5, 2013 (week 40-13) and the week of October 6, 2013 through October 12, 2013 (week 41-13). After the week ending October 12, 2013, claimant is disqualified from benefits based on the voluntary leaving without good cause on October 15, 2013.

Claimant voluntarily left work without good cause on October 15, 2013. Claimant is eligible to receive benefits from September 29, 2013 through October 12, 2013 (weeks 40-13 and 41-13), but is disqualified thereafter based on this work separation,

DECISION: Hearing Decision 14-UI-11439 is modified, as outlined above.

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

DATE of Service: March 27, 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>.

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