

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0542**

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On March 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 13527). Claimant filed a timely request for hearing. On April 1, 2014, ALJ Holmes-Swanson conducted a hearing, and on April 2, 2014 issued Hearing Decision 14-UI-14070, concluding the employer discharged claimant but not for misconduct. On April 4, 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) Scenic Foods, Inc. employed claimant as a quality control technician from July 13, 2013 until July 16, 2013.

(2) The employer hired claimant as a temporary, seasonal worker for the summer 2013 production season. Claimant's work was on an on-call basis with no guaranteed hours. Based on past experience, the employer expected claimant to work at least 40 hours per week, with some possibility of overtime. The employer initially promised to pay claimant \$12.00 per hour for his work. .

(3) On July 13, 2013, claimant attended an orientation for the position with the employer. The employer paid claimant \$11.38 per hour for the ten hours that he participated in orientation, or a total of \$113.80. When the orientation was completed on July 13, 2013, the employer did not give claimant a work schedule. The employer told claimant it would contact him when work was available.

(4) On July 14, 2013, claimant accepted an offer of other work as a delivery person for a bakery. That job was permanent and was to start on July 16, 2012. It paid a salary of \$1,200 during the first month when claimant was in training. It paid a salary of \$1,800 starting the second month of work, with the possibility of an additional bonus of \$200 per month depending on claimant's performance in the job.

After three months in the job, claimant was promised medical insurance benefits. For the first month at the job, claimant was to work six days per week from 6:00 a.m. until 11:00 a.m. Starting the second month at the job, claimant was to work six days per week from 6:00 a.m. until 2:00 p.m.

(5) On the evening of July 15, 2013, one of the employer's trainers left a message for claimant telling claimant to report for work on July 16, 2013. On the morning of July 16, 2013, claimant sent an email to the employer stating "I cannot work anymore." Exhibit 1 at 1.

(6) Claimant's weekly benefit amount was \$205.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with good cause.

Although we agree with the ALJ's ultimate conclusion that claimant is not disqualified from unemployment benefits based his work separation, we disagree with the ALJ's reasoning. At the outset, the ALJ's finding that the employer ended the employment relationship by "effectively laying off" claimant when it did not give him a definite work assignment after his orientation is not consistent with the undisputed facts, and the ALJ's determination that claimant's work separation should be analyzed as a discharge is not consistent with the applicable regulations. Hearing Decision 14-UI-14070 at 3. The regulations state that if an 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) (August 3, 2011). If an 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).

In this case, although the employer did not immediately give claimant a work schedule on July 13, 2013, this behavior was consistent with the on-call nature of the work for which claimant had been hired. Viewed in a realistic light, the employer's behavior cannot reasonably be construed as an expression of unwillingness to allow claimant to continue in the work relationship that had been established. It was claimant who first manifested an unwillingness to continue the work relationship when he sent the July 16, 2013 email to the employer unequivocally stating that "I cannot work anymore." Exhibit 1 at 1. Applying the controlling regulations to the undisputed facts, claimant's work separation was a voluntary leaving on July 16, 2013 and not a discharge on July 14, 2013. The remaining issue is whether claimant is disqualified from benefits under the circumstances of his voluntary leaving. On this record, the ALJ's discharge analysis to determine whether claimant was disqualified from benefits was inapposite.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he 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). When a claimant leaves work to accept an offer of new work with another employer, good cause exists only if the offer of new work is definite, the new work is to begin in the shortest length of time reasonable under the circumstances, the new work is reasonably expected to continue and the new work will pay either an amount equal to or excess of the weekly benefit amount or an amount greater than the work left. OAR 471-030-0038(5)(a).

Claimant agreed at hearing that he left work to take the offer of new work as a delivery driver for a bakery. Transcript at 5, 6. The offer made to claimant for this new work appeared to have been definite

within the meaning of OAR 471-030-0038(5)(a). The job position was designated in the offer, a date certain was established for starting the job, the hours of work were set, and the pay was specified with particularity. There appeared to be no contingencies remaining to the offered job that might cause a retraction of the offer. The offered job was permanent and, therefore, was reasonably expected to continue. Claimant started work at the new job the same day that he notified the employer that he was quitting. Under these circumstances, claimant started the new job within a reasonably short period of time after he quit. Taking the most conservative approach, the offered job would pay \$1,200 during its first month of training, or approximately \$300 per week. Because this amount exceeded claimant's weekly benefit amount of \$205, claimant satisfied the pay requirement for establishing good cause even if the new work paid less than the amount he might reasonably expect to receive from the employer.<sup>i</sup> Claimant met his burden under OAR 471-030-0038(5)(a) to establish that he had good cause to leave work with the employer for the offer of new work as a bakery delivery driver.

Claimant had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-14070 is affirmed.

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

**DATE of Service:** April 29, 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.

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<sup>i</sup> Although the employer did not guarantee claimant's number of work hours, the employer reasonably expected that claimant would work at least 40 hours per week, and possibly some overtime hours. Transcript at 10. If claimant worked 40 hours at \$12 per hour, the rate the employer promised claimant, he would earn \$480 per week.