

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1336

*Modified*  
*Benefits Allowed in Part, Denied in Part*

**PROCEDURAL HISTORY:** On July 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct within 15 of a planned voluntary leaving without good cause (decision # 115609). Claimant filed a timely request for hearing. On July 25, 2014, ALJ S. Lee conducted a hearing, and on August 1, 2014, issued Hearing Decision 14-UI-22651, concluding claimant voluntarily left work without good cause. On August 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Kool Pak LLC employed claimant, last as an office support worker, from July 19, 2013 to June 4, 2014. Claimant was an over-the-road driver for the employer from July 19, 2013 to approximately January, 2014, when he was transferred to an office support position because of medication he was taking for a back condition.

(2) By May 2014, claimant became unhappy with the office support position because it was not his chosen profession, he believed he could obtain employment as an over-the-road driver elsewhere despite taking his medication and he wanted to make more money. Claimant began submitting resumes for work as an over the road driver and a potential employer contacted the employer for information.

(3) The employer told claimant it did not want claimant to seek work as an over the road driver elsewhere while working in its office. Rather than discontinue his employment search, claimant agreed to resign and on June 4, 2014, gave the employer written notice of his intention to resign on June 13, 2014. However, after receiving claimant's resignation notice, the employer terminated claimant's employment immediately, effective June 4.

**CONCLUSIONS AND REASONS:** Claimant was discharged, not for misconduct, within two weeks of a planned voluntary leaving without good cause.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct or claimant voluntarily left work without good cause. “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 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time. Quitting work without good cause includes quitting suitable work<sup>1</sup> to seek other work. OAR 471-030-0038(5)(b)(A).

ORS 657.176(8) provides:

For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that:

- (a) The voluntary leaving would be for reasons that do not constitute good cause;
- (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and
- (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving,

then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

Claimant quit work as an office support worker effective June 13, 2014, after he agreed with the employer to quit rather than continue to seek work as an over-the-road driver while remaining employed in his office position. However, claimant failed to assert or show that no reasonable and prudent person in his circumstances would have continued to work as an office support worker for an additional period of time despite the employer’s preference or rather than seek driving work, or that office support work itself was suitable for him. Thus, to the extent claimant quit work because of the employer’s preference or to seek other work as an over-the-road driver, his planned voluntary leaving was without good cause.

The employer discharged claimant on June 4, after he gave notice of his planned resignation. Claimant’s discharge was not for misconduct.<sup>2</sup> The record fails to show any reason for the employer’s

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<sup>1</sup> In determining whether any work is suitable for an individual, the Department considers, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190.

<sup>2</sup> 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.

decision to discharge claimant immediately upon receiving notice of his planned resignation that is attributable to claimant as a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him. The discharge was, therefore, not for misconduct, within 15 days of claimant's planned voluntary leaving.

In Hearing Decision 14-UI-22651, after finding that claimant resigned with notice to seek other work, which was without good cause, but that the employer discharged him immediately rather than allow him to work through his notice period, which was not for misconduct, the ALJ concluded that claimant was disqualified from receiving any benefits, reasoning that under ORS 657.176(8),

When an employer discharges a claimant, not for misconduct, within 14 days of a planned voluntarily (sic) leaving, the discharge is disregarded and the separation is analyzed as if the voluntary leaving occurred as planned.

Hearing Decision 14-UI-22651 at 4. While we agree with the ALJ that claimant voluntarily left work without good cause and is subject to disqualification generally for that reason, we disagree that the discharge is completely disregarded and that he is disqualified from receiving any benefits under ORS 657.176(8). Because claimant was discharged from work within 15 days of a planned voluntary leaving, under that provision, the work separation is adjudicated as if the discharge did not occur, and the planned leaving had. However, claimant is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. Here, claimant's discharge occurred during the week of June 1 through June 7, 2014 (week 23-14), and he is eligible for benefits through the end of the week *prior* to the week of claimant's planned voluntary leaving, June 8 through June 14, 2014 (week 24-14), which is also week 23-14. Accordingly, claimant is eligible for benefits for week 23-14. Thereafter, he is disqualified from receiving unemployment insurance benefits under ORS 657.176(2) until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 14-UI-22651 is modified, as outlined above.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** September 30, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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