

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1416

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102839). Claimant filed a timely request for hearing. On August 14, 2014, ALJ M. Davis conducted a hearing, and on August 15, 2014 issued Hearing Decision 14-UI-23548, concluding claimant was discharged, but not for misconduct, within fifteen days of her planned voluntarily leaving without good cause. On August 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: On *de novo* review and pursuant to ORS 657.275(2), the findings of fact in Hearing Decision 14-UI-23548 are **adopted**.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause.

The first issue in this case is whether claimant quit work or was discharged. 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) (August 3, 2011). 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. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

On July 6, 2014, claimant gave the employer notice that she would quit her job two weeks later on July 20, 2014. However, the employer did not allow claimant to work through her notice period. Because

claimant was willing to continue working for the employer until July 20, 2014, but was not allowed to do so by the employer, the July 6, 2014 work separation was a 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The owner testified that she had no plans to discharge claimant on July 6, 2014, even after she received reports that claimant was not communicating in the kitchen on July 4 and 5, 2014. The owner testified that she hoped claimant would be able to change her behavior to meet the employer's expectation. While the owner testified that claimant received verbal warnings about her professionalism in the workplace, she also testified that she only decided to discharge claimant after she submitted her notice of resignation. We agree with the ALJ that the employer failed to establish that claimant willfully, or with wanton negligence, violated the employer's policies or procedures when she submitted her notice of resignation. The employer discharged claimant for a reason that does not constitute misconduct. *See* OAR 471-030-0038(3)(a).

However, ORS 657.176(8) provides that when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that she 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 quit date. Claimant notified the employer she would end her employment on July 20, 2014. The employer discharged her, not for misconduct, on July 6, 2014, less than 15 days prior to her planned quit date. Therefore, we must determine whether claimant's planned quit would have been without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010).

Claimant denied voluntarily quitting work. However, her testimony was internally inconsistent on other matters. For example, when asked whether or not she had issues with her coworkers, she initially testified that she did not, then testified that she had a few issues with coworkers, then testified that she asked for the June 6th meeting because of issues with the sous chef. *Compare* Transcript at 30, 32, 37. Because claimant's testimony on such matters was unreliable, we consider her testimony as a whole to

be less reliable than that provided by the employer's owner. Therefore, where matters were in dispute, we found facts in accordance with the owner's testimony, and we conclude that claimant notified the employer on June 6th that she planned to leave work two weeks later.

The preponderance of the evidence is that claimant quit work because of her discomfort working for the sous chef, and told the owner when she quit that she was unable to continue working with the sous chef. We agree with the ALJ that, while it may have been difficult for claimant to work with the sous chef due to her discomfort with the text messages she received about covering a shift for him and other communication problems, claimant failed to show how her relationship with the sous chef created a grave situation for her, nor did she show that she pursued her reasonable alternatives prior to submitting her resignation on July 6, 2014.

In sum, claimant notified the employer of her intention to voluntarily quit work without good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits except that she is eligible for benefits for the weeks from July 6 through 19, 2014 (weeks 28-14 and 29-14), which is both the week in which the actual discharge occurred and the week prior to the week of the planned quit date.

DECISION: Hearing Decision 14-UI-23548 is affirmed.

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

DATE of Service: September 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 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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