

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1917

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 114839). Claimant filed a timely request for hearing. On November 24, 2014, ALJ Triana conducted a hearing, and on November 26, 2014 issued Hearing Decision 14-UI-29452, affirming the Department's decision. On December 26, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Rural Development initiative Inc. employed claimant as a program support specialist from August 1, 2004 to October 1, 2014. Claimant worked for the employer full time.

(2) Toward the end of claimant's employment, the employer's expectations for her position changed, and the employer determined that claimant lacked the job skills necessary meet the new performance expectations.

(3) In April 2014, the employer warned claimant that she was not meeting its performance expectations. Claimant continued attempting to perform her assigned duties to the best of her ability.

(4) In mid-August 2014, the employer gave claimant her annual performance evaluation, in which the employer concluded that claimant was not meeting its performance expectations. Claimant continued attempting to perform her assigned duties to the best of her ability.

(5) On September 3, 2014, the employer again informed claimant that she was not meeting its performance expectations. The employer offered claimant the option of resigning within the month and

receiving 12 weeks of severance pay, or being placed on a 90-day performance improvement plan (PIP), after which the employer likely was going to discharge claimant. On September 4, 2014, claimant accepted the first option and notified the employer she was resigning, effective October 1, 2014.

(6) Claimant quit work to avoid being discharged.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant quit work with 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.

Leaving work without good cause includes resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

In the present case, claimant quit work to avoid being discharged due a lack of job skills, and not misconduct. She therefore is not disqualified from receiving benefits under OAR 471-030-0038(5)(b)(F). The remaining issue is whether she quit work with good cause under OAR 471-030-0038(4). In Hearing Decision 14-UI-29452, the ALJ concluded that claimant did not, asserting that although claimant likely would have been discharged after her 90-day PIP expired, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have worked through the 90-day period while either trying to improve their performance to meet employer expectations or searching for new employment.¹

However, the ALJ's analysis overlooks that by resigning, claimant guaranteed that she would be paid for another 16 weeks, during 8 of which she would be free to search full time for other work, without a discharge on her employment record. Given that claimant's discharge after only 90 days was reasonably certain, and no evidence that she would have received a severance package if discharged, we disagree

¹ Hearing Decision 14-UI-29452 at 3.

with the ALJ and conclude that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have chosen to not to resign. Claimant therefore quit work with good cause. She is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-29452 is set aside, as outlined above.²

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

DATE of Service: January 30, 2015

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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.