

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0189

Affirmed
Disqualification
Eligible for weeks 43-14 and 44-14

PROCEDURAL HISTORY: On November 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 135322). The employer filed a timely request for hearing. On February 6, 2015, ALJ Kirkwood conducted a hearing and issued Hearing Decision 15-UI-33156, concluding the employer discharged claimant, but not for misconduct, within fifteen days of claimant's planned voluntary leaving without good cause. On February 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Jacob's Heating & Air Conditioning employed claimant as a commercial installer and jobsite foreman from June 10, 2011 to October 24, 2014.

(2) To install heating and cooling units in buildings at claimant's job site, claimant's crew was required to scale a 12 foot landing where the units were installed. Because the employer provided its crew only with 6 and 8 foot ladders, claimant was required to borrow another contractor's 16-foot ladder, whenever it was available, for his crew to safely scale the 12-foot landing. Because using the shorter ladders was unsafe, the general contractor warned each member of claimant's crew that they would be banned from the site if they did not use the necessary ladder and safety equipment. Claimant reported the problem to his direct supervisor with the employer.

(3) On October 23, 2014, the employer's commercial division manager (Huxtable) received a complaint from the general contractor that the employer's jobsite crew was falling behind schedule. She went to the site and spoke to claimant about the general contractor's complaint. Claimant explained that the reason the employer's crew was behind schedule was the lack of a 16-foot ladder to safely scale the 12-foot landing where the employer's units were installed. Rather than agree to provide the necessary ladder because it was "not in the budget", Huxtable modified the production schedule and directed claimant to disperse crew members to different areas of the site to work. Audio Record ~ 30:40 to 31:10. Claimant concluded there was no way he could meet Huxtable's production schedule and protect his crew without the necessary ladder and safety equipment. After Huxtable left, claimant sent her an email with the subject heading "2 week notice" and attached to the email a handwritten note that read,

"Consider this my 2 week notice to leave Jacobs. 10-24-14 Scott O'Neil." (Exhibit 1, p. 6)

Before tendering his resignation notice, claimant did not notify Huxtable's supervisor, the employer's chief financial officer (Desserault), about the general contractor's verbal warnings and need for a 16-foot ladder.

(4) After Huxtable received claimant's email, she asked him to meet with her. On October 24, 2014, claimant met with her at the employer's office, reiterated his concerns and told her he would work out the two weeks with the proper ladder and safety equipment. Rather than allow him to do so, Huxtable terminated claimant's employment.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct, within fifteen days of claimant's planned voluntary leaving 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 October 24, 2014, claimant notified the employer by email that he was quitting work two weeks later, or on November 7, 2014. However, the employer did not allow claimant to work through his notice period. Because claimant was willing to continue working for the employer until November 7, but was not allowed to do so by the employer, the October 24, 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 the employer's interest. The record fails to show that the employer discharged claimant due to a willful or wantonly negligent violation of a reasonable employer expectation or for disregarding the employer's interest. Accordingly, we conclude the employer's October 24 discharge was not for misconduct under ORS 657.176(2)(a). See OAR 471-030-0038(3)(a).

However, ORS 657.176(8) provides that when an individual has notified an employer that he (or she) will quit work on a specific date, and the employer discharges him, 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 he 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 he would end his employment on November 7, 2014. The employer discharged him, not for misconduct, on October 24, 2014, less than 15 days prior to his planned quit date. Therefore, we must determine whether claimant's planned quit would have been with or without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless the claimant proves, by a preponderance of evidence, that the claimant had good cause for leaving work when the claimant 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). 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.

Claimant quit work because he concluded there was no way he could safely meet Huxtable's production schedule without the necessary ladder or other safety equipment. Although claimant explained his predicament to both his direct supervisor and Huxtable, he did not discuss the problem with Desserrault, the final authority on the matter. Given the general contractor's objection to claimant's crew working without the proper ladder and safety equipment, claimant's legitimate concern for his crew's safety, and the ostensible ease of email communication to the chief financial officer, claimant failed to show that no reasonable and prudent jobsite foreman in his circumstances, interested in maintaining his employment, meeting the employer's production schedule and protecting his crew, would have availed himself of that reasonable alternative before abruptly quitting when he did.

In sum, claimant notified the employer of his intention to voluntarily quit work, without good cause, but the employer then discharged claimant within fifteen days of the planned quit date for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits, except that he is eligible for benefits for the weeks including October 24, 2014 (week 43-14) through the week including October 26 through November 1, 2014 (week 44-14) the week prior to the week of the planned quit date.

DECISION: Hearing Decision 15-UI-33156 is affirmed.

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

DATE of Service: April 9, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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