

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0445

Affirmed
Disqualification
Eligible for weeks 07-15 and 08-15

PROCEDURAL HISTORY: On March 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 105751). Claimant filed a timely request for hearing. On April 7, 2015, ALJ Clink conducted a hearing, and on April 14, 2015, issued Hearing Decision 15-UI-36839, concluding the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned voluntary leaving without good cause. On April 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to include an explanation of the circumstance or reason beyond her control that prevented her from presenting the information at the time of the hearing. Under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. EAB considered the remainder of claimant's written argument to the extent it was based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Rhine & Tanzer, Inc. employed claimant, last as senior manager of its Elephant's Deli-Portland Airport location, from November 26, 2007 to February 21, 2015.

(2) In early February 2015, the employer asked claimant to participate in selecting a second store manager from one internal and one external candidate, and to recommend the one she thought would work best for her and her crew. Claimant recommended the internal candidate, but the employer selected the other candidate. Claimant worked with the newly hired manager for one week, concluded she was being pushed out, considered her changed working conditions stressful and decided to quit. On February 21, 2015, claimant gave the employer notice of her intent to quit work on March 6, 2015.

(3) Upon receipt of claimant's notice on February 21, the employer terminated claimant's employment without giving her a reason.

(4) Before submitting her resignation notice, claimant did not ask the employer if she was being removed, did not ask for time off to recover from her stress, and did not explore the possibility of a transfer to another position or to one of the employer's six other store locations. In addition, no medical provider recommended that claimant quit.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, 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 on February 21, 2015. 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).

Claimant notified the employer on February 21, 2015 that she was quitting work on March 6, 2015, but the employer did not allow claimant to work through her notice period. Because claimant was willing to continue working for the employer until March 6, but was not allowed to do so by the employer, the 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. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, the record fails to show that the employer discharged claimant due to a willful or wantonly negligent violation of a standard of behavior the employer had the right to expect of claimant, or an act or series of actions that amounted to a willful or wantonly negligent disregard of the employer's interest. Accordingly, we conclude that on February 21, 2015, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

ORS 657.176(8) provides that when an individual has notified an employer that she (or he) 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 March 6, 2015. The employer discharged her, not for misconduct, on February 21, 2015, 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 (or he) 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). 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 she concluded she was being pushed out and considered her changed working conditions too stressful to continue. However, before submitting her resignation notice, claimant did not ask the employer if she was being removed, did not ask for time off to recover from her stress, and did not explore the possibility of a transfer to another position or to one of the employer's six other store locations. We also note that no medical provider recommended that she quit. Claimant also had the option of continuing her employment until she knew if or for how long she would be retained as a co-manager, or until she knew what her duties would be if she was going to be removed as a manager. Absent a showing that these reasonable options were futile, we cannot find that claimant had no reasonable alternative but to quit work when she did.

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 effective the week including the date of her planned voluntary leaving on March 6, 2015 (week 09-15) until she has earned four times her weekly benefit amount from work in subject employment. However, claimant is eligible for benefits for the weeks including February 15 through 28, 2015 (weeks 07-15 and 08-15), which is the week in which the actual discharge occurred through the week prior to the week including March 6, 2015.

DECISION: Hearing Decision 15-UI-36839 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 15, 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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