

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0876

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, within 15 days of claimant's planned voluntary leaving without good cause (decision # 84920). Claimant filed a timely request for hearing. On June 29, 2015, ALJ Logan conducted a hearing, and on July 2, 2015 issued Hearing Decision 15-UI-41017, affirming the Department's decision. On July 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record. EAB may not consider a party's new information unless the information is relevant and material to the issues before EAB, and factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). In this case, claimant attempted to offer additional information to the ALJ about the circumstances that prompted her to leave work in an attempt to establish good cause for leaving work under OAR 471-030-0038(4). Audio recording at ~6:45, 9:00, 16:22. The ALJ did not admit claimant's documentation, did not have her read it into the record, and, ultimately, told her that her testimony on the issue of whether she had good cause to quit work under OAR 471-030-0038(4) was not necessary. *Id.* The ALJ then decided the case, in part, on the basis of claimant's failure to establish good cause to quit work under that same provision. *See* Hearing Decision 15-UI-41017 at 3. The new information in claimant's written argument about the effect working in Portland while living in and commuting from Long Beach had on her relationship with her fiancé is relevant and material to our determination, and claimant was prevented by the ALJ from offering it during the hearing. We therefore admit claimant's written argument into the record as Exhibit EAB 1. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record as Exhibit EAB 1.

FINDINGS OF FACT: (1) McClarens Young International employed claimant as an administrative assistant from May 7, 2014 to May 1, 2015.

(2) Claimant resided and worked in the Portland, Oregon. In March 2015, claimant and her fiancé agreed to marry.

(3) Claimant's fiancé resided in Long Beach, Washington. In March 2015, claimant began living part-time in Long Beach, Washington and commuting to work several times a week. The commute took claimant up to three hours in each direction. Claimant could not commute every day, so she had to continue maintaining a second home in the Portland area. Claimant experienced exhaustion and stress because of the commute and being separated from her fiancé. The separation from her fiancé "began creating serious financial, emotional, and familial relationship issues." Exhibit EAB 1. In order to resolve the issues caused by claimant continuing to live part-time and work in Portland, claimant and her fiancé decided to live together on a full-time basis.

(4) Claimant considered staying in Portland and retaining her job. Although claimant and her fiancé both owned their own homes, claimant's fiancé had held a government job with the same employer for approximately 17 years, worked as a manager, and had a higher income, in addition to employer-paid retirement and other benefits. Claimant did not work in management, her pay was substantially less than her fiancé's and she did not receive employer-paid benefits. Comparing her job with her fiancé's, claimant decided that it made more sense to preserve his employment than hers, and decided to move to Long Beach.

(5) On April 30, 2015, claimant orally notified the employer of her intent to quit work. On May 1, 2015, claimant sent an email to her employer and coworkers giving two weeks' notice of her intent to resign to move to Long Beach and reside with her fiancé. On May 1, 2015, the employer discharged claimant rather than allow her to work out her notice period. The employer paid claimant through May 15, 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

In Hearing Decision 15-UI-41017, the ALJ found as fact that claimant worked for the employer until May 15, 2015. Hearing Decision 15-UI-51017 at 1. However, "work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). The record shows that, although the employer paid claimant the equivalent of the wages she would have earned had the employer allowed her to continue performing services between May 1, 2015 and May 15, 2015, the employer severed its relationship with claimant on May 1, 2015. Therefore, May 1, 2015 was the separation date in this matter, and the nature of the work separation on that date was a discharge.

A claimant who is discharged for misconduct or leaves work voluntarily without good cause is disqualified from the receipt of benefits. ORS 657.176(2)(c). 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because she quit work. The employer did not assert or show that its decision not to allow claimant to work out her notice period was due to any willful or wantonly

negligent conduct on claimant's part. Therefore, claimant's May 1, 2015 discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of her discharge.

However, because the employer discharged claimant within 15 days of her planned voluntary leaving, ORS 657.176(8) may apply. ORS 657.176(8) provides that, for purposes of applying ORS 657.176(2), when an individual has given notice of her intent to quit work on a specific date, and the voluntary leaving would be for reasons that do *not* constitute good cause, and the employer discharged her, but not for misconduct, within 15 days of the planned leaving date, the work separation must be analyzed as if the discharge did not occur, except that the date of the individual's disqualification from unemployment insurance benefits is delayed until the week in which the planned leaving was to occur. Therefore, to determine whether claimant is subject to disqualification from benefits as of the week of her planned leaving, we must first determine whether or not claimant's planned leaving was for good cause.

In Hearing Decision 15-UI-41017, the ALJ concluded that claimant quit work without good cause, reasoning that, because the circumstances that caused her to quit work were not "compelling family reasons," she quit work without good cause. However, while the "compelling family reasons" rule as set forth in OAR 471-030-0038(5)(g) provides that, for purposes of applying the general "good cause" definition set forth in OAR 471-030-0038(4), an individual with "compelling family reasons" has left work *with* good cause, the rule does not state that an individual who leaves work without "compelling family reasons" has left work *without* good cause. Rather, if OAR 471-030-0038(5)(g) does not apply to the circumstances presented by a particular case, the circumstances of the voluntary leaving must be analyzed under OAR 471-030-0038(4).

"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 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. Claimant has the burden to prove "good cause" by a preponderance of the evidence. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

In Hearing Decision 15-UI-41017, the ALJ also concluded that claimant did not have good cause to quit work under OAR 471-030-0038(4) because she "enjoyed her job and did not face a grave situation at work."¹ We agree with the ALJ that claimant did not assert or show that she had a grave, work-related reason for quitting work. However, the grave circumstances an individual experiences need not be related to work to amount to good cause for leaving a job. An individual may quit work due to purely personal grave circumstances and not be disqualified from receiving benefits.² *See accord Sothras v. Employment Div.*, 48 Or App 69, 616 P2d 524 (1980) (a "very good employee" who "liked her job" nevertheless had good cause for quitting her job because an attack by an assailant who remained at-large after the attack made it impossible for claimant to continue living in the area, leaving her no reasonable

¹ Hearing Decision 15-UI-41017 at 3.

² If an individual leaves work for personal reasons amounting to good cause, and the employer has requested relief of charges from the Department, in some circumstances the employer may be excused from any potential liability relating to the claimant's claim.

alternative but to leave work); *Robb v. Employment Div.*, 54 Or App 471, 635 P2d 392 (1981) ("Sothras stands for the proposition that the Employment Division may consider personal, non-job related problems in determining if an employee has "good cause" for leaving his or her employment"); *Young, supra*, 13 P3d at 1020 (citing *Sothras* with approval).

In this case, claimant quit work to preserve her relationship with her fiancé. She had attempted to retain her employment and relationship without moving to a location from which commuting was impracticable, but the strain retaining her employment placed on her relationship was too great. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working at a job that required her to maintain the expense of two households, commute up to three hours each direction to travel to work, and create "serious financial, emotional and familial relationship issues," such that continuing to work jeopardized the relationship. We therefore conclude that claimant had good cause for quitting work for personal reasons. She is not disqualified from receiving unemployment insurance benefits because of her work separation.

Having concluded that claimant's planned voluntary leaving was for good cause, ORS 657.176(8) does not apply to this matter, and claimant's discharge may not be disregarded. Therefore, we conclude that claimant's May 1, 2015 work separation was a discharge, not for misconduct, and she may not be disqualified from receiving unemployment insurance benefits because of her work separation.³

DECISION: Hearing Decision 15-UI-41017 is set aside, as outlined above.

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

DATE of Service: August 24, 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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³ Notably, even if we had concluded claimant's work separation was a voluntary leaving, claimant would still be qualified for benefits because, as stated herein, claimant's voluntary leaving was for good cause.