

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1002

Affirmed
Disqualification
Eligible Weeks 26-15 and 27-15

PROCEDURAL HISTORY: On July 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, not for misconduct, within 15 days of a planned quit without good cause (decision # 132440). Claimant filed a timely request for hearing. On August 20, 2015, ALJ Seideman conducted a hearing in which the employer did not participate, and issued Hearing Decision 15-UI-43304, affirming the Department's decision. On August 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) ECBlend LLC employed claimant from January 17, 2014 to July 1, 2015 as a regional manager.

(2) Claimant has dyslexia and was dissatisfied that one of his managers "was making a big deal" about claimant's dyslexia at work. Audio Record at 9:54 to 10:09. The manager's behavior caused claimant stress at work.

(3) During June 2015, claimant met a person who said he planned to open a pet store in an empty store space. The person offered claimant work in the future pet store. On July 1, 2015, claimant paid him money to complete a criminal background check.

(4) Later on July 1, 2015, claimant told his employer he planned to quit work on July 15, 2015. The employer then discharged claimant without giving claimant a reason. Claimant later learned through hearsay that the employer discharged him because claimant allegedly posted a derogatory comment about the employer on Facebook. Claimant did not post a derogatory comment about the employer on Facebook.

(5) The person who told claimant he was opening a pet store never opened a pet store in the empty store space, and did not return claimant's telephone messages. Claimant was unable to contact the person again after July 1, 2015.

CONCLUSIONS AND REASONS: Claimant was discharged, not for misconduct, within fifteen days prior to her planned quit without good cause.

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. However, ORS 657.176(8) provides that, when an individual has notified an employer that he will quit work on a specific date, and the employer discharged 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.

On July 1, 2015, claimant notified the employer he was quitting work on July 15, 2015. The employer discharged claimant later that day, within 15 days prior to his planned quit date. Claimant learned through hearsay that the employer discharged him because claimant allegedly posted a negative comment about the employer on his personal Facebook page. The record shows claimant did not post a negative comment about the employer on his Facebook page, therefore the employer discharged claimant, not for misconduct. Because the employer discharged claimant, not for misconduct, within 15 days prior to his planned quit date, 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 he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 P2d 722 (2010). Claimant had dyslexia, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time. If an individual quits a job to accept an offer of other work, the individual has good cause for leaving only if the offer of work is definite and will begin in the shortest length of time possible under the circumstances. OAR 471-030-0038(5)(a) (August 3, 2011).

Claimant left work, in part, to accept a job with a new pet store. Claimant notified the employer on July 1, 2015 that he planned to quit on July 15, 2015. As of July 1, the pet store had not yet moved into the space claimant had seen, much less opened. Thus, claimant did not know if or when work would begin. In addition, because the person opening the pet store required claimant to complete a criminal background check, we infer the offer of work was contingent upon claimant passing the background check. Claimant did not know the results of his background check when he gave notice to quit. Although claimant may have expected the store to open and to pass the background check, the offer of

work was not “definite” at the time he quit work because the offer was contingent on those events occurring, and they had not yet occurred when he gave notice to quit. Therefore, claimant did not have good cause to quit under OAR 471-030-0038(5)(a).

Claimant also left work, in part, because he was dissatisfied with how one manager addressed his dyslexia at work. Although claimant felt stress at work from the manager’s behavior, and the manager’s behavior may have been inappropriate, claimant did not allege or establish that the manager’s behavior was so serious as to create a situation so grave that a reasonable and prudent person with dyslexia would have no reasonable alternative but to leave work when he did. Thus, claimant failed to establish good cause for quitting work due to the manager’s behavior.

Because the employer discharged claimant, not for misconduct, within 15 days of claimant’s planned quit without good cause, the work separation is adjudicated as if the discharge did not occur, and the planned quit did occur. Claimant therefore is disqualified from receiving unemployment insurance 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 voluntary leaving date. Here, claimant’s discharge occurred during the week of June 28 through July 4, 2015 (week 26-15), and the week prior to the week of his planned quit is July 5 through July 11, 2015 (week 27-15). Accordingly, claimant is eligible for waiting week credit or benefits for weeks 26-15 and 27-15.

DECISION: Hearing Decision 15-UI-43304 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 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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