

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1537

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83129). Claimant filed a timely request for hearing. On December 21, 2015, ALJ M. Davis conducted a hearing, and on December 23, 2015, issued Hearing Decision 15-UI-49912, affirming the Department's decision. On December 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stream International, Inc. employed claimant as telephone representative from August 10, 2015 to October 2, 2015.

(2) The employer expected its employees to report for work as scheduled and had an attendance policy that provided that if an employee accrued 2.5 attendance points for absences or tardiness during his or her training period the employee could be discharged. Claimant was aware of the employer's expectation and attendance policy.

(3) By the end of September 2015, during her training period, claimant had already accrued two attendance points based on absences from work. During the last week of September, claimant reported for work while obviously ill and her supervisor verbally warned her that if she accrued any more attendance points for lateness or absence, even due to illness, she would be discharged. She had claimant sign a written warning stating the same.

(4) On October 2, 2015, claimant was ill and taking medication. She called the employer and left a message that she would be late or absent due to illness. After concluding she would be terminated whether late or absent, she stayed home from work and did not return after that day.

CONCLUSIONS AND REASONS: We disagree with the Department and ALJ. Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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). 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.

In the Department’s initial determination, its authorized representative concluded claimant quit work without good cause after finding as fact that claimant quit because she “assumed she was discharged” after she violated a “final written warning” received after a prior violation of the employer’s attendance policy. Decision # 83129. Notably, the authorized representative failed to mention that the employer specifically warned claimant verbally and in writing that she would be discharged for any additional attendance policy violation regardless of the cause. The ALJ agreed that claimant quit work without good cause, reasoning,

To the extent claimant voluntarily quit work because she believed the employer would discharge her; she did not have good cause. The employer warned her that if she accrued any additional absences, she would be discharged. Claimant decided not to return to work when she realized she would be late to work on October 2, 2015. While claimant’s job may have been in jeopardy, she could have reported to work and the employer may not have discharged her.

Hearing Decision 15-UI-49912 at 2.

We disagree. Substantial evidence fails to support the ALJ’s reasoning that reporting for work based on the mere possibility the employer might not discharge her was a reasonable alternative to leaving work when she did. Claimant was verbally warned the prior week while obviously ill at work that if she was tardy or absent, even due to illness, she would exceed the allowed number of attendance points and be discharged. On this record, after accruing additional attendance points for her absence on October 2, her discharge for that reason was all but assured. Even the ALJ found that the employer specifically warned her that “if she accrued any additional absences, she would be discharged.” *Id.* More likely than not, claimant quit work on October 2 to avoid a discharge that was inevitable, and likely imminent, but would not have been for misconduct.¹

An employer has the right to expect an employee to report for work as scheduled and claimant acknowledged at hearing that she knew her absence from work on October 2 violated that employer expectation. Audio Record ~ 6:45 to 8:00. However, claimant did not miss work that day because she was indifferent to the consequences of her actions. Claimant’s absence that day was due to illness and absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

¹ OAR 471-030-0038(5)(b)(F), which provides that quitting work to avoid being discharged for misconduct is quitting without good cause, does not apply to this case, because claimant’s discharge would not have been for misconduct.

Claimant had no reason to wait some unspecified amount of time to be discharged, and every incentive to avoid the stigma of discharge before beginning her work search. Under the circumstances, no reasonable and prudent employee of normal sensitivity, exercising ordinary common sense, whose work separation was all but assured, would choose to be discharged instead of quitting.² Claimant voluntarily left work with good cause and is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-49912 is set aside, as outlined above.³

Susan Rossiter and J. S. Cromwell.

DATE of Service: February 2, 2016

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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² *See Appeals Board Decision 12-AB-2961*, November 16, 2012 (claimant had good cause to quit work to avoid imminent or inevitable discharge that was not for misconduct); *Appeals Board Decision 12-AB-2919*, November 15, 2012 (remand to determine whether claimant's potential discharge was for misconduct, and whether he had good cause to quit to avoid being discharged, not for misconduct, when his immediate work separation was assured and the only thing left was to negotiate how the separation would be characterized by the employer to prospective employers); *Appeals Board Decision 12-AB-2824*, November 6, 2012 (claimant had good cause to quit to avoid being discharged, not for misconduct, and losing her pharmacy technician certification); *Appeals Board Decision 12-AB-1609*, June 27, 2012 (claimant had good cause to quit to avoid being discharged, not for misconduct, when his discharge was assured and he had reason to believe it would look better on his employment record if he quit instead); *Appeals Board Decision Employment Appeals Board, 12-AB-0436*, March 16, 2012 (claimant had good cause to quit to avoid being discharged, not for misconduct, and receive a severance package); *Appeals Board Decision 11-AB-3571*, February 3, 2012 (claimant had good cause to quit to avoid being discharged, not for misconduct, and receive a monetary settlement); *compare, Appeals Board Decision 12-AB-2831*, November 16, 2012 (claimant did not have good cause to quit work when her discharge was not assured and did not specify particular concerns about the stigma of a discharge on her future employability); *Appeals Board Decision 12-AB-2916*, November 19, 2012 (claimant did not have good cause to quit work to avoid a performance improvement plan she thought would result in her discharge, but discharge was not inevitable); *Appeals Board Decision 12-AB-2914*, November 19, 2012 (claimant did not have good cause to quit work to avoid a performance improvement plan she thought would result in her discharge, but discharge was not inevitable).

³ 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.