

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0207**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145511). Claimant filed a timely request for hearing. On February 9, 2016, ALJ Frank conducted a hearing, and on February 17, 2016 issued Hearing Decision 16-UI-53132, concluding claimant voluntarily left work, but was eligible to receive benefits during the weeks of November 8, 2015 through November 21, 2015. On February 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Keystone Automotive Industries, Inc., doing business as Foster Auto Parts, employed claimant from February 17, 2014 until November 12, 2015, last as a forklift operator and also performing some quality control duties for its plastics department.

(2) Sometime before November 2015, claimant assumed new job duties in addition to the duties he was already performing. At that time, claimant was earning \$13.50 per hour. Claimant thought the employer should raise his hourly wage to reflect his new and additional duties.

(3) On November 11, 2015, as the operations manager passed claimant's work area, claimant asked to speak with him. Claimant told the operations manager in substance that he deserved a raise because he was performing additional job duties and they discussed claimant's demand. The shop supervisor overheard the conversation and joined it very shortly after it began. As the conversation progressed, claimant told the operations manager that he wanted his pay raised to \$15 per hour. The operations manager declined claimant's wage demand and stated, "There's nothing I can do to get you that." Transcript at 18. Claimant stated that the wage he was receiving was "not livable" and "if I don't get \$15 an hour, I'm going to have to put in my two weeks' notice." Transcript at 19. The operations manager told claimant, "I don't want you to have to go that route [quitting]." Transcript at 19. The conversation ended. Claimant did not attempt to withdraw his resignation. After the conversation, the operations manager contacted the plant manager and a representative from the employer's human

resources department about his discussion with claimant. It was decided not to give claimant the wage raise he demanded and to accept his resignation.

(4) On November 12, 2015, the employer's payroll department prepared a final pay check for claimant covering the two weeks that he stated he would continue to work if he did not receive the raise. The employer's plant manager, accompanied by a human resources representative and the district manager, went together to speak with claimant in the plant to verify that he had stated an intention to quit the day before and, if so, to give him the final pay check. Prior to the time they spoke with claimant, claimant did not attempt to withdraw his resignation. The employer representatives approached claimant. The plant manager asked claimant if he had made any "threats" to the operations manager the day before. Transcript at 29. Claimant stated that he had told the operations manager that he was going to quit if his wage was not increased to \$15 per hour. The plant manager told claimant that his wage was not going to be increased and the employer had accepted his resignation. Claimant then stated that since he had not given notice of his intention to quit to the plant manager, his resignation was ineffective. The plant manager refused to allow claimant to withdraw his resignation and to continue working.

(5) On November 12, 2015, the employer discharged claimant because it did not want him to work until November 25, 2015, which was two weeks after he spoke with the operations manager about resigning if he was not given a raise.

**CONCLUSIONS AND REASONS:** Claimant intended to leave work without good cause on November 25, 2015. The employer discharged claimant but not for misconduct on November 12, 2015, which was within fifteen days of his planned voluntary leaving on November 25, 2015. Claimant is eligible to receive benefits for the weeks of November 8, 2015 through November 21, 2015 and is thereafter disqualified from receiving benefits based on this work separation.

The first issue this case presents is the nature of claimant's work separation. Claimant contended that he never stated on November 11, 2015 that he was going to resign in two weeks if he was not given a raise, and the employer abruptly discharged him on November 12, 2015 for no apparent reason. Transcript at 5. The employer's witnesses contended otherwise. Transcript at 19, 24, 25, 29. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

At hearing the testimony of the parties was in conflict about what claimant said on November 11 and 12, 2015. Two witnesses for the employer gave first-hand, detailed and consistent accounts of claimant's statements on November 11, 2015. Transcript at 17, 18, 19, 24. Claimant agreed that both employer witnesses took part in the November 11, 2015 discussion, but denied that he ever stated an intention to quit. Transcript at 5, 11, 15, 34. The witnesses for the employer appeared credible and, as compared to claimant, relatively disinterested in the outcome of the hearing. No reliable motive can be discerned for the employer's witnesses to fabricate their testimony and the testimony of two employer witnesses outweighs that of claimant. As to the November 12, 2015 discussion among claimant, the plant manager and two other employer representatives, the parts of it that are undisputed - that the plant manager asked claimant if he had said he was going to resign on the previous day - make the most logical sense only if claimant had stated an intention to resign on the previous day. Because the plant manager's account of

the second conversation was corroborated by the testimony of the employer's two witnesses about the November 11, 2015 conversation, and appeared more plausible than claimant's account, it also outweighs claimant's account. EAB has accepted the testimony of the employer's witnesses about both discussions.

Based on the testimony of the employer's witnesses, claimant stated on November 11, 2015 that he was giving two weeks' notice of leaving work if the employer did not agree to raise his wage. The purpose of the plant manager's discussion with claimant on November 12, 2015 was to confirm that claimant had stated a conditional intent to quit if his wage was not increased, to tell claimant with certainty that his wage was not going to be raised and the condition he placed on continuing to work had failed and his resignation was accepted. Despite claimant's statement to the plant manager on November 12, 2015 that he had not told him that particular manager that he was quitting, claimant's November 11, 2015 statement to the operations manager about his intention to resign was to a member of the employer's management, was a communication to the employer, and effective even if he was informed of its acceptance by the plant manager, a different member of management. While claimant might have attempted to withdraw his resignation after the plant manager told him it had been accepted, an employer is allowed to reject an attempted rescission of an earlier resignation and the work separation remains a voluntary leaving. *Counts v. Employment Department*, 159 Or App 22, 976 P2d 96 (1999). Where, as here, the employer did not formally notify claimant it had accepted claimant's initial resignation that is not of any significance since a later rejection of the attempted rescission of a resignation is effectively an acceptance of the initial resignation. *Schmelzer v. Employment Division*, 57 Or App 759, 646 P2d 650 (1982). On November 11, 2015, by initially stating that he was going to resign and not withdrawing that resignation before the employer accepted it on November 12, 2015, claimant was unable by his later actions to change the nature of the work separation from that of a voluntary leaving.

However, rather than being a straightforward case of a voluntary leaving, on November 12, 2015, the employer intervened to discharge claimant before the effective date of his resignation, which was two weeks after November 11, 2015 or November 25, 2015. ORS 657.176(8) states that when an individual has notified the employer that the individual will leave work on a specific date and it is determined that the voluntary leaving would be for reasons that do not constitute good cause, and the employer discharged the individual, but not for misconduct, no later than 15 days prior to the planned voluntary leaving, the separation is treated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, in this situation, the individual 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. This statute potentially applies to the employer's discharge of claimant because the discharge occurred on November 12, 2015, which was 13 days before claimant's planned voluntary leaving and that leaving was for reasons that claimant did not show were for good cause. The remaining issues to determine the applicability of ORS 657.176(8) are whether claimant's planned voluntary leaving was or was not for good cause and whether the employer's intervening discharge of claimant was or was not for misconduct.

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 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

Claimant resignation became effective because the employer refused to raise his wage from \$13.50 per hour to \$15 per hour. Aside from contending that he understood the operations manager to have had agreed to the raise, claimant did not present any evidence that the employer's failure to provide this wage increase created a grave situation for him. Transcript at 7, 8. For example, claimant did not assert or contend that he was unable to meet his living expenses when earning \$13.50 per hour, or that some other serious harm would likely befall him if his wage remained at \$13.50. Even assuming claimant believed the operations manager had reneged on an agreement to raise his wage that, standing alone, is insufficient to demonstrate that he faced a situation of gravity. Absent some evidence of independent gravity from not receiving the raise, claimant failed to meet his burden to demonstrate that grave reasons motivated him to leave work. Claimant did not meet his burden to demonstrate that he had good cause when he told the employer he planned to leave work if his wage was not increased.

With respect to whether the employer demonstrated that its intervening discharge of claimant was or was not 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The testimony of the employer's plant manager was that the employer discharged claimant in lieu of allowing him to work after he gave notice of his intention to leave because in its judgment, claimant would have not been "happy" at work during the period between his notice to the employer and the effective date of his leaving. Transcript at 33. A concern about claimant's future morale in the workplace is insufficient to demonstrate the type of willful or wantonly negligent mental state necessary to show that claimant engaged in misconduct. The employer discharged claimant, but not for misconduct on November 12, 2015.

Given that claimants' planned voluntary leaving was not for good cause, and the employer discharged claimant not for misconduct within 15 days of claimant's planned leaving, the requisites to the application of ORS 657.176(8) exist in this case. Applying ORS 657.176(8), the work separation is considered a voluntary leaving, but claimant is eligible for benefits for the week in which the November 12, 2015 discharge occurred (the week beginning November 8, 2015) through the week prior to the week of claimant's November 25, 2015 voluntary leaving (the week ending November 21, 2015).

Claimant voluntarily left work without good cause, and therefore is disqualified from receiving benefits. However, he is eligible for benefits for the weeks of November 8, 2015 through November 21, 2015.

**DECISION:** Hearing Decision 16-UI-53132 is affirmed.

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

**DATE of Service: March 14, 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](http://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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