

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0238

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 73425). The employer filed a timely request for hearing. On February 5, 2016, ALJ DeLuga conducted a hearing, and on February 23, 2016 issued Hearing Decision 16-UI-53561, concluding that claimant voluntarily left work without good cause. On March 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments and the entire hearing record.

FINDINGS OF FACT: (1) Landmark Ford, Inc. employed claimant from July 2012 until November 12, 2015 as a mechanic.

(2) The employer employed claimant 40 hours per week and paid him \$15 per hour, plus monthly bonuses averaging \$300 per month.

(3) In November 2015, claimant accepted an offer of work as a year-round mechanic with Timberline Lodge, working 40 hours per week for \$14 per hour. The start date for the new job was December 4, 2015, and the job was expected to continue indefinitely.

(4) On November 12, 2015, claimant gave his supervisor two weeks' notice of his intent to quit work on November 26, 2015. Claimant planned to move from Portland to Government Camp before he began work for Timberline Lodge on December 4. Claimant's supervisor told claimant he was upset with him because he was quitting after the employer had paid for two years of education for him. The supervisor told claimant to collect his tools and leave the property, and that the employer would give him his final paycheck on November 13, 2015. Claimant left work as instructed and did not return.

(5) Claimant's weekly benefit amount was \$310.¹

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, not for misconduct.

The parties disputed whether claimant quit work, or whether he was discharged by the employer. The applicable Oregon administrative rule states that, 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). On November 12, 2015, claimant gave the employer two weeks' notice that he intended to quit on November 26, 2015. Claimant was willing to work until November 26, but the employer did not allow him to work after he gave notice on November 12. Thus, the employer discharged claimant on November 12, less than 15 days prior to claimant's planned voluntary leaving date.

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 discharges him, not for misconduct, no more than fifteen days prior to that date, and the planned voluntary leaving would have been without good cause, the work separation shall be 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. As this statute is potentially applicable to claimant's work separation, the first issue to be determined is whether claimant's planned voluntary leaving would have been with, or 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). Where an individual leaves work to accept an offer of other work, good cause exists if the offer is definite, the work is to begin in the shortest length of time as can be deemed reasonable under the individual's circumstances, the offered work is reasonably expected to continue and will pay an amount equal to or in excess of the individual's weekly benefit amount or an amount greater than the work left. OAR 471-030-0038(5)(a).

In Hearing Decision 16-UI-53561, the ALJ found that claimant planned to leave work eight days before the start of his next job, and concluded that claimant failed to show that eight days was the shortest length of time as can be deemed reasonable under claimant's circumstances.² We disagree and conclude that claimant met his burden to show he had good cause to leave work on November 26. Had claimant left work on November 26, 2015, he would have had seven days off work to move his residence and his

¹ We take notice of this fact, which is contained in Employment Department records. 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. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

² Hearing Decision 16-UI-53561 at 3.

tools from Portland to Government Camp, before beginning his new job with Timberline on December 4. We conclude that seven days between these two jobs was a reasonable period of time to move residences and start a new job, taking into consideration the possibility of inclement weather in Government Camp during November, and the distance from Portland to Government Camp.³ Moreover, claimant satisfied the other three elements of OAR 471-030-0038(5)(a). Claimant's offer of work from Timberline Lodge was definite because it included terms that showed a mutual understanding between claimant and Timberline, including pay rate, start date, position and duration. Furthermore, the work was reasonably expected to continue, and was expected to pay \$560 per week (\$14 x 40 hours), which was more than his weekly benefit amount of \$310. Accordingly, under OAR 471-030-0038(5)(a), claimant's planned voluntary leaving on November 26, 2015 would have been with good cause, making ORS 657.176(8) inapplicable. Because ORS 657.176(8) is inapplicable, the only issue remaining is whether the employer discharged claimant for misconduct under ORS 657.176(2)(a).

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) (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 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 employer discharged claimant because it was dissatisfied that claimant gave notice he would quit work on November 26, 2015 after claimant completed training financed by the employer. The employer's dissatisfaction is insufficient to show claimant engaged in a willful or wantonly negligent disregard of the employer's reasonable expectations. Accordingly, we agree with the ALJ that claimant's conduct prompting his discharge was not misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 16-UI-53561 is set aside, as outlined above.

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

DATE of Service: March 28, 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.

³ The distance from Portland, Oregon to Government Camp, Oregon is 56 miles. <http://www.travelmath.com/drive-distance/from/Portland,+OR/to/Government+Camp,+OR>

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.