

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0252

Late Application for Review Allowed
Hearing Decision 16-UI-52286 Affirmed
Disqualification

PROCEDURAL HISTORY: On December 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, but because he was discharged, not for misconduct, no more than 15 days before his planned leaving date, he was eligible to receive benefits up to November 14, 2015 (decision # 160402). Claimant filed a timely request for hearing. On January 28, 2016, ALJ Frank conducted a hearing at which the employer did not appear, and on February 3, 2016 issued Hearing Decision 16-UI-52286, concluding claimant voluntarily left work without good cause, but because he was discharged, not for misconduct, no more than 15 days before his planned leaving date, he was eligible to receive benefits for the weeks of November 8, 2015 through November 21, 2015. On March 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

LATE APPLICATION FOR REVIEW: Claimant's application for review of Hearing Decision 16-UI-52286 was filed on March 4, 2015, which was nine days after the February 23, 2016 date on which it would have been timely filed. In support of his late filing, claimant offered a letter faxed from the same telephone number as his late application for review in which "Linda L." stated that she first attempted to fax an application for review from claimant to EAB on February 11, 2016, which EAB did not receive. Based on this representation, EAB allowed claimant's late application for review since the non-receipt of the timely faxed application for review was a factor or circumstance beyond claimant's reasonable control, and it appears that claimant faxed his second application for review within seven days of the date he was first aware that EAB did not received the February 11, 2016 application for review faxed. See OAR 471-041-0070 (March 20, 2012).

WRITTEN ARGUMENT: Claimant submitted a written argument to EAB in which he offered copies of emails, not presented during the hearing, addressing when he was offered the new position that caused him to leave employment. However, claimant did not explain why he was unable to present this new information during the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. For

this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Harrington Industrial Plastics, LLC employed claimant from September 7, 2007 until November 10, 2015, last as a warehouse manager.

(2) As of early November 2015, claimant earned \$15.75 per hour and worked 40 hours per week for the employer. Claimant was dissatisfied with his earnings and sought new employment.

(3) On November 9, 2015, claimant spoke with a representative of Terra Hydr about a new position. The representative told claimant Terra Hydr was offering positions paying \$20 per hour and requiring approximately 40 hours of work per week. The representative also told claimant he needed to take and pass certain online tests as a condition of his hire, and until he did so, Terra Hydr could not set his starting date.

(4) On November 10, 2015, in the morning, claimant notified the employer that he was resigning effective in two weeks or on November 24, 2015 because he had found new employment. Approximately an hour after claimant gave notice of his resignation, claimant's manager told him to leave the workplace and his final pay check would be mailed to him on November 11, 2015.

(5) On approximately November 17, 2015, claimant began taking the online tests to allow him to work at Terra Hydr, and he began working for Terra Hydr on December 8, 2015.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause, but is eligible to receive benefits during the weeks of November 8, 2015 through November 21, 2015.

Claimant planned to voluntarily leave work on November 24, 2015, but the employer discharged him on November 10, 2015, after he notified it of his intention to leave. When a discharge intervenes before a planned voluntary leaving date, ORS 657.176(8) sets out the circumstances under which the discharge will be disregarded and the work separation is adjudicated as if the planned voluntary leaving had occurred. If, after an individual has notified the employer that he plans to leave work, but not for good cause, the individual's employer discharges the individual, but not for misconduct, no more than 15 days before the planned voluntary leaving date, the separation is considered to be a voluntary leaving, but 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. ORS 657.176(8)(a)-(c). Because the employer discharged claimant 14 days before his planned voluntary leaving date, ORS 657.176(8) is potentially applicable to this work separation. To determine whether it is fully applicable to this separation, it must also be determined whether claimant's planned leaving on November 24, 2015 was or was not for good cause and whether the employer discharged claimant on November 10, 2015 for or not for misconduct.

The Voluntary Leaving. 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). A claimant who leaves work to accept an offer of new employment has good cause for leaving only if, among other things, the offer of new work is "definite." OAR 471-030-0038(5)(a). 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 testified that as of the November 10, 2015 date he notified the employer he was quitting work, the work offered to him by Terra Hydr was contingent on his taking and passing certain online tests, and that Terra Hydr could not give him a starting date until it received final notice that he had successfully completed those tests. Audio at ~7:55, ~8:22, ~10:16, ~10:22. According to the Department's Unemployment Insurance Benefits Manual, a job offer is "definite" within the meaning of OAR 471-030-0038(5)(a) only if it is "not contingent on anything." Unemployment Insurance Benefits Manual (April 2, 2010) at Ch. 442 §A. Given that Terra Hydr's offer to claimant was conditioned on the taking the online tests, it was not "definite." See *Appeals Board Decision*, 2015-EAB-1389 (January 4, 2016) (any contingency to the new work makes the offer not definite). As well, the Department's Benefits Manual further states that, to be considered "definite," a job offer should include "an expected start date" to ensure that a claimant does not "[leave] the old job too soon." Unemployment Insurance Benefits Manual at Ch. 442 §B. Terra Hydr's job offer to claimant also did not have an expected date, and for this second reason, it also was not "definite" within the meaning of OAR 471-030-0038(5)(a); see *Appeals Board Decision* 2015-EAB-0298 (May 5, 2015) (an offer lacking a certain start date is not a definite offer of new work). Claimant did not meet his burden to show that he had good cause to leave work to accept new work with Terra Hydr. Because claimant's planned leaving was without good cause, ORS 657.176(8) remains potentially applicable to claimant's claim.

The Discharge. The final matter to consider in determining whether ORS 657.176(8) applies to claimant's work separation is whether 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As can best be discerned on this record since the employer did not appear to present evidence at the hearing, the employer discharged claimant on November 10, 2015 because he notified it that day that he planned to leave work on November 24, 2015. That claimant chose to resign was not a willful or wantonly negligent disregard of the employer's standards, and there is no evidence in the record supporting that the employer discharged claimant for any other acts that might constitute misconduct. It has not been demonstrated that the employer discharged claimant for misconduct.

The Application of ORS 657.176(8). Since all the requisites to the application of ORS 657.176(8) were met, although claimant left work without good cause, he is eligible to receive benefits during the period November 8, 2015 (the week in which the discharge occurred) through November 21, 2015 (the end of the week prior to the week of the planned voluntary leaving) and is thereafter disqualified as a result of the work separation.

DECISION: Hearing Decision 16-UI-52286 is affirmed.

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

DATE of Service: April 4, 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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