

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0580

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83653). Claimant filed a timely request for hearing. On April 25, 2016, ALJ Murdock conducted a hearing, and on April 29, 2016 issued Hearing Decision 15-UI-58536, affirming the Department's decision. On May 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant and the employer both submitted written arguments in which they presented new information not offered into evidence during the hearing. Neither party explained why they did not present this information at the hearing or otherwise showed as required by OAR 471-041-0090 (October 29, 2006) that factors circumstances beyond their reasonable control prevented them from doing so. For these reasons, EAB did not consider the new information that either party sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Appliance & Mower Center/AMC Parts employed claimant from February 11, 2014 until January 5, 2016, last as the assistant manager of the parts shipping department.

(2) At the time he was hired, claimant was assigned to work as a shipping clerk. In May 2015, the employer promoted claimant to the position of assistant manager of the parts department.

(3) In mid-September 2015, the manager of the parts department took the employees in that department, including claimant, on a tour of the warehouse to discuss recent orders that were not shipped to customers as expected. The day after the tour, the employer's general manager and operations manager met with the parts department manager. After they met, the parts department told claimant that the general manager and operations manager had told him that employees on the tour told them that the visit to the warehouse was made for disciplinary reasons. Exhibit 1 at 2. A few days later, claimant, rather than the parts department manager, went to speak with the general manager about her conversation with the parts department manager. The next day, claimant met with the general manager and operations

manager. At that meeting, he demanded that the managers tell him what employees had told them about the purpose of the site visit, which he described as a “fabricated story” regarding what had occurred; he also demanded to be told the names of the reporting employees. Exhibit 1 at 2, 3. The managers refused to disclose the identities of the employees. Claimant was upset and angry with the managers. *Id.*

(4) In mid-October 2015, the manager of the parts department left employment. On approximately October 22, 2015, the employer’s owner asked claimant if he could “step in” and assume some of the managerial duties in the parts department because the previous manager had departed. Transcript at 7. Claimant assumed some of the manager’s duties and the employer’s chief operating officer took over some. Transcript at 8, Exhibit 1 at 3. Claimant did not receive a raise in pay.

(5) On November 19, 2015, the owner met with the general manager, the operations manager, and claimant. The owner brought up the incident in September when claimant had confronted the general manager and operations manager. The owner stated that claimant, the general manager and the operations manager should “start afresh” and “forget the past.” Exhibit 1 at 3; Transcript at 27, 28. At the meeting, claimant understood the owner to refer to him as a member of the “management team.” Transcript at 9. The owner also told claimant it was important for him to show he could get along with the general manager and the operations manager, and that he trusted and respected both of them. The owner further told claimant “it had to be both ways” and that the managers needed to feel that they, as well, had a good working relationship with claimant. Transcript at 20. On November 20, 2015, claimant had a conversation with the general manager and the operations manager. When claimant asked if they thought they could work with him, the operating officer said “yes,” but the general manager said only “I will try.” Exhibit 1 at 3.

(6) On November 27, 2015, an employee in the parts department gave notice that he was quitting to the general manager or the operations manager rather than claimant. Claimant was offended and thought that the general manager and the operations manager were disrespecting him as the manager of the parts department when they did not immediately inform him of the resignation. Exhibit 1 at 4.

(7) On December 22, 2015, claimant met with the general manager and the operations manager to discuss the reason why a merchandise delivery was not put away promptly upon receipt. Claimant thought the warehouse manager was responsible for putting the merchandise away and that, as the parts department manager, he was being unfairly blamed for the warehouse manager’s failure to perform his duties. Claimant referred to himself as the parts department manager and told the general manager to “stop protecting the warehouse manager.” Transcript at 11. The general manager told claimant that he was not a department manager, but the “interim” manager of the parts department and that the employer would make a decision by March 2016 about a permanent manager for the parts department. Transcript at 6; Exhibit 1 at 5.

(8) On December 23, 2015, claimant called the owner about the delay in putting away the delivery that was discussed with him the previous day. Claimant told the owner the employer was misinformed about when the delivery was made to the employer and the failure to put the delivery away was not his fault. The owner apologized to claimant for not having had the correct information. Exhibit 1 at 5. During this call, in response to claimant’s comments about the conversation he had the previous day, the owner also told claimant he was interim manager of the parts department and not the permanent manager and a decision was going to be made about that managerial position by March 2016. Transcript at 7.

(9) On December 30, 2015, the owner called claimant and told him that he needed to promptly ship a particular order. Claimant told the owner that he had never received a list of the merchandise to be shipped. Claimant thought the owner was blaming him for the failure of the warehouse manager to perform his duties since the list of items to be retrieved had been given to the warehouse manager. Transcript at 13, 14.

(10) On January 4, 2016, the warehouse manager was showing a warehouse employee the procedures for retrieving items from inventory for shipping. Claimant thought such training was part of his duties. When questioned, the warehouse manager stated that the general manager and the operations manager had told him to train the warehouse employee. After this incident, claimant thought the general manager was retaliating against him for the interaction in mid-September 2015 and that, as a result, he would not be promoted to the position of manager of the parts department.

(11) On January 5, 2016, claimant submitted a resignation letter to the employer stating that his last day of work would be January 7, 2016. The reason claimant gave for quitting work was the employer's failure to make a decision about whether he would receive the promotion to parts department manager. Exhibit 2 at 6. Upon receiving claimant's resignation, the employer was unwilling to allow him to continue working since it thought he would not be productive at work after submitting his resignation, gave him his final paycheck and escorted him from the premises.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

In this case, in response to claimant's January 5, 2016 notice that he planned to leave work on January 7, 2016, the employer discharged him that same day. A discharge that intervenes between when a notice of leaving has been given to the employer and the planned date of the voluntary leaving may be subject to special consideration. ORS 657.176(8) applies to a situation where an individual notifies an employer that he will leave work on a specific date, and the leaving would be for reasons that do not constitute good cause, and the employer discharges claimant, but not for misconduct, no more than 15 days prior to the planned voluntary leaving; under these circumstances, the work separation will be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. In this situation, the individual is eligible for benefits during the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving. ORS 657.176(8)(c). Here, since the employer discharged claimant two days before his planned voluntary leaving date, ORS 657.176(8) is potentially applicable to claimant's claim. We next consider whether claimant's voluntary leaving was for good cause to determine the further applicability of ORS 657.176(8).

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 left work when he did, in part, because the employer had not yet made a decision about whether he would be promoted to the position of parts department manager. That claimant wanted the employer to make its decision about the promotion sooner than March 2016 did not, without more, give rise to a grave situation. Claimant did not assert or present evidence showing that he was likely to sustain any cognizable harm if it took the employer two months longer to make its decision than he preferred. Claimant also did not show that the employer's delay in making the decision was likely motivated by an intention to prejudice claimant in his efforts to obtain that promotion, or the delay was likely to have that result. Claimant did not show that the employer's delay was a grave reason to leave work.

Claimant also contended that after his interaction with the general manager and operations manager in September 2015, employer representatives behaved with hostility toward him, retaliated against him and unfairly blamed him for situations that were outside the scope of his job duties. However, it appears that claimant stated his views very bluntly and vigorously confronted the managers during the September 2015 interaction. In view of the tenor of that meeting, it was likely not an act of retaliation and nor a grave situation when the general manager stated to claimant on November 20, 2015, that she could only "try" to work with him. What was significant in the November 19 and 20, 2015 interactions were the conciliatory attitude of the owner, his urging claimant and the general manager to try to start over, and the willingness of the general manager to try to make an effort. The incidents on December 22 and 23, 2015, when claimant contended he was blamed for the inadequate performance of the warehouse manager when the shipment of an order was delayed, also did not cause a grave situation for claimant. Indeed, claimant agreed that the owner apologized to him on December 23, 2015 for having relied on incorrect information when he initially called claimant about the status of the shipment. Although claimant cited the incident on December 30, 2015 as another where he was held responsible for the delays of the warehouse manager, the owner denied he had accused claimant of dereliction in this instance and testified he was only concerned about getting the shipment out since the employer needed to generate revenues quickly. Transcript at 30, 31. In light of the owner's rebuttal testimony and the lack of specific detail in claimant's testimony, claimant did not show that in the incident on December 30, 2015 the owner acted in a retaliatory manner, with hostility or blamed him for the warehouse manager's performance. Finally, the incident on January 4, 2015 also was not necessarily emblematic of a retaliatory action against claimant. It is not clear why claimant would be offended, and feel retaliated against, when the general manager instructed the *warehouse* manager to train a *warehouse* employee in retrieving inventory. As well, since claimant was informed in late December 2015 that he was only acting as an interim manager in the parts department is also is not clear why he would think the general manager intended to undercut his managerial authority when she assigned the training to the warehouse manager. There are many alternate, neutral explanations for why the general manager might have made the decision she did, including claimant and the general manager's workloads, their skills and knowledge, their experience in training new employees, *etc.* Since claimant did not rule out that non-retaliatory and non-hostile motives were the basis for this decision, as well as the other allegedly hostile and retaliatory incidents that claimant cited, claimant did not demonstrate grave reasons for leaving work when he did.

From this record, claimant's disappointment and resentment at not being promptly promoted to the position of department manager after being asked to act as the interim manager may be inferred as the principal basis for his decision to leave work. However, the employer's decision to carefully consider

over a period of time if claimant could appropriately handle interim managerial duties or if it needed to look further to find a new parts department manager was not a grave reason for claimant to leave work. It is not uncommon for an employee whom an employer is considering for a managerial position to be asked to perform some managerial duties to assess whether he or she has the temperament and skills to perform as a manager. A reasonable and prudent employee would not have left work under the circumstances that claimant did. Claimant did not show good cause for leaving work when he did.

Because claimant's leaving was without good cause, we next consider whether the employer discharged him for misconduct, which is the next step in determining whether ORS 657.178(8) is applicable to this matter. 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 has the burden to show claimant's discharge was for misconduct by a preponderance of the evidence.

The employer's witness testified that the employer discharged claimant on January 5, 2016, two days in advance of his planned voluntary leaving, because it thought he would not be productive during his remaining time at work. Transcript at 34. The employer's speculation about how claimant would perform in the final two days of his employment was not evidence that claimant violated the employer's standards with willful or wanton negligence. The employer did not demonstrate claimant engaged in misconduct or that it discharged claimant for misconduct.

Since claimant's planned voluntary leaving was not for good cause, and the employer discharged claimant, not for misconduct, two days before his planned voluntary leaving, ORS 657.176(8) is applicable to claimant's claim. Under that statute, claimant's work separation must be treated as if the voluntary leaving had occurred and the discharge had not. However, because the discharge occurred within the same benefit week as the planned voluntary leaving, there is no week in which claimant was eligible to receive benefits due to the intervening discharge. *See* ORS 657.178(8)(c).

Claimant voluntarily left work without good cause. Although claimant was discharged not for misconduct within 15 days of the date of his planned leaving, he is not eligible for benefits under ORS 657.176(8)(c).

DECISION: Hearing Decision 16-UI-58538 is affirmed.

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

DATE of Service: June 29, 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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