

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0681

Affirmed
Disqualification
Eligible Week 6-16

PROCEDURAL HISTORY: On March 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 115720). The employer filed a timely request for hearing. On May 12, 2016 ALJ Wyatt conducted a hearing, and on May 20, 2016 issued Hearing Decision 16-UI-60110, concluding the employer discharged claimant, not for misconduct, within 15 days of a planned quit without good cause. On June 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, including a copy of the other employer's contingent offer of work to claimant. Claimant's Argument at 3-4. Claimant, however, failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

Claimant also asserted that she was not allowed to fully state her case because the ALJ "cut short" claimant's hearing due to another scheduled hearing. Claimant's Argument at 5. ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3). We conclude that the ALJ did so in this case. The ALJ told the parties' representatives during their closing arguments, not during the ALJ's inquiry into the facts of the case, that he had another hearing scheduled. Closing arguments are not evidence. Moreover, the ALJ did not "cut off" claimant's closing argument.

To the contrary, claimant's representative completed his closing argument and stated, "I guess that's about it," before the ALJ closed the record. Transcript at 40.

FINDINGS OF FACT: (1) Carl Zeiss Vision, Inc. employed claimant from 2014 to February 12, 2016 as a full time customer service agent.

(2) In late January, 2016, claimant received a conditional offer of other work as an ophthalmic technician from another employer. The other employer told claimant that she would start work on March 7, 2016 if she was selected for a position.

(3) On February 3, 2016, claimant told her supervisor she intended to leave work because she had received an offer of other work. On February 8, 2016, claimant informed the employer that her last day of work would be February 19, 2016. At that time, the employer was willing to allow claimant to continue working until February 19. Claimant planned to travel to Hawaii for a vacation between February 19 and March 7, 2016.

(4) Claimant had several approved absences and instances when she reported late to work in February 2016, before February 10, 2016, due to illness.

(5) On February 9, 2016, claimant asked her lead if she could come in late to work, leave early from work, or take the day off on February 10, 2016 to complete prerequisites for the other work. Claimant's lead told her that she could not have the time off, so would have to instead call in sick for an "unapproved absence." Transcript at 24.

(6) On February 10, 2016, claimant sent the employer an email stating she was staying home due to illness that day. Later that day, claimant sent a text message to her lead asking if she could report work, and claimant's lead told her she could not report to work that day. Claimant had no attendance warnings before February 10, 2016.

(7) On February 12, 2016, the employer discharged claimant because it was dissatisfied that claimant did not report to work on February 10, 2016 after the employer denied claimant's request to take time off work on February 10.

CONCLUSIONS AND REASONS: Claimant was discharged, not for misconduct, within fifteen days prior to her planned quit without good cause.

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) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). However, ORS 657.176(8) provides that, when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that she 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.

On February 3, 2016, claimant notified the employer she was quitting work, and told the employer on February 9 that her last day would be February 19, 2016. The employer discharged claimant on February 12, 2016, within 15 days prior to her planned quit date. The provisions ORS 657.176(8) therefore apply to claimant's situation, and we begin our analysis by determining if the employer discharged claimant for misconduct. The employer discharged claimant because she had an "unapproved absence" when she called in sick on February 10. The employer reasonably expected claimant to report to work absent illness or some other valid reason for missing work. Claimant understood that expectation as a matter of common sense. We conclude, however, that the employer failed to meet its burden to demonstrate that claimant's conduct on February 10 was misconduct because it was a good faith error and, alternately, an isolated instance of poor judgment.

The record shows that claimant's lead told claimant she would need to call in sick if she needed time off from work because the employer could not grant approved leave for February 10. Based on the lead's statements to claimant, claimant understood that she could take the time off, but that it was not "approved" time off work. There is no evidence to show that claimant knew or should have known that taking "unapproved" time off in a manner that the lead advised her to do would result in discipline from the employer, much less her discharge from work. Claimant's actions on February 10 resulted from a good faith, though apparently erroneous, belief that she could miss work for personal reasons on February 10 and account for it as sick time.

At worst, claimant's conduct on February 10 was an isolated instance of poor judgment. Although the employer asserted at hearing that claimant had multiple attendance violations in February 2016, claimant testified that her absences before February 10 were approved and due to illness. Absences due to illness are not misconduct. OAR 471-040-0038(3)(b). Claimant's testimony was corroborated by the fact that she had no attendance warnings before February 10. Claimant was discharged for a good faith error or an isolated instance of poor judgment, and thus was not discharged for unexcused misconduct.

Because the employer discharged claimant, not for misconduct, within 15 days prior to her planned quit date, we must determine whether claimant's planned quit would have been without good cause. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she 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) (August 3, 2011). OAR 471-030-0038(5)(a) provides, in pertinent part, that for purposes of applying OAR 471-030-0038(4), an individual who leaves work to accept an offer of other work has good cause for leaving if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances.

Claimant planned to quit work on February 19, 2016 to accept an offer of other work. However, the record shows that the job offer was conditional, described by claimant as a "possible" job offer based on "certain time-sensitive things," and "not a final offer," with "conditions on different things." Transcript at 27, 28. Therefore, the job offer was not definite at the time claimant quit. The new job also did not

begin in the shortest period reasonable under the circumstances. The new job began on March 7, 2016, approximately 17 days after claimant's job with the employer would have ended if she had not been discharged. Claimant did not assert or show that it was necessary for her to have 17 days between jobs, but, rather, testified that she wanted time off for a Hawaiian vacation. Therefore, the new job did not begin in the shortest time reasonable after claimant's job with the employer ended and claimant did not have good cause to quit under OAR 471-030-0038(5)(a).

Because the employer discharged claimant, not for misconduct, within 15 days of claimant's planned quit without good cause, the work separation is adjudicated as if the discharge did not occur, and the planned quit did occur. Claimant therefore is disqualified from receiving unemployment insurance benefits, except that she 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 date. Here, claimant's discharge occurred during the week of February 7 through 13, 2016 (week 6-16), and the week prior to the week of her planned quit was also week 6-16. Accordingly, claimant is eligible for waiting week credit or benefits for week 6-16.

DECISION: Hearing Decision 16-UI-60110 is affirmed.

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

DATE of Service: July 18, 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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