

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0743

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause, but that she was eligible for unemployment benefits until March 26, 2016 because the employer discharged her, not for misconduct, within 15 days of the date she planned to leave work (decision # 113022). Claimant filed a timely request for hearing. On June 9, 2016, ALJ Monroe conducted a hearing, and on June 17, 2016, issued Hearing Decision 16-UI-62090, affirming the administrative decision. On June 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the June 9 hearing, the ALJ admitted documents submitted by claimant into the record as Exhibit 1 but did not mark them. Accordingly, we have marked Exhibit 1 based on the ALJ's descriptions. Exhibit 1 consists of the following 52 pages: a cover letter describing the documents in the exhibit (1 page); a copy of claimant's dentist license (1 page); copies of employer policies (2 pages); a copy of claimant's employment agreement with the employer (9 pages); copy of a "Request for Privileges" for the employer (1 page); information regarding the employer's pay plan (1 page); "Draft Schedules" (1 page); copies of emails claimant exchanged with coworkers (7 pages); screen shots of text messages claimant and her supervisor exchanged on February 22, 2016 (3 pages); a copy of claimant's February 22, 2016 letter of resignation (1); copies of March 8, 2016 emails claimant exchanged with a coworker (2 pages); copies of billing statements and invoices to claimant from Henry Schein (6 pages); a document regarding procedures (1 page); and copies of emails regarding claimant from former coworkers (5 pages).

FINDINGS OF FACT: (1) La Clinica del Valle Health Center employed claimant as an associate dentist from August 4, 2015 until March 17, 2015.

(2) When the employer hired claimant, it required that she sign an employment agreement. One of the terms of the agreement restricted claimant from soliciting the employer's patients for one year after her work for the employer ended. Transcript at 30. Claimant also understood that if her work for the

employer ended, her ethical obligations as a professional restricted her from asking that the employer's staff members leave the employer and go to work for claimant. Transcript at 41.

(2) When claimant began work for the employer, she found that the hand pieces she was given to use were defective. Claimant also found that she had inadequate support staff to properly assist her with her case load. Although the employer had promised claimant two full time assistants when it hired her, claimant was initially assigned only one assistant who was very overworked. Claimant repeatedly asked the employer's managers to replace the hand pieces and to provide her with additional support staff. Some time prior to February 22, 2016, the employer's chief dental officer recommended that claimant arrange for an outside company to evaluate the hand pieces that claimant had found to be defective. Transcript at 11.

(3) Some time prior to February 2016, the employer implemented a new compensation plan. Although claimant was not eligible to be placed on the compensation plan until she completed her six months probationary period, she was upset by the plan because she believed that individuals with less experience than claimant would receive higher salaries. Transcript at 16.

(4) In early February 2016, the employer hired two part time assistants to work with claimant; one was scheduled to work 20 hours a week, and the second was scheduled to work 30 hours a week. Transcript at 37.

(5) On February 22, 2016, claimant submitted a letter in which she told the employer she would be quitting her job, effective March 31, 2016. Claimant decided to voluntarily leave work because the employer failed to provide her with adequate support staff, the employer planned to place her on an unfair compensation plan, and the employer had provided her with defective equipment.

(6) Also on February 22, 2016, after she had submitted her letter of resignation, claimant sent a text message to her supervisor in which she stated that she wanted to change the date on which she planned to leave her job. Claimant's text message stated, in relevant part:

I feel it would be more professionally appropriate to give La Clinica more time (until mid-May). A specific date can be considered., [sic] but I felt that 90 days from today's date would be more appropriate and fair. I hope this is agreeable to everyone. Exhibit 1 at 34.

Claimant's supervisor responded with a text message in which she thanked claimant, and explained that she would "connect with HR and [the chief dental officer] tomorrow and let [claimant] know." Exhibit 1 at 35.

(7) On February 23, 2016, the company hired to evaluate claimant's hand pieces completed its inspection and concluded that the hand pieces needed to be replaced. Also on February 23, claimant reported the results of the evaluation in an email to the chief dental officer. Exhibit 1 at 33. On February 24, the chief dental officer notified claimant that new hand pieces had been ordered. *Id.*

(8) By letter dated February 25, 2016, the chief dental officer notified claimant the employer was discharging her, effective March 17, 2016. The employer discharged claimant because it believed

claimant violated the terms of her employment agreement and her ethical obligations by soliciting patients and staff members to come to work for or be treated by claimant after she left the employer.

CONCLUSION AND REASONS: Claimant voluntarily left work without good cause, but is eligible to receive unemployment benefits for the weeks of 11-16 and 12-16 (March 13 through 26, 2016).

Claimant planned to voluntarily leave work on March 31, 2016,¹ but the employer discharged her on March 17, 2016, after she submitted her letter of resignation. When a discharge intervenes before a planned voluntary leaving, ORS 657.176(8) sets out the circumstances under which the discharge will be disregarded and the work separation adjudicated as if the planned voluntary leaving had occurred. If, after an individual has notified the employer that she plans to leave work, but not for good cause, and 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. Under these circumstances, however, 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) may apply to claimant's work separation. To determine if this statutory provision is fully applicable to the circumstances here, we begin by determining if claimant's planned voluntary leaving on March 31, 2016 was for good cause.

The Voluntary Leaving. 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). 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 her employer for an additional period of time.

Claimant quit her job with the employer because she believed she was provided defective equipment with which she was expected to work, was given inadequate support staff, and was offered an unfair compensation plan. In regard to the equipment that claimant used, the employer eventually responded to claimant's complaints, and directed claimant to engage an outside company to inspect the hand pieces claimant asserted were unworkable. This inspection occurred on February 23, 2016, a day after claimant submitted her resignation; based on claimant's report on the results of the inspection, the employer ordered new hand pieces on February 24. Since claimant was responsible for arranging the inspection, we infer it likely that on the date she submitted her resignation, she knew or should have known the employer was going to evaluate and address the equipment problem about which she had complained. In regard to the lack of support staff provided to claimant, the employer had provided claimant with two

¹ Although claimant attempted to change the effective date of her resignation in the February 22 text message she sent her supervisor after she submitted her letter of resignation, the text message gave no specific date in May on which claimant wanted to end her employment. The text message and the supervisor's response also indicated that claimant and her supervisor understood that a change in her resignation date was contingent acceptance of the new date by human resources personnel and the chief dental officer. By discharging claimant on March 17, 2016, the employer clearly indicated it refused to accept any change in claimant's resignation date.

part time assistants by February 22. The number of hours worked by these two part time assistants and claimant's one full time assistants was equal to (and actually greater) than the hours that would have been worked by the two full time assistants the employer promised claimant when she was hired. Although defective equipment and lack of staff may have created a grave situation during several months of her employment, solutions for these two problems were in place, or imminent, by the date on which claimant decided to resign.

In regard to claimant's dissatisfaction about the employer's compensation plan, claimant failed to demonstrate that this plan, on which she would have been placed had she continued to work for the employer and completed her probationary period, constituted a grave situation. Claimant provided no evidence that the compensation plan would have adversely affected her professional or financial standing.

Because claimant failed to meet her burden to demonstrate that she faced a grave situation, she failed to show good cause for voluntarily leaving work. To determine whether ORS 657.176(8) applies, we next determine whether the employer discharged claimant for misconduct.

The Discharge. 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.

The employer discharged claimant because it believed that she violated her ethical obligations and employment contract by asking patients and staff members to leave the employer and choose to be treated by or work for claimant when she left her job with the employer. The employer's chief dental officer testified about a number of specific patients and staff members who complained about claimant's solicitation attempts. Transcript at 31-33. Claimant, however, testified that she never asked any patients or staff members to leave the employer. Because there is no reason to doubt the credibility of either witness, the evidence on this point is equally balanced. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore failed to meet its burden to demonstrate that claimant engaged in misconduct by willfully violating the employment agreement and her ethical obligations. We conclude that the employer discharged claimant, but not for misconduct.

The Application of ORS 657.176(8). Since all the requisites to the application of ORS 657.176(8) were met, claimant is eligible to receive benefits during the period from March 13, 2016 (the week in which the discharge occurred) through March 26, 2016 (the end of the week prior to the week of the planned voluntary leaving). After this date, she is disqualified from the receipt of benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-62090 is affirmed.

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

DATE of Service: July 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.

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