

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0557

Affirmed
Disqualification
Eligible Week 10-17

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned voluntary leaving without good cause. (decision # 102353). Claimant filed a timely request for hearing. On April 27, 2017, ALJ Amesbury conducted a hearing, and on May 3, 2017, issued Hearing Decision 17-UI-82449, affirming the Department's decision. On May 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Homette Corporation employed claimant as a welder from April 11, 2016 to March 7, 2017.¹

(2) The employer reserved parking spaces in front of its building for visitors to its business, handicapped individuals and, due to start and end times of employee shifts that often occurred in the dark, employees who had safety concerns, typically female employees. The employer notified all of its employees of its parking policy and the production manager continually requested employees who parked their vehicles in front of the building in violation of the policy, including claimant, to move their vehicles to the side of the building. Claimant believed the policy constituted gender discrimination because many female employees were allowed to park their vehicles in the front of the building, while he was not.

(3) The employer had a policy prohibiting employees from using their personal tools because, in its experience, the tools often had modified safety mechanisms that presented safety concerns the employer wanted to avoid. If an employee needed a tool that was not on the premises, the employer offered to

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.

provide the tool at its own cost. Claimant believed the policy was not applied uniformly and that he was unfairly prohibited from using his personal tools.

(4) Claimant believed that the supervisor the employer hired to manage claimant's work area was not a qualified welder and often ignored safety concerns. On one occasion, when claimant complained to the production manager about his concerns, he believed the manager embarrassed him in front of the supervisor in question, and that the incident negatively affected his relationship with that supervisor going forward.

(5) On March 7, 2017, claimant concluded that his working conditions were too stressful for him to tolerate any longer because they had caused him a panic attack, sleeping difficulties and were affecting his relationship with his spouse. On that day he gave you production manager notice that he was quitting, effective March 17, 2017, to seek other work. The manager responded that claimant's planned resignation would be effective that day because the employer was overstaffed in claimant's department and there was no need for him to continue until March 17, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned voluntary leaving without good cause.

The first issue is whether claimant quit work or was discharged. If the employee could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Claimant notified the employer's production manager on March 7, 2017 that he was quitting work, effective Friday, March 17, 2017. However, the production manager notified claimant that because claimant's department was overstaffed, the work separation would be effective that day. Because claimant was willing to continue working for the employer until March 17, but was not allowed to do so by the employer, claimant's March 7, 2017 work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer had the right to expect of an employee.

The record shows that the employer discharged claimant due to an overstaffing problem rather than claimant's willful or wantonly negligent violation of any reasonable employer standard of behavior or a

willful or wantonly negligent disregard of the employer's interest. Accordingly, the employer discharged claimant, not for misconduct as defined under ORS 657.176(2)(a) and OAR 471-030-0038(3)(a).

However, ORS 657.176(8) provides that when an individual has notified an employer that he (or she) will quit work on a specific date, and the employer then discharges him, 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 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. Claimant notified the employer he would end his employment on March 17, 2017. The employer discharged him, not for misconduct, on March 7, 2017, less than 15 days prior to his planned quit date. Therefore, the next issue is whether claimant's planned quit would have been with or without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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 the employer for an additional period of time.

Claimant quit work because he believed the employer's parking policy was discriminatory against him as a man, the employer's personal tool policy was applied unfairly only against him, and the production manager embarrassed him when he brought what he thought was a safety issue to him to address with his supervisor. However, claimant did not assert or show that any man, including him, who had safety concerns created by the dark were denied the right to park in front, did not dispute that an elderly male handicapped employee was allowed to park in front, and did not assert or show which, if any, safety policies or regulations were violated by his supervisor's actions.

To the extent claimant quit because he believed his working conditions were too stressful for him to tolerate any longer because they allegedly caused him a panic attack, sleeping difficulties or marital problems, he failed to assert or show that he sought treatment, was diagnosed or treated for stress or that a medical provider recommended that he seek or even consider other employment.

To the extent that claimant quit because he believed the production manager embarrassed him in front of the supervisor in question because of his professed safety concerns and that the incident negatively affected his relationship with that supervisor going forward, he failed to assert or show that he complained or even considered complaining to the production manager's supervisor about his conduct. Moreover, viewed objectively, claimant failed to show that what the record shows was a single incident of such conduct created a situation of such gravity for him that it left him with no reasonable alternative but to quit his job and become unemployed.

Although claimant concluded his working conditions were onerous enough for him to quit work when he did, he failed to show that no reasonable and prudent person in his circumstances would have continued to work for the employer for an additional period of time. Accordingly, claimant voluntarily left work without good cause.

In sum, claimant notified the employer of his intention to voluntarily quit work without good cause, but was discharged within fifteen days of the date of the planned quit for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits except that he is eligible for benefits for the week including March 5 through March 11, 2017 (week 10-17), which is both the week in which the actual discharge occurred and the week prior to the week of the planned quit date.

DECISION: Hearing Decision 17-UI-82449 is affirmed.

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

DATE of Service: May 31, 2017

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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