

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0881

Affirmed
Disqualification
(Descalificación)
Eligible Week 20-17
(Elegible Semana 20-17)

PROCEDURAL HISTORY: On June 16, 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 # 160033). Claimant filed a timely request for hearing. On July 17, 2017, ALJ S. Lee conducted an interpreted hearing, at which the employer failed to appear, and on July 21, 2017, issued Hearing Decision 17-UI-88654, affirming the Department's decision. On July 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Charles Point LLC employed claimant as a maintenance and repair worker from April 24, 2017 to May 19, 2017.

(2) Claimant's job consisted of general apartment maintenance and repair, painting and tasks relating to apartment turnover. During the first three weeks of his employment, certain coworkers with whom claimant came into contact made derogatory comments about claimant in reference to his Latino heritage. Although they stated that they only were joking, claimant believed that they made the statements to make him feel inferior. Claimant never complained to his supervisor or anyone else in management because he had been told by a Latino coworker that the coworker had complained and the employer did nothing.

(3) Claimant believed that he needed certain tools to perform some of the jobs he was given but the employer did not have the tools. Claimant did not discuss the matter with his supervisor or anyone else in management because he was told by the same Latino coworker that he had raised the issue before and the employer did nothing to correct the problem.

(4) On May 15, 2017, claimant concluded that his working conditions were not tolerable any longer because he believed he was being discriminated against by coworkers because of his race and because

the employer had not provided him with the tools necessary to perform his job. On that day he gave his supervisor notice that he was quitting, effective May 26, 2017, without specifying any reason. However, on May 19, 2017, his supervisor notified him that his employment was ended, effective that day, because it was “not working out.” Transcript at 6.

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 his supervisor on or about May 15, 2017 that he was quitting work, effective May 26, 2017. However, on May 19, 2017, the supervisor approached claimant and told him that the work separation would be effective that day, because “this is not working out.” Transcript at 6. Because claimant was willing to continue working for the employer until May 26, but was not allowed to do so by the employer, claimant’s May 19, 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 because claimant’s supervisor concluded after claimant’s resignation notice that the employment relationship was “not working out” rather than because of 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 May 26, 2017. The employer discharged claimant, not for misconduct, on May 19, 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, in part, because he believed his coworkers acted in a discriminatory manner against him as a Latino. Claimant asserted that unnamed coworkers made unspecified statements that reflected poorly about him in reference to his race and then asserted that they were "just joking." Transcript at 6-8. Claimant also asserted that he quit, in part, because he was not given the appropriate tools to perform various assigned maintenance and repair tasks. Transcript at 9-11. With regard to both the claimed discrimination and tool problems, claimant admitted that he never discussed either of the issues with his supervisor or anyone in management at the employer because a coworker had told him he had complained about the same things without any resolution. Transcript at 9-11. 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, after only three weeks of employment and who was interested in remaining employed, would have at least brought his concerns to his supervisor or someone else in management for some assistance or resolution, rather than relying on the statements of a virtual stranger, before abruptly quitting.

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 May 14 through May 20, 2017 (week 20-17), 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-88654 is affirmed. *Decisión de la Audiencia 17-UI-88654 queda confirmada.*

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

DATE of Service: August 17, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.