

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1332**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, within 15 days of claimant's planned voluntarily leaving without good cause, and was disqualified from benefits effective August 20, 2017 (decision # 152030). Claimant filed a timely request for hearing. On October 27, 2017, ALJ A. Mann conducted a hearing, and on November 2, 2017 issued amended Hearing Decision 17-UI-96059, affirming decision # 152030.<sup>1</sup> On November 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Voyager Enterprises, Inc. employed claimant from May 26, 2017 to August 18, 2017. Claimant worked 40 hours per week and was paid minimum wage, tips and occasional overtime pay.

(2) Claimant was dissatisfied with the safety of her employer's company vehicles and frequently complained about them. Claimant disliked driving vehicles she considered unsafe. The employer responded to claimant's safety reports, but thought she complained too much and was too argumentative.

(3) Claimant's aunt required a caregiver. Claimant planned to leave her job with the employer, move in with her aunt, obtain a caregiver certification, and, once those things were done, get hired by her aunt to work at minimum wage performing caregiver services for approximately 35 hours each week.

(4) On August 6, 2017, claimant notified the employer that she planned to resign, effective August 20, 2017. The employer accepted claimant's resignation. Between August 6, 2017 and August 20, 2017

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<sup>1</sup> On October 30, 2017, the ALJ issued Hearing Decision 17-UI-95716, which contained an error as to the effective date of the disqualification and was superseded by Hearing Decision 17-UI-96059. The ALJ's November 2, 2017 decision, Hearing Decision 17-UI-96059, incorrectly stated that it modified decision # 152030; we note, however, that both decision # 152030 and Hearing Decision 17-UI-96059 established claimant's disqualification from benefits effective August 20, 2017.

claimant thought she had “pulled” her resignation; the employer was not aware that claimant wanted to rescind her resignation and did not agree to allow her to rescind it. *Compare* Transcript at 7; 20, 33-34.

(5) On August 13, 2017, claimant worked and again complained about the vehicle. The employer had the car inspected and was told there was nothing wrong with it. Claimant was next scheduled to work on August 18, 2017. On August 17, 2017, the employer called and discharged claimant for complaining about the vehicle again. Transcript at 38-39.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, not for misconduct, within 15 days of her planned voluntary leaving without good cause.

ORS 657.176(2) requires a disqualification from benefits for individuals who are discharged for misconduct or voluntarily leave work without good cause. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On August 6, 2017, claimant notified the employer that she planned to resign on August 20<sup>th</sup>. At that time, claimant was willing to work for 14 more days and could have continued to work for the employer for an additional period of time. Sometime between August 6, 2017 and August 20<sup>th</sup>, claimant attempted to rescind her resignation; the employer was not aware of the attempted rescission and did not accept it, leaving claimant’s planned voluntary leaving in place as scheduled.<sup>2</sup> On August 17<sup>th</sup>, three days before claimant’s planned voluntary leaving, however, at a time when claimant was willing to continue working for at least a few more days, the employer discharged her.

ORS 657.176(8) provides that if an individual is discharged, but not for misconduct, fifteen days prior to a planned voluntary leaving without good cause, then the work separation is adjudicated as though the discharge had not occurred and the planned voluntary leaving had occurred, except 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.

The first question is, therefore, whether claimant’s discharge was 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 she thought the employer’s company vehicle was unsafe and complained about it. Although the employer disputed whether there was actually a problem with the vehicle that made it unsafe, it appears that claimant and other employees had consistent similar complaints. Absent evidence that claimant intentionally fabricated safety concerns and falsely reported them to the employer, we cannot conclude that her safety complaints, albeit repeated, were the result of

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<sup>2</sup> See e.g. *Counts v. Employment Dept.*, 159 Or App 22, 976 P2d 96 (1999) (when an employer refused to allow rescission of a resignation the work separation remained a voluntary leaving); *Schmelzer v. Employment Division*, 57 Or App 759, 646 P2d 650 (1982) (the work separation remains a voluntary leaving even if the employer did not formally accept or reject claimant’s initial resignation because the rejection of the attempted rescission is effectively an acceptance of the initial resignation).

willful or wantonly negligent conduct attributable to her as misconduct. Claimant's December 17<sup>th</sup> discharge was, therefore, not for misconduct.

Because claimant's discharge occurred within 15 days of her planned voluntary leaving, the next question is whether claimant's planned voluntary leaving was with or 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. "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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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.

To the extent claimant planned to quit work due to her vehicle safety concerns, it is more likely than not that her planned leaving was without good cause. Although being required to drive an unsafe vehicle might constitute a situation of gravity under other circumstances, the record shows that the employer investigated claimant's complaints, took the vehicle to the shop, and "If you talk to the people at the shop there was nothing wrong with it." Transcript at 40. The employer's responsiveness to claimant's safety concerns, and reliance on mechanical advice about the safety and functionality of the vehicle, demonstrate that it is more likely than not that the vehicle's condition was not a grave situation.

Likewise, to the extent claimant planned to quit work to accept a job as caregiver for her aunt, claimant's planned leaving was without good cause. OAR 471-030-0038(5)(a) provides that an individual who leaves work for a job that is contingent, and not scheduled to begin in the shortest length of time reasonable under the circumstances, has left work without good cause. In this case, claimant's ability to accept an offer to work as caregiver for her aunt was contingent upon claimant becoming certified as a caregiver. Given that claimant had not yet done that prior to the date of her planned voluntary leaving, the record also fails to show that claimant's new job, assuming she obtained the certification, was scheduled to begin within the shortest time reasonable under the circumstances. Claimant's planned voluntary leaving was, therefore, without good cause.

Because the employer discharged claimant, not for misconduct, three days prior to her planned voluntary leaving without good cause, claimant is disqualified from benefits on the basis of the voluntary leaving until she requalifies for benefits under Employment Department law. However, claimant 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.

**DECISION:** Hearing Decision 17-UI-96059 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** December 12, 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](http://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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