

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0027

Modified
No Disqualification

PROCEDURAL HISTORY: On November 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 73029). Claimant filed a timely request for hearing. On December 21, 2017, ALJ L. Lee conducted a hearing, and on December 29, 2017 issued Hearing Decision 17-UI-99962, affirming the Department's decision. On January 8, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Copeland Construction, LLC employed claimant from September 2017 until October 30, 2017 as a local truck driver.

(2) Claimant worked 40 hours per week for the employer and earned \$19 per hour.

(3) On October 29, 2017, claimant had an interview with another employer, Top Rock. Top Rock offered claimant a job to begin on November 6, 2017, for full time work, with a wage rate of \$18 per hour. Although claimant had to take a drug and alcohol test to work as a driver with Top Rock, his employment with Top Rock was not contingent on the results of the drug and alcohol test because Top Rock would permit him to work with its ground crew before he took the drug and alcohol test and if he failed the test.

(4) On October 30, 2017, claimant told his supervisor that he was quitting work on November 3, 2017. The employer, as a matter of policy, did not have an employee work the notice period when an employee gave notice that he or she was quitting. Later on October 30, the employer discharged claimant because he gave notice that he was quitting.

(5) On November 1, 2017, claimant began working for Top Rock earning \$18 per hour.

(6) In November 2017, claimant restarted a prior unemployment benefits claim. His weekly benefit amount for that claim was \$590 per week.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was discharged not for misconduct, but conclude that the discharge was within fifteen days of a planned quit for 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) (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. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he 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). A claimant who leaves work to accept an offer of other work has shown "good cause" if the offer of work is definite, pays an amount equal to or in excess of the weekly benefit amount or more than the work left, begins in the shortest length of time reasonable under the circumstances, and is reasonably expected to continue. OAR 471-030-0038(5)(a) (August 3, 2011).

ORS 657.176(8) provides that when an individual has notified an employer that he will quit work on a specific date, and the employer discharged 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.

On October 30, 2017, claimant notified the employer's owner that he had accepted a new job, but would continue to work through November 3, 2017. However, the owner's policy is not to have an employee who gives notice work his notice period, and based on that policy, the employer discharged claimant on October 30 because he gave notice to quit. An employer does not have the right to expect an employee to refrain from quitting a job. Nor does the record establish that claimant's discharge was due to any other willful or wantonly negligent violation on claimant's part of a reasonable employer expectation. The employer therefore discharged claimant, but not for misconduct under ORS 657.176(2)(a). The remaining issue is to determine whether ORS 657.176(8) applies to this case based on whether claimant's planned quit would have been with or without good cause.

There is no evidence suggesting that claimant's offer of work from Top Rock was not reasonably expected to continue, and it began in the shortest length of time reasonable under the circumstances and paid more than claimant's weekly benefit amount. In Hearing Decision 17-UI-99962, the ALJ found that the job offer from Top Rock was conditional on claimant passing a drug and alcohol test. Hearing Decision 17-UI-99962 at 2. However, the record shows that the job offer from Top Rock was definite and not contingent on the results of claimant's drug and alcohol test because, even had claimant failed to take or pass the alcohol and drug test required to work for Top Rock as a driver, Top Rock would nevertheless employ him as a ground crew worker. We therefore conclude that under OAR 471-030-0038(5)(a), claimant quit work with good cause to accept an offer of other work.

In sum, claimant notified the employer of his intention to quit work with good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Thus, ORS

657.176(8) does not apply to this case. Accordingly, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-99962 is modified, as outlined above.

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

DATE of Service: February 8, 2018

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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