

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0112

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101527). Claimant filed a timely request for hearing. On October 3, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing for October 16, 2017 to the parties, but sent the employer's notice of hearing to an incorrect address. On October 16, 2017, ALJ Scott conducted a hearing at which the employer failed to appear, and on October 17, 2017 issued Hearing Decision 17-UI-94708, concluding that the employer discharged claimant not for misconduct. OAH sent the employer's copy of Hearing Decision 17-UI-94708 to an incorrect address, and on October 23, 2017, the United States Postal Service returned it to OAH as undeliverable. On October 27, 2017, OAH mailed a new notice of hearing for November 13, 2017. On November 2, 2017, the United States Postal Service returned the employer's October 3, 2017 notice of hearing to OAH as undeliverable, which OAH received on November 6, 2017. On November 13, 2017, ALJ Scott conducted a hearing at which claimant and the employer appeared, and on November 20, 2017 issued Hearing Decision 17-UI-97247, 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 June 25, 2017. Hearing Decision 17-UI-97247 superseded Hearing Decision 17-UI-94708. On November 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

On December 27, 2017, EAB issued Appeals Board Decision 2017-EAB-1378, reversing Hearing Decision 17-UI-97247 and remanding the case to OAH for additional evidence. On January 23, 2018, ALJ Scott conducted a remand hearing, and on January 25, 2018, issued Hearing Decision 18-UI-101747, again affirming decision # 101527. On January 31, 2018, claimant filed an application for review of Hearing Decision 18-UI-101747 with EAB.

EVIDENTIARY MATTER: The ALJ admitted the employer's documents, which she identified as Exhibit 1, into evidence, but failed to mark them as such. As a clerical matter, we have identified that exhibit based on the record and marked it as Exhibit 1.

FINDINGS OF FACT: (1) CPM Development Corporation employed claimant from November 18, 2013 until June 9, 2017 as a rock dispatcher.

(2) Claimant earned \$21 per hour as a rock dispatcher and worked an average of 45 to 50 hours per week. On June 7, 2017, the employer told claimant it would be demoting her to an accounts receivable position she had performed in the past. The accounts receivable position paid \$20 per hour, averaged 43 to 48 hours per week, and had the same benefits as the rock dispatcher position, including 401(k) employer match, medical, dental, vision, prescription and profit-sharing. The accounts receivable position was a similar shift and at the same location as the rock dispatcher position.

(3) Claimant contacted Wildish, another employer. Wildish offered claimant work through a temporary agency to begin on June 12, 2017, for \$20 per hour. The Wildish position offered no benefits and was a temporary to hire position. Claimant believed the position at Wildish would have at least ten hours of overtime per week. Claimant had to pass a drug test before she began work with Wildish.

(4) On June 9, 2017, claimant told her supervisor she had accepted an offer of other work, and the employer and claimant mutually agreed that claimant's last day of work would be June 9, 2017.

(5) After her employment ended with the employer on June 9, 2017, claimant completed and passed the drug test for Wildish.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant quit work without good cause.

It is first necessary to address the nature of the work separation. If claimant, 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). The work separation in this case was caused by claimant's notice to quit on June 9, 2017. Claimant could have continued to work for the employer, albeit at a lower rate of pay. Because the decision to end the employment relationship rested exclusively with claimant, and she could have continued to work for the same employer for an additional period of time had she wanted to do so, the work separation was a 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). 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 the employer for an additional period of time.

Claimant left work, in part, because she was demoted to a position that paid less per hour and offered fewer overtime hours. Under OAR 471-030-0038(5)(d), an individual may demonstrate good cause to leave work due to a reduction in pay under certain circumstances, but that provision does not apply

where, as here, the reduction in pay occurs “as a result of transfer, demotion or reassignment.” OAR 471-030-0038(5)(d)(A). Because claimant’s reduction in pay would have been the result of a transfer to a new position, claimant did not demonstrate good cause for leaving work when she did due to a reduction in pay. Nor did claimant show that she would have a reduction in hours due to the demotion, or even assuming she would have a reduction in hours, that continuing to work for her employer substantially interfered with return to full time work, or that the cost of continuing to work exceeded the remuneration she received. *See* OAR 471-030-0038(5)(e).

Claimant also failed to show, under OAR 471-030-0038(4), that no reasonable and prudent person in her circumstances would have continued to work for the employer for an additional period of time. Claimant did not show that working for a slightly reduced wage with the same benefits for approximately the same number of hours constituted a circumstance of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded she had no reasonable alternative but to leave her employment. Claimant presented no evidence to show that the accounts receivable job was unsuitable for her, and she had performed that work in the past. *See* ORS 657.190. Claimant did not assert or show that she was not physically qualified for or lacked sufficient training to perform the work offered and did not present any evidence that the accounts receivable job posed a risk to her health, safety or morals. The shift and location were the same.

Claimant also left work, in part, to accept an offer of other work. If an individual quits a job to accept an offer of other work, the individual has good cause for leaving only if the offer of work is definite, will begin in the shortest length of time possible under the circumstances, and is “reasonably . . . expected to continue.” OAR 471-030-0038(5)(a). In addition, the new job must pay either an amount equal to or in excess of the weekly benefit amount or an amount greater than the work left. *Id.* Claimant showed that, under the circumstances, the new job was to begin within the shortest length of time possible, and it probably paid more than the job she left. However, because claimant’s employment offer was contingent on the outcome of a drug test, and claimant had not completed it at the time he resigned, claimant’s job offer was not “definite” when she resigned. In addition, because the job was a temporary to hire position and not a permanent position, it was not reasonably expected to continue.

Claimant did not have good cause to quit work and is disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 18-UI-101747 is affirmed.

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

DATE of Service: March 6, 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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