

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0178

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision, concluding claimant voluntarily left work without good cause (decision # 140201). Claimant filed a timely request for hearing. On February 2, 2018 ALJ Griffin conducted a hearing, and issued Hearing Decision 18-UI-102434, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jeld-Wen, Inc. employed claimant as a financial accountant from October 10, 2016 until August 9, 2017.

(2) After hire, claimant became unhappy working for the employer. Claimant perceived his job as a difficult one with a steep learning curve. While claimant made some mistakes in his work, claimant thought his supervisor unfairly blamed him for mistakes that were not his. Claimant's supervisor, the controller, began telling him that she did not trust his work and that the junior accountant was more capable than he was. Claimant thought that he and the controller had communication problems and the workplace was stressful. Claimant felt uncomfortable at work.

(3) After claimant was hired, but before approximately February 2017, claimant was in contact with an acquaintance whom he had served with in the Marine Corps. The acquaintance was the finance director for Michael's Foods, Inc. Claimant and the financial director had many conversations about claimant leaving work with the employer and taking an accounting position with Michael Foods. Sometime before August 8, 2017, the finance director had arranged for claimant to take an August 22, 2017 flight to Minneapolis, Minnesota for an interview at Michael's Foods and a plant tour. Claimant had "high confidence" that he would secure a job with Michael's Foods. Audio at ~18:26.

(4) On Tuesday, August 8, 2015, claimant submitted a resignation letter to the employer's controller stating that his last day of work was going to be August 18, 2017. Around that time, the controller sent an email to the accounting group notifying it that all accounting questions should be directed to her rather than to claimant. The controller did not discuss claimant's resignation with him and claimant thought the controller was ignoring him as a result of his intention to leave work.

(5) On Wednesday, August 9, 2017, claimant reported for work, but left early. On claimant's next scheduled work days, the following Thursday, Friday and Monday, August 10, 11 and 14, 2017, claimant did not report for work and did not call in to notify the controller that he was going to be absent. Claimant had stopped reporting for work after August 9, 2017 because he was confident that he would secure a new job with Michael's Foods and he needed to make preparations that would allow him to promptly begin working for that new employer. Claimant also stopped reporting for work because he felt uncomfortable in the workplace.

(6) On August 14, 2017, the employer sent claimant a letter notifying him that his employment had been terminated as of that date for failing to call in to report absences from work for three consecutive days, August 10, 11 and 14, 2017.

(7) On August 22, 2017, claimant flew to Minneapolis to interview for the accounting position with Michael's Foods. By letter dated August 28, 2017, the plant controller for Michael's Foods offered claimant an accounting manager position with Michael's Foods. Exhibit 2 at 3-4. That job was to begin on September 5, 2017. However, that job offer was contingent on claimant passing a background check and signing a confidentiality/non-compete agreement. *Id.* at 3. Claimant accepted that job offer.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

After claimant notified the employer that he was going to leave work effective August 18, 2017, the employer sent a letter to claimant on August 14, 2017 terminating the work relationship due to his failure to report for work or to notify the employer of his absences for three consecutive days after August 9, 2017. Since each party purported to notify the other of a work severance, the first issue that this case presents is the nature of the work separation. If claimant could have continued to work for the same employer for an additional period at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant 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).

Claimant first notified the employer on August 8, 2017 that he was quitting work effective August 18, 2017, but then ceased reporting for work or notifying the employer of his whereabouts of his own volition. On August 14, 2017, the employer notified claimant that in light of his failure to report for work or to call in, the employer considered the work relationship to have been terminated. It appears from the record that claimant was unwilling and had no intention of reporting for work after August 9, 2017 and the employer's August 14, 2017 letter was merely a subsequent acknowledgement that the work relationship had been severed by claimant. Because claimant was the first party to manifest an unwillingness to continue the work relationship and then he accelerated the date after which he was not willing to continue working, claimant's work separation was a voluntary leaving as of August 9, 2017, the date after which, without explanation, he discontinued reporting for work.

ORS 657.176(6) provides that when an individual has notified an employer that the individual plans to leave work on a specific date and the planned leaving would have been for good cause, but the individual actually leaves work without good cause no more than 15 days prior to the planned leaving date, the work separation shall be adjudicated as if the actual voluntary leaving had not occurred and the planned voluntarily leaving had occurred and the individual may receive benefits for the period which includes the week in which the actual voluntary leaving occurred through the week prior to the week of the planned voluntary leaving date. Because the date that claimant actually left work, August 9, 2017, was within 15 days of claimant's planned voluntary leaving date of August 18, 2017, ORS 657.176(6) is potentially applicable to claimant's claim. Whether ORS 657.176(6) is actually applicable to claimant's claim depends on whether or not he had good cause to leave work both on the planned leaving date of August 18, 2017 as well as the actual leaving date of August 9, 2017. Both issues are addressed below.

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). "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 to accept an offer of new work has good cause to leave work only if the offer of new work is definite and the work is to begin in the shortest time deemed reasonable under the individual circumstances. OAR 471-030-0038(5)(a).

Claimant testified that he initially decided to leave work on August 18, 2017 because the work environment was hostile and because he had a new job with Michael's Foods. Audio at ~13:20, ~15:25, ~15:59. Claimant testified that he accelerated the effective date of his voluntary leaving from August 18, 2017 to August 9, 2017 because he needed to make preparations that would allow him to begin working for Michael Foods and because the work environment had continued to be hostile. Audio at ~12:59, ~13:20, ~15:25, ~21:59. In connection with his leaving on either date, claimant generally contended that the employer's controller had unfairly held him responsible for some mistakes he had not made, had expressed a lack of confidence in his work and was not communicating with him to an extent that he had become "uncomfortable" and thought the work environment was hostile. Audio at ~13:20, ~24:20, ~25:50. However, claimant did not show that the working conditions he described caused objective harms to him or otherwise created a situation of such gravity that he had no reasonable alternative other than to leave work. Indeed, claimant did not assert or describe any harm he thought he sustained other than stating that he had felt "uncomfortable."

To the extent that claimant's actual and planned leavings were as a result of the position that he anticipated being offered with Michael's Foods, or the need to make preparations that would enable him to start that work, claimant did not show that the job from Michael's Foods was sufficiently definite at the time he left work to constitute good cause for leaving under OAR 471-030-0038(5)(a). As of the dates of the planned and actual leaving, August 9 and August 18, 2017, claimant had not yet been formally offered a position by Michael's Foods. While claimant had "high confidence," that he would receive a job offer from Michael's Foods, there was some reason for Michael's Foods to interview him before offering him a job and some reassurance that it must have wanted. Common sense suggests that whether Michael's Foods would offer claimant a job was contingent on claimant having an adequate interview. In addition, the August 28, 2017 letter in which Michael's Foods offered claimant a job made

that offer explicitly contingent when, after setting out the terms of the offer, it stated that “[t]hese terms of employment are conditional upon your passing a background check and signing a confidentiality/non-compete agreement.” Exhibit 2 at 3. According to the Department’s Unemployment Insurance Benefits Manual, an offered job is “definite” within the meaning of OAR 471-030-0038(5)(a) only if it is “not contingent on anything” at the time claimant left work. Unemployment Insurance Benefits Manual (April 2, 2010) at Ch. 400, §442B. The Manual specifically mentions that a job offer that is conditional on “passing a background check” at the time claimant left work is not “definite.” *Id.*; *Appeals Board Decision*, 2017-EAB-0064, February 14, 2017 (a job offer that was contingent on passing a background was not “definite” within the meaning of OAR 471-030-0038(5)(a) and was not good cause to leave work before that check was conducted and it was known whether it had been passed). Because both at the time of the actual leaving and the planned leaving, the new work from Michael’s Foods that claimant anticipated receiving was contingent on the results of an interview and passing a background check and claimant did not know the outcome on either at the time he actually left or initially planned to leave work as well as that he had not signed a confidentiality/non-compete agreement at the time of either leaving, claimant did not have good cause to leave work with the employer to accept, or to make necessary preparations to accept new work with Michael’s Foods.

Since claimant did not have good cause to leave work on the initially planned date of August 18, 2017 and claimant did not have good cause to leave work when he actually left on August 9, 2017, claimant also is not eligible to receive benefits for any period of time under ORS 657.176(6).

DECISION: Hearing Decision 18-UI-102434 is affirmed.

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

DATE of Service: March 22, 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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