

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0490

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 160541). The employer filed a timely request for hearing. On April 18, 2018, ALJ Frank conducted a hearing, and on April 24, 2018 issued Order No. 18-UI-108037, concluding that the employer discharged claimant, not for misconduct, within 15 days of claimant's planned quit without good cause. On May 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that contained information and documents that she did not offer into evidence at the hearing. Claimant did not explain why she was unable to present this information during the hearing or otherwise show, as required by OAR 471-041-0090(2) (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present by way of her written argument.

FINDINGS OF FACT: (1) Cow Creek Band of the Umpqua Tribe employed claimant from December 21, 2009 until February 26, 2018, last as business health operations administrator.

(2) At times, Claimant experienced depression and anxiety during her employment, particularly in and after September 2017. Claimant also had osteoarthritis and degenerative disk disease.

(3) Sometime before approximately 2017, the employer hired a new director for its health clinic. At that time, claimant was the assistant health director and the second in command of the clinic. The employer expected the new director to restructure and reorganize the operations of the health clinic. Claimant expressed opposition to many changes that the new director proposed to implement and did not think his approach served the best interests of the clinic or its patients. In September 2017, in a meeting with claimant and a supervisor, the new director was "very mean" to claimant, and stated that he "could not trust [claimant] at all" and that claimant "was a total liar." Audio at ~11:36. Claimant and the new

director's working relationship deteriorated and became very poor. Claimant and the new director had many ongoing conflicts and arguments about changes the director wanted to implement.

(4) Sometime before or around February 2018, the employer changed claimant's position from assistant clinic director to business health operations administrator as part of the restructuring of the health clinic which the new director was undertaking. Claimant disliked being removed from the direct operations of the clinic and resented that her old position "was no longer in effect." Audio at ~6:31.

(5) On February 8, 2018, claimant met with the employer's human resources manager to discuss her concerns with clinic operations and with the new clinic director. Claimant described some of her disagreements with the clinic director and told the human resources manager that she believed stress from them was making her ill. Claimant did not describe the nature of her illnesses. The human resources manager understood from the discussion with claimant that claimant and the clinic director could not get along. Sometime later, the human resources manager spoke with the clinic director, who stated that he thought claimant had become "disgruntled" when he was hired to take responsibility over the clinic and her position was changed from assistant clinic director. Also sometime later, the human resources manager spoke with claimant's supervisor to discuss what could be done given claimant's discontent since the employer considered claimant to be a "valued employee." Audio at ~23:55. Had claimant asked, the employer would have transferred claimant into a position that did not require her to deal with the clinic director.

(6) On February 21, 2018, claimant gave the employer a letter in which she requested a layoff so that she would not be forced to resign. In the letter, claimant cited certain conflicts she had with the clinic director and the way he managed the health clinic as justifying her request. Claimant also mentioned that she disliked the clinic director's "negative attitude," that she considered the work environment to have become "hostile," that she was "miserable every day," and that her "mental status was declining" due to stress. Audio at ~20:10. The employer told claimant it would not lay her off.

(7) On Friday, February 23, 2018, claimant gave the employer a letter of resignation, stating she would quit work effective March 9, 2018. That letter stated she was quitting due to the decline in health she experienced as a result of workplace conflicts and stress.

(8) On Monday, February 26, 2018, claimant reported for work. After arriving at work, claimant spoke with some employees about certain issues she had had with the clinic director, the changes the clinic director was making in the clinic and why she had decided to leave work. The substance of this conversation was reported to the employer's human resources department. On February 26, 2018, the employer discharged claimant, rather than allowing her to work until her planned voluntarily leaving date of March 9, 2018. The employer did so because it considered what claimant said to the other employees to have been "disruptive." Audio at ~18:00.

CONCLUSIONS AND REASONS: Claimant's planned voluntary leaving from work was without good cause. However, because the employer discharged claimant, but not for misconduct, within 15 days of her planned voluntary leaving date, claimant is entitled to receive benefits for the week of February 25, 2018 through March 3, 2018, and is disqualified thereafter until requalified.

In this case, after claimant notified the employer on February 23, 2018 that she intended to leave work on March 9, 2018, the employer intervened and discharged claimant effective February 26, 2018. Where a discharge intervenes between an individual's announcement of a planned voluntary leaving date and the date of the actual leaving, ORS 657.176(8) sets out the framework for determining whether or not the work separation should be adjudicated as a voluntary leaving or a discharge. ORS 657.176(8) provides that if the voluntary leaving would be for reasons that do not constitute good cause, the employer discharged the individual, not for misconduct, no more than 15 days before the date of the planned voluntary leaving, the separation shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. If this occurs, however, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week in which the date of the planned voluntary leaving falls. Here, claimant was discharged on February 26, 2018, which was 11 days before claimant's planned leaving date of March 9, 2018, and ORS 657.176(8) is potentially applicable to claimant's claim. To determine if ORS 657.176(8) is fully applicable, it must be determined both if claimant's leaving would or would not have been for good cause, and if the employer's discharge of claimant was or was not for misconduct. These issues are considered below.

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) (January 11, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). For an individual with a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), good cause for leaving work is such that a reasonable and prudent person with the characteristics and qualities of an individual with such impairment would not have continued to work for her employer for an additional period of time.

While claimant referred to having been diagnosed with depression, anxiety, osteoarthritis, and degenerative disc disease at hearing, she was not asked and presented no evidence as to the duration of those conditions or whether they were permanent or of long term duration. However, the employer did not dispute that claimant experienced those conditions or suggest that any of the conditions was not permanent or long term. For purposes of this decision, we have assumed those conditions constituted permanent or long-term impairments for claimant.

Although claimant testified to her dissatisfactions with the management style and decisions of the clinic director and that she considered him to have been "mean," "aggressive" and "hostile," she did not present specific, concrete evidence that supported these characterizations. Audio at ~11:20. Nor did claimant offer detailed evidence as to how the actions of the clinic director may have exacerbated her anxiety, depression, osteoarthritis or degenerative disc disease. However, it is notable that nothing in claimant's description of the impacts of those conditions on her at any time, including at around the time she decided to leave work, remotely suggests that they rendered her incapable of reacting appropriately to work circumstances, assessing her options under those circumstances, or pursuing available alternatives.

The hearing testimony of the employer's human resources manager appeared heartfelt and sincere when she stated that claimant was a "valued as an employee" that the employer would have taken steps to

retain if claimant had asked for a reassignment. Audio at ~ 23:55. Claimant did not suggest that the human resources manager would not have helped her, or dispute the testimony of the manager that, as result of the employer's restructuring, the employer had positions into which claimant could have been assigned that would not have required her to deal with the clinic director at the time she quit work. Audio at ~24:24. Indeed, the human resources manager had on her own initiative met with claimant's supervisor after the meeting between claimant and claimant's manager on February 8, 2018 to discuss claimant's complaints, and no evidence in the record shows that the human resources manager or claimant's manager would not have acted to assist claimant, or that they would have been unable to do so under the circumstances. As well, since claimant had occupied a number of different positions during her time with the employer, it is inferable that claimant was reasonably aware that an inquiry into what other positions the employer had available would be an alternative to quitting work. A reasonable and prudent person with claimant's impairments, in claimant's circumstances, would not have decided that her only alternative was to quit work until she had asked and determined that the employer would not or could not transfer into a position where she would not have interactions with the clinic director. Because she did not explore reasonable alternatives to quitting, claimant did not show that she had good cause for leaving work when she did.

Because claimant did not have good cause for leaving work, ORS 657.176(8) remains potentially applicable to claimant's situation. The remaining issue to determine is whether or not the employer's intervening discharge of claimant should be disregarded is whether the employer discharged claimant for misconduct.

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. The employer carries the burden to show claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, when asked specifically by the ALJ what reasonable employer expectation that claimant might have violated by what she did or said on February 26, 2018 that caused the employer to discharge her, the employer's witness was not able to identify one. Audio at ~16:16. None is apparent to us. On this record, the employer did not meet its burden to show that it discharged claimant for a willful or wantonly negligent violation of its standards that constituted misconduct. Because the employer discharged claimant, not for misconduct, within 15 days of a planned voluntary leaving without good cause, ORS 657.176(8) is applicable to claimant's situation. Accordingly, claimant is entitled to receive benefits for the week of February 25, 2018 through March 3, 2018, and is disqualified from benefits thereafter until requalified.

DECISION: Order No. 18-UI-108037 is affirmed.

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

DATE of Service: June 14, 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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