EO: 200
BYE: 201913

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0536

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 144214). Claimant filed a timely request for hearing. On May 16, 2018, ALJ Schmidt conducted a hearing, and on May 17, 2018 issued Order No. 18-UI-109571, concluding the employer discharged claimant, not for misconduct. On May 25, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information that was not part of the hearing record. The employer did not explain why it was unable to present this information during the hearing, or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the information that the employer sought to introduce by way of its written argument and only considered information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Mucho, Inc. employed claimant as co-general manager of its restaurant from February 5, 2018 until March 8, 2018.

(2) The employer required claimant, as co-general manager, to work a minimum of 50 hours per week. During the time that she was employed by the employer, claimant worked between 10 and 12 hours per day, five days per week. During claimant's employment, she was in training to assume co-general manager duties, including supervising subordinate staff.

(3) Claimant was required to stand for lengthy periods during work shifts and to perform various physical tasks. At the outset of her employment and throughout, claimant would become extraordinarily exhausted during the shifts that she worked and would struggle to finish them. As her employment continued, claimant experienced various symptoms due to exhaustion from working her shifts, including a racing heartbeat, aching legs, numb hands, a lack of strength to pick up items, a lack of stamina, sweating profusely, shortness of breath, an inability to think and concentrate, and tiredness to the degree that she thought she would pass out. These symptoms would cause claimant to feel like she "hit a brick

wall" and that her "body was shutting down." Audio at ~9:28, ~11:40. Claimant did not know what was wrong, but tried to work despite the symptoms. Claimant did not initially seek a medical evaluation since she did not have a primary care physician.

(4) On approximately February 8, 2018, after only three days of employment, claimant discussed the exhaustion and lack of stamina she was experiencing with the general manager, who was training her. The general manager told claimant that working long hours was a requirement of the co-general manager position, and the job was physically hard. The general manager advised claimant to think about whether she wanted to continue in the position and to let the general manager know her decision on the upcoming Monday, February 12, 2018. On that Monday, claimant told the general manager that she wanted to continue training for the position.

(5) On approximately February 13, 2018, claimant discussed with the general manager whether she might be assigned to work in catering, or promoting the catering part of the business, since it required less standing and physical activity than did the restaurant part. The employer did not alter claimant's assignment.

(6) After February 13, 2018, claimant discussed her continuing exhaustion and lack of stamina with the general manager on three or four occasions. No changes were made to claimant's job duties to attempt to ease her fatigue.

(7) Sometime shortly before March 7, 2018, claimant tried to arrange for an appointment with a physician to evaluate her condition since her symptoms were continuing rather than abating. On March 7, 2018, claimant submitted a resignation email to the employer because she was not physically able to continue performing the duties of co-general manager. In that email, claimant stated that she would continue to work for two weeks, which would have been until March 21, 2018. Also in that email, claimant offered to work part time in the catering part of the business if such a position were available.

(8) On March 8, 2018, the general manager contacted claimant and told her that her further work for the employer was not needed and to turn in her keys and phone and to pick up her final paycheck on March 9, 2018. The employer did not have a need for an employee working in catering and did not want to continue training claimant during her notice period for a position that she was going to leave in two weeks.

(9) On March 9, 2018, claimant was examined by a physician who referred her to a cardiologist. The cardiologist diagnosed claimant with premature ventricular contractions of the heart, which disrupted and accelerated her heart rhythms and significantly decreased blood flow throughout her body. The cardiologist told claimant that, given this condition, her inability to work at a job requiring physical exertion like that of co-general manager was understandable. The cardiologist scheduled claimant for heart surgery to attempt to control her premature ventricular contractions.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

In this case, claimant first notified the employer on March 7, 2018 that she planned to voluntarily leave work in two weeks, or on March 21, 2018, after which the employer notified claimant one day later, on March 8, 2018, that it was unwilling to allow her to continue working during the notice period and that it

was involuntarily ending its work relationship with her that day. In other words, the employer discharged claimant between the date she announced she was leaving and the planned date of her leaving.

ORS 657.176(8) provides that when an individual notifies an employer that the individual will leave work on a specific date, the voluntary leaving would be for reasons that do not constitute good cause, the employer discharged claimant, but not for misconduct prior to the date of the planned voluntary leaving and the actual discharge occurred no more than 15 days prior to the planned voluntary leaving, the work separation should be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the discharge occurred though the week prior to the week of the planned voluntary leaving. Here, the employer discharged claimant on March 8, 2018, the day after she notified the employer that she was resigning, which was 13 days before claimant's planned voluntary on March 21, 2018. The first prong for establishing the applicability of ORS 657.176(8) is met. We next turn to whether claimant's voluntary leaving would have been without good cause to determine whether the second prong for the applicability of ORS 657.176(8) had been met.

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 is such that a reasonable and prudent person with the characteristics and qualities of an individual with such impairment would leave work.

From the record, the length of time during which claimant had or would experience premature ventricular contractions was not clear, nor whether that condition should be considered a permanent or long-term impairment. For purposes of this decision, the modified standard for determining whether claimant had good cause for leaving work when she did has not been applied. The general good cause standard, the standard of a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, has been applied.

While claimant did not know what was causing her body to fail her when she tried to perform the physical duties required of a co-general manager, the physical symptoms she experienced, as described, would have likely have been disturbing, if not alarming and would have substantially prevented her from regularly performing the physical aspects of the work required of a co-general manager. The employer did not dispute the seriousness of claimant's physical limitations during the month that she tried to work for the employer, and the significance of the effects of those limitations on her ability to function at work was corroborated by the cardiologist's diagnosis and his comments at the time of diagnosis. It appears likely that, on this record, the symptoms claimant experienced from premature ventricular contractions constituted a grave situation when she was trying to work as a co-general manager.

While claimant did not seek a medical evaluation of her condition until March 9, 2018, this was after only a month of working for the employer. Since claimant did not have a primary care physician during that time, it is reasonable that she would try to work for a few weeks to determine if her symptoms would abate before seeking medical intervention, particularly when she had no history of a heart condition or similar symptoms. During the few weeks before her condition was diagnosed, claimant spoke to the general manager several times about her exhaustion, but the manager told claimant that the hours she was working were part of her job, and did not offer to reduce the hours or appreciably modify the physical requirements of the general manager job. Claimant also sought to be assigned to a catering position for which she thought the employer might have a need, and which she thought would be less physically demanding than working as a general manager, but the employer was not able to accommodate her.

It appears that claimant pursued the alternatives of which she was reasonably aware to reduce her hours or the physical demands to which she would be subjected before what was causing her symptoms was diagnosed. Although the general manager testified that the employer would have considered authorizing a leave of absence for claimant had claimant requested one, this statement appeared hypothetical and, without more, it appears unlikely that an employer would have authorized a leave for an employee like claimant who did not yet have a medical diagnosis and who, like claimant, had been employed only for one month. Because it was reasonable for claimant not to have sought a medical evaluation during the first month she was employed, and claimant unsuccessfully pursued the alternatives of which she was reasonably aware to avoid quitting, it appears likely that claimant had good cause to leave work on the date on March 21, 2018.

Given that claimant had good cause for the voluntary leaving of work that she planned, ORS 657.76(8) is not applicable to her work separation. Accordingly, the employer's discharge that intervened between the date she notified the employer she was leaving and the date of her planned leaving should not be disregarded. On this record, claimant's work separation should be adjudicated as a discharge and not as a voluntary leaving.

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) 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 prove that it discharged claimant for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not violate the employer's reasonable standards, and did not violate them willfully or wanton negligence, when she notified the employer that she planned to leave work on March 21, 2018. While it the employer might have legitimate business reasons for not allowing claimant continue training for a position she intended to leave at the end of the notice period, claimant may not be disqualified from unemployment benefits unless she engaged in willful or wantonly negligent behavior that caused the employer to discharge her. On this record, the employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her discharge by the employer.

DECISION: Order No. 18-UI-109571 is affirmed.

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

DATE of Service: June 25, 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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