

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0592

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause (decision # 93111). Claimant filed a timely request for hearing. On May 16, 2018, ALJ Snyder conducted a hearing, and on May 24, 2018, issued Order No. 18-UI-110109, affirming the Department's decision. On June 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument to the extent it was based on the record, when reaching this decision.

FINDINGS OF FACT: (1) Cow Creek Band of Umpqua Tribe (Cow Creek Health and Wellness Center) employed claimant as a safety officer, namely, the Clinical Quality Improvement Coordinator, from December 2014 to March 13, 2018.

(2) In her position as safety officer, claimant's main responsibility was to ensure that the facility maintained compliance with relevant safety and health regulations, including Occupational Safety and Health Administration (OSHA) regulations, as well as Accreditation Association of Ambulatory Health Care (AAAH) accreditation, which was necessary for the employer to receive reimbursement from Medicare and Medicaid.

(3) During the last two years of claimant's employment, claimant continually had disagreements with the employer's clinic director over the employer's compliance with relevant safety and health regulations and the employer's accreditation. The clinic director was concerned about costs and often

disagreed with claimant that the employer was out of compliance with certain safety and health regulations and that AAAHC accreditation was truly necessary when a less expensive type of accreditation might be available for the employer's needs. Claimant believed the clinic director belittled her regarding safety concerns she raised in both emails and in meetings with him and others to the point of hostility, which caused her increasing anxiety. Beginning in 2016, claimant was prescribed anti-anxiety medication for work stress by a medical provider and took her medication prior to meetings to enable her to get through them.

(4) In early February 2018, claimant requested and attended a meeting with the employer's human resources manager and reported her concerns about the employer's compliance with relevant safety and health regulations, its ability to maintain its AAAHC accreditation, and the clinic director's overtly critical behavior toward her when attempting to perform her job duties. The manager reported claimant's concerns to the employer's health operations officer, who supervised the director. Shortly after the meeting, claimant's direct supervisor, MS, told her that the employer was immediately removing some of her job duties, and on a day-to-day basis, MS gave claimant instructions regarding what duties she was to perform that day. Around that time, claimant also told MS that her three year relationship with a man had escalated to domestic violence and that she was staying with friends until a safety plan could be developed.

(5) On or around February 24, 2018, the health operations officer informed MS that the employer had decided to create a new position for claimant that would provide her with new job duties and remove her from the clinic where she had been working. However, MS abruptly resigned from the employer on or about February 26, 2018. After her resignation, claimant received no direction regarding her job duties or role, which increased her stress and created a feeling of alienation for her.

(6) On March 5, 2018, claimant met with the employer's human resources manager and submitted her resignation, effective March 19, 2018, based on her lack of a job description or clearly defined role with the employer at that time, and the clinic director's past behavior toward her over her concerns with regulatory compliance and AAAHC accreditation. Claimant believed these issues were "unresolvable under the current Clinic Administration." Exhibit 1. The manager told claimant that a new position was being created for her that would clearly define her job duties and address all of her concerns, and asked claimant whether she would be interested in it. Claimant replied that she would not be interested in the new position. Claimant declined the offer because the job had not yet been defined, which left her unable to make an informed choice at that time. The new position being created for her would not have required her to report to the clinic director.

(7) On March 13, 2018, claimant's ex-boyfriend made a threatening call to the claimant's work facility. For the safety of claimant and others, the employer told claimant to leave work that day without any need to finish her notice period.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ that the employer discharged claimant, not for misconduct, within fifteen days of claimants planned quit without good cause.

The first issue in this case is whether claimant quit work or was discharged. If 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) (January 11, 2018). 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

Claimant notified the employer on March 5, 2018, that she was quitting work on March 19, 2018. However, the employer did not allow claimant to work through her notice period for safety reasons. Because claimant was willing to continue working for the employer until March 19, but was not allowed to do so by the employer, the March 13, 2018 work separation was a discharge.

The next issue is whether 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. Here, the record shows that the employer discharged claimant for the safety of claimant and others after claimant's ex-boyfriend made a threatening call to the claimant's work facility, and not for misconduct.

However, ORS 657.176(8) provides that when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her, 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 she 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. Here, claimant notified the employer she would end her employment on March 19, 2018. The employer discharged her, not for misconduct, on March 13, 2018, less than 15 days prior to her planned quit date. Therefore, we must determine whether claimant's planned quit would have been without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of 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). Claimant had been treated for anxiety for approximately two years, and for that reason, likely was a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

Claimant submitted her resignation when she did due to her lack of a job description or clearly defined role with the employer and the clinic director's behavior toward her over her concerns with regulatory compliance and AAAHC accreditation, which she believed were “unresolvable” issues. However, it is clear from the record that the employer took her concerns seriously and was in the process of creating a new position for her that reportedly would have eliminated the clinic director as her supervisor and created clearly defined job duties that would have minimized or eliminated her contact with him. It is reasonable to infer that the employer valued claimant's abilities as an employee and wished to maintain

an employment relationship with her. On this record, claimant failed to show that continuing to work, at least until learning of her new job description and duties, and if necessary, requesting further accommodation for her concerns, would have been futile. Claimant had the option of continuing her employment for a reasonable period of time, at least until any ambiguities regarding her job and its chain of command were resolved. Moreover, although claimant demonstrated that her job duties until March 5 had caused her anxiety, she did not assert or show that her medical provider had recommended that she quit in order to protect her health, that she quit for that reason, or that her anxiety likely would not have improved given a new set of job duties and supervisor. For that reason, claimant failed to show that no reasonable and prudent person with the characteristics and qualities of an individual with her impairment would have continued to work for her employer for an additional period of time.¹

In sum, claimant notified the employer of her intention to voluntarily quit work without good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits except that she is eligible for benefits for the week from March 11 through 17, 2018 (week 11-18), which is both the week in which the actual discharge occurred and the week prior to the week of the planned quit date.

DECISION: Order No. 18-UI-110109 is affirmed.

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

DATE of Service: July 20, 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

¹ We note that ORS 657.176(12) provides:

(12) An individual may not be disqualified from receiving benefits under subsection (2)(c), (d) or (e) of this section or be considered unavailable for purposes of ORS 657.155 if:

(a) The individual or a member of the individual's immediate family is a victim of domestic violence, stalking or sexual assault, or the individual believes that the individual or a member of the individual's immediate family could become a victim of domestic violence, stalking or sexual assault; and

(b) The individual leaves work, fails to apply for available suitable work or fails to accept suitable work when offered in order to protect the individual or a member of the individual's immediate family from domestic violence, stalking or sexual assault that the individual reasonably believes will occur as a result of the individual's continued employment or acceptance of work.

However, the record fails to show that claimant submitted her resignation when she did to protect herself or a member of her family from domestic violence that she reasonably believed *would occur as a result of her continuing employment with the employer*. ORS 657.176(12) therefore does not apply to claimant's work separation.

‘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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