

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0601

Order No. 18-UI-111077 – Affirmed, Disqualification Effective December 31, 2017

Order No. 18-UI-111160 – Affirmed, Ineligible Weeks 16-18 through 22-18

PROCEDURAL HISTORY: On May 2, 2018, the Oregon Employment Department (the Department) served notice of two administrative decisions; one concluding claimant voluntarily left work without good cause (decision # 93332) and the other concluding claimant was not available for work from April 15 through April 28, 2018, and continuing until the reason for the denial had ended (decision # 94651). Claimant filed timely requests for hearing on each decision. On June 8, 2018, ALJ Murdock conducted separate hearings on decisions # 93332 and # 94651, and on June 11, 2018 issued Order No. 18-UI-111077, affirming decision # 93332 and Order No. 18-UI-111160, modifying decision # 94651 and concluding claimant was not available for work from April 15 through June 2, 2018. On June 14, 2018, claimant filed timely applications for review of each order with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-111077 and 18-UI-111160. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0601 and 2018-EAB-0602).

FINDINGS OF FACT: (1) Superior Talent Resources Inc. employed claimant as a test technician from June 2017 to December 20, 2017.

(2) The employer expected claimant to report for work when scheduled. However, during claimant's employment, claimant was attending school at Portland State University and his school schedule often conflicted with his work schedule. Although the employer initially accommodated claimant's school requirements, in December 2017, the employer stopped doing so.

(3) On December 19, 2017, claimant gave his manager two weeks' notice that he was quitting work effective January 2, 2018, because the employer would no longer accommodate his school schedule.

(4) On December 20, 2017, when claimant reported for work at 5:00 a.m., his supervisor confirmed with claimant that he had just given the employer two weeks' notice of his intent to quit. At that point, the

manager told claimant the employer no longer needed him and directed him to go home after turning in his employer badge and any other employer equipment in his possession.

(5) Claimant filed an initial claim for unemployment benefits on April 16, 2018. He claimed, but was not paid, benefits for the weeks including April 15 through June 2, 2018 (weeks 16-18 through 22-18), the weeks at issue.

(6) During the weeks claimed, claimant sought work as an electrical engineer, in systems and manufacturing and in scientific research. Claimant's labor market area was Portland, Beaverton, Tigard Milwaukie, Oregon City, Clackamas, Gladstone and Gresham. The customary days and hours for work as an electrical engineer and in systems work in claimant's labor market were Monday through Friday 8:00 a.m. to 5:00 p.m. The customary days and hours for work in the manufacturing sector in claimant's labor market were all days and all hours.

(7) During the weeks in issue, claimant remained enrolled at Portland State University attending a single research class necessary for him to complete his course of study toward obtaining a PHD degree in computer and electrical engineering. He was scheduled to complete his degree requirements by December 9, 2018. He received a government stipend of \$2,600 per month to facilitate the completion of his degree. The research class he attended was for course credit and consisted of meetings with an advisor to monitor his progress towards completing his dissertation. During the weeks at issue, claimant was not willing to accept full-time work because of he needed time to attend school and complete his course of study.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. The employer discharged claimant, not for misconduct, within fifteen days of claimant's planned voluntary leaving without good cause and claimant was not available for work during the weeks at issue.

Work Separation. 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).

On December 19, 2017, claimant notified his manager that he was quitting work effective January 2, 2018. However, after claimant reported for work on December 20, 2017 and his supervisor confirmed that claimant had submitted a two-week notice of his intent to quit, the supervisor responded, "we don't need you" and directed him to go home after turning in his badge and other employer equipment. Audio Record (June 8, 2018 9:30 a.m. hearing) ~ 11:00 to 12:10. Because claimant was willing to continue working for the employer until January 2, 2018, but was not allowed to do so by the employer, the December 20, 2017 work separation was a discharge.

The next issue is whether the employer discharged claimant for misconduct. 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. Here, the record shows

that the employer discharged claimant simply because he had submitted two weeks' notice of his intent to quit, which on this record was not misconduct.

However, ORS 657.176(8) provides that when an individual has notified an employer that he (or she) will quit work on a specific date, and the employer then discharges him, 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 he 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 he would end his employment on January 2, 2018. The employer discharged him, not for misconduct, on December 20, 2017, less than 15 days prior to his 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 he (or she) 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). 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. Under OAR 471-030-0038(5)(b)(D), leaving work without good cause includes leaving work to attend school not required by law.

Claimant admitted that he submitted his resignation notice because his employer would not accommodate his school schedule by granting him days off. Audio Record (June 8, 2018 9:30 a.m. hearing) ~ 9:30 to 10:30. Accordingly, there is no dispute in the record that claimant quit work to enable him to attend school. As claimant was attending school to obtain a PHD degree in engineering, which was not required by law, under OAR 471-030-0038(5)(b)(D), his voluntary leaving was without good cause.

In sum, claimant notified the employer of his 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 he is eligible for benefits for the weeks including December 17, 2017 through December 30, 2017 (weeks 51-17 through 52-17), which is the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date. Thereafter, claimant is disqualified from receiving benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

Available for Work. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (April 1, 2018). Among those requirements are that the individual be willing to work full time, part time and accept temporary work opportunities during all of the usual hours and days of the week

customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

It is generally accepted that an individual seeking unemployment insurance benefits while regularly attending school has a "heavy burden" to overcome the inference that he (or she) was not available for work. *See Petro v. Employment Div.*, 32 Or. App. 17, 20, 573 P.2d 1250 (1978), *citing Callaghan v. Morgan*, 9 Or. App. 116, 120, 496 P.2d 55 (1972) (so stating). That inference may be overcome with unequivocal and consistent testimony by the claimant, particularly when corroborated by other evidence, that he prioritized finding work over attending school and would resolve any scheduling conflicts in favor of work. *Petro, supra*, at 20. Claimant, having initially been denied benefits, has the burden to establish he was eligible for benefits for the weeks at issue. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Claimant failed to meet his burden. When claimant filed his initial claim on April 6, 2018, he listed "school" as a reason he could not begin full time work immediately. Audio Record (June 8, 2018 8:15 a.m. hearing) ~ 4:00 to 4:20. When claimant completed a student eligibility questionnaire for the Department, in response to a question regarding what he would do if offered work that conflicted with his current class schedule, claimant responded, "school is my first priority" after indicating that he had invested \$15,500 per year for school. Audio Record (June 8, 2018 8:15 a.m. hearing) ~ 4:20 to 9:00. However at hearing, claimant indicated that he had been willing to work full time and that he could have switched his school hours to facilitate work, which was inconsistent with what he reported to the adjudicator during a May 1, 2018 conversation. Audio Record (June 8, 2018 8:15 a.m. hearing) ~ 9:00 to 13:30. We agree with the ALJ that the answers claimant previously gave to the Department were more persuasive as to his intent at that time than his equivocal testimony given after he was determined ineligible for benefits because of those statements. Order No. 18-UI-111160 at 3. More likely than not, claimant was not willing to accept employment from employers who would not be flexible with his school schedule and requirements. Claimant's school attendance imposed a condition that substantially limited his opportunities to return to work at the earliest possible time.

Claimant was not available for work during the weeks at issue. Therefore, he is ineligible for benefits for the weeks including April 15 through June 2, 2018 (weeks 16-18 through 22-18).

DECISION: Order Nos. 18-UI-111077 and 18-UI-111160 are 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 '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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