

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0673

Modified
Disqualification

PROCEDURAL HISTORY: On May 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80349). Claimant filed a timely request for hearing. On June 15, 2018, ALJ S. Lee conducted a hearing at which the employer did not appear, and on June 25, 2018 issued Order No. 18-UI-112012, affirming the Department's decision. On July 3, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Luxottica Retail North America Inc. employed claimant as the manager of a LensCrafters store in Eugene, Oregon from October 23, 2017 until April 23, 2018.

(2) When the employer hired claimant, she had no experience in the employer's field of eye examinations and selling eyeglasses to customers, although she did have experience managing various types of other retail sales businesses. The employer and claimant recognized that claimant would need training before she was familiarized with the employer's business and able to fully discharge managerial duties.

(3) For approximately the first month of claimant's employment, claimant was assigned to the employer's LensCrafters store in Idaho Falls, Idaho for training from that store's manager. Claimant disliked working at the Idaho Falls store because the managers and staff made objectionable comments and she thought gossip was too prevalent.

(4) In late November 2017, claimant transitioned to working at employer's Eugene store, the store she was hired to manage. Claimant believed she was hired to make changes to practices in the Eugene store. Once at the Eugene store, claimant realized the optometrist and lab manager had been there for at least 20 years, the assistant manager had been there for seven years and the lead worker had been there for five years. These employees were very resistant to any change, resistant to claimant's efforts and did not assist claimant in learning the employer's business.

(5) Claimant expected the manager of the Idaho Falls store to visit the Eugene store very shortly after claimant assumed managerial responsibilities there and continue claimant's training for a week in late November or early December 2017. However, the manager of the Idaho Falls store was too busy to leave her own store to train or assist claimant further. Claimant tried to contact the employer's district manager for assistance, but the district manager did not return claimant's call.

(6) As claimant tried to manage the Eugene store alone, claimant had difficulty working with and managing the lab manager. The lab manager had a very negative attitude, complained excessively, threw things and used foul language. The lab manager also failed to inform claimant of deadlines that she missed and of which claimant was unaware. Claimant informed the lab manager that the lab manager needed to stop using offensive language and behaving so angrily. However, the lab manager's behavior continued. Claimant told the lab manager that she needed to let claimant know when she missed task deadlines. While the lab manager agreed to do so, she often did not comply. Ultimately, the regional lab manager placed the lab manager at the Eugene store on a personal development plan, which included the goal of attitude improvement.

(7) In December 2017, claimant was closing the Eugene store with a male lab technician and a female salesperson. All three entered the break room after closing the store and the male technician stripped off his trousers down to his underwear in front of claimant and the salesperson and changed his pants. Claimant immediately told the technician that it was not appropriate for him to change his pants in the presence of females and not to do so ever again.

(8) In addition, as claimant tried to manage the Eugene store alone, claimant became aware that the Monday through Friday, 9:00 a.m. through 5:00 p.m. schedule of the lead at the store was not working to the advantage of the store. Claimant contacted the district manager about how to approach this situation and the district manager told claimant that she should take care of it. When claimant brought up the schedule with the lead, the lead refused to work more than one weekend per month because she contended she was not hired to work weekends. Later, some employees who prescreened customers for eye examinations left employment at the Eugene store and the lead was one of the few remaining employees who had the skills to perform prescreening. However, the lead refused to perform prescreening and claimant was required to assign an employee who was her "right hand" to do prescreening because that employee had the necessary skills. Audio at ~21:58. Without the assistance of this employee, it was difficult for claimant to complete her work since she was not fully trained. Claimant called the district manager about the problems she was having with the lead. The district manager again told claimant that claimant needed to address the problems with the lead herself, and that she would call claimant in a week to follow up. When two weeks had passed without the district manager having called, claimant tried to reach the district manager, but was unable to do so. Claimant assumed that the Christmas holidays were impeding the district manager in contacting her.

(9) On January 6, 2018, claimant called the manager at the Idaho Falls store and asked her to come to the Eugene store to help for a week, as she had expected her to do during late November 2017 since the district manager had not contacted claimant in response to claimant's recent attempts to reach her for assistance. The Idaho Falls manager arrived on January 8, 2018 accompanied by a second manager. The managers stayed for one week at the Eugene store to help and train claimant. During that week, the managers told claimant that they thought that claimant's difficulties in managing the store arose from

having a “really tough staff” that resented claimant because they were significantly more experienced than claimant. Audio at ~26:20. During that week, both managers assisted claimant.

(10) Sometime around the end of January 2018, the district manager called claimant to arrange a meeting with her and the assistant manager at the Eugene store. At that meeting, the district manager set up personal development plans for claimant and the assistant manager to help them with their overall job performances.

(11) Approximately a week after the personal development plans were implemented, the manager from the Idaho Falls store and the other manager spent another week at the Eugene store to assist claimant. During that week, that other manager used the word “nigger” when speaking to claimant and other staff at her store. Audio at ~30:40. Claimant told this manager that she objected to him using that type of language and that it was not appropriate.

(12) Sometime in approximately late February 2018, claimant learned that the district manager was away from work on a medical leave.

(13) On March 15, 2018, claimant tried to contact the employer’s human resources representative who was assigned to claimant’s district. In the absence of the district manager, claimant wanted input about how to handle some of the difficulties she was experiencing at the Eugene store, including dealing with the lab manager, the lead and the employee who took off his outer trousers in front of claimant and the female employee. Claimant tried to reach the human resources representative for her district a second time on March 19, 2018 when she did not hear back from her.

(14) On April 5, 2018, claimant received a text message from the person who was covering for the absent district manager. On April 6, 2018, claimant spoke by phone with that employer representative and the regional lab manager. The employer representative reviewed claimant’s personal development plan and her status in achieving its goals. The regional lab manager told claimant that she had not completed a particular task and claimant responded to him that she had delegated that task to the lab manager since she did not have time to perform it. At some point during the call, claimant told the employer representative and the regional manager that she thought they were looking for reasons to fire her. The employer representative responded that she did not have time for such a discussion with claimant.

(15) On April 9, 2018, the employer representative covering for the district manager called claimant and asked claimant, “Do you like working here?” Audio at ~37:41. Claimant told the employer representative that she was going to leave work and that her last day would be April 23, 2018. Claimant decided to leave work because she felt she was not receiving adequate support in her job and the Eugene store was “really volatile.” Audio at ~9:40. During that call, the representative told claimant that she did not need to work through the notice period up to April 23, 2018 and that she should gather up her belongings that day and leave. Claimant did so.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause, but is entitled to receive benefits for the weeks of April 8, 2018 through April 21, 2018.

After claimant told the employer she planned to leave work on April 23, 2018, the employer discharged her on April 9, 2018 by telling her to gather her belongings and leave the workplace. When an employee has been discharged after notifying the employer that the employee intends to leave work, ORS 657.176(8) sets forth the circumstances under which the discharge is disregarded and the work separation adjudicated as a voluntary leaving. If the voluntary leaving would be for reasons that do not constitute good cause and the employer discharged the employee not more than 15 days prior to the planned voluntary leaving date, the work separation is adjudicated as a voluntary leaving and not a discharge. However, the employee 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 voluntary leaving date. Here, since claimant was discharged on April 9, 2018, which was 14 days before claimant's planned voluntary leaving date on April 23, 2018, ORS 657.176(8) is potentially applicable to claimant's claim. To determine if it is applicable, whether claimant's planned leaving would have been for good cause and whether the employer's discharge of claimant was not for misconduct must be considered. In Order No. 18-UI-112012, the ALJ erred in not considering the applicability of ORS 657.176(8) to claimant's claim and whether or not claimant was entitled to receive two weeks of benefits.

The first issue to be considered in determining the applicability of ORS 657.186(8) is whether or not claimant had good cause for leaving work. 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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In this case, claimant contended that she left work because she was not receiving adequate support from the employer's management. Audio at ~38:38-39:01. However, claimant did not identify a situation of gravity that caused her to leave work. While claimant recounted various problems she had with the employees at the Eugene store, she did not contend that she suffered any cognizable harm from those problems. Claimant made a single cursory, passing reference during her testimony to "losing sleep at night" over work and "having anxiety at work," but did not elaborate or provide additional detail. Audio at ~41:46. Many of the difficulties that claimant testified that she experienced as manager at the Eugene store seemed more in the nature of those that a manager might expect to encounter in the course of a role supervising subordinate employees, rather than being occurrences out of the norm or amounting to grave circumstances.

While the district manager may not have been as attentive to claimant during training as claimant desired, the manager of the Idaho Falls store appeared responsive and helpful. Claimant did not suggest that the person who was covering for the district manager while that manager was on sick leave was unwilling to assist claimant if claimant had asked. Finally, even though claimant testified that she mentioned to the lab manager and the person covering for the district manager during the conversation on April 6, 2018 that she thought they were searching for reasons to discharge her, claimant did not mention at any point in her testimony that one of the reasons she left work was to avoid discharge or even that she was concerned about being discharged. On this record, claimant did not meet her burden to

show that grave reasons caused her to leave work. Because claimant did not show good cause for her decision to leave work, claimant is disqualified from benefits based on this work separation.

While claimant is disqualified from benefits based on the voluntary leaving, claimant may receive benefits for the week of April 8, 2018 through April 14, 2018 if the employer's intervening discharge of her was not for misconduct. ORS 657.176(8). OAR 471-030-0038(3)(a) (January 11, 2018) 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 claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Given the employer's failure to appear at hearing, the most that can be discerned from the record is that the employer discharged claimant because it did not want claimant to work during the period between when she announced her intention to leave work and her planned leaving date. That claimant planned to leave work was not a willful or wantonly negligent violation of the employer's reasonable standards. There was insufficient evidence in this record to show that the employer discharged claimant for misconduct. Because the April 9, 2018 discharge that intervened after claimant announced intention to leave work on April 23, 2018 was not for misconduct, claimant is entitled to receive unemployment benefits for the weeks of April 8 through April 21, 2018.

DECISION: Order No. 18-UI-112012 is modified, as outlined above.

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

DATE of Service: August 8, 2018

NOTE: This decision modifies an order that denied benefits and allows two weeks of benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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