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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0778

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct within fifteen days of claimant's planned voluntary quit without good cause (decision # 130256). Claimant filed a timely request for hearing. On July 30, 2018, ALJ Murdock conducted a hearing at which the employer failed to appear, and on July 31, 2018 issued Order No. 18-UI-114093, affirming the Department's decision. On August 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Claimant offered a text message into evidence at hearing and the ALJ marked it as Exhibit 1, but did not admit it into the record. Audio Record at 29:58 to 32:07. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The document submitted by claimant is relevant and its admission into evidence is necessary to complete the record in this case. Accordingly, Exhibit 1 is admitted into the record. A copy will accompany this order. Any party that objects to the admission of Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

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 her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, with the exception of Exhibit 1, we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Clair Horn Eyecare employed claimant from November 7, 2017 until June 8, 2018 as an optician.

(2) The employer had two optometry offices. One was in Medford, Oregon, and the other in Yreka, California. Before claimant accepted the optician job, the employer's dentist told claimant she would "probably never have to go to Yreka." Exhibit 1.

(3) As a result of sex offense conviction(s) in Florida, claimant was subject to lifetime registration as a sex offender in all states unless an individual state's courts relieved her of the duty to do so. Claimant understood that California required her to register as a sex offender there if she worked there for more than 14 consecutive days or more than 30 days total in a calendar year. Before claimant accepted the job with the employer, she contacted the county sheriff with jurisdiction over sex offenders registering in Yreka, Siskiyou County, and was told that she did not have to register there because she did not reside in California or stay overnight when she worked there.

(4) Sometime in 2018, the dentist began having claimant work in California more often because she did not request pay for her travel time to California like the other opticians. The employer was also increasing claimant's duties and work time in California because the employer wanted claimant to train new employees there.

(5) In May 2018, claimant became concerned about the accuracy of the information she had received from Siskiyou County law enforcement regarding the sex offender registry. The employer had a new accounting practice that would clearly show how many days claimant worked in California for the year 2018, which would total more than 30 during the second week of June 2018. Claimant contacted the California Department of Justice and was told that she was required to register as a sex offender in California if she worked more than 30 days in a calendar year in California, even if she did not reside there.

(6) Based on the new information, claimant contacted Siskiyou County law enforcement again. However, the county sheriff refused to register claimant as a sex offender using claimant's Yreka work address, or her address in Oregon because, on May 18, 2018, an Oregon court had granted claimant an order relieving her from the requirement to register as a sex offender in Oregon. Claimant was concerned because she believed her failure to be registered in California could result in her arrest there and result in a violation of Florida law, resulting in her extradition to and prosecution in Florida.

(7) On June 6, 2018, claimant was offered other work from another employer that was contingent on claimant passing a background check and a drug test.

(8) On June 6, 2018, claimant attempted to explain her criminal legal situation to the employer, but the employer told claimant he was not interested in her criminal background if she did not steal from him. Claimant later told the employer that she planned to quit work on June 16, 2018 to accept an offer of other work. Claimant planned to quit work due to the potential of violating California and Florida sex offender laws regarding one's place of employment and registering as a sex offender, which could have resulted in criminal charges against claimant.

(9) On June 8, 2018, the dentist told claimant not to return to work because "it would be better for both of [them]." Audio Record at 6:15 to 6:25.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was discharged not for misconduct, but conclude that the discharge was within fifteen days of a planned quit with good cause.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. 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). OAR 471-030-0038(5) provides, in pertinent part, that an individual has "good cause" for leaving work to accept an offer of other work only "if the offer is definite."

ORS 657.176(8) provides that when an individual 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. The he 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. *Id*.

On June 6, 2018, claimant notified the employer's dentist that she planned to quit, but would continue to work through June 16, 2018. However, the dentist discharged claimant on June 8, 2018. The record does not establish that claimant's discharge was due to a willful or wantonly negligent violation on claimant's part of a reasonable employer expectation. The employer therefore discharged claimant, not for misconduct under ORS 657.176(2)(a). The remaining issue is to determine whether ORS 657.176(8) applies to this case based on whether claimant's planned quit would have been with or without good cause.

To the extent claimant left work to accept an offer of other work, claimant did not leave work with good cause. Because claimant's employment offer was contingent on the outcome of a background check and a drug test, and claimant had not completed it at the time she gave notice that she planned to quit, claimant's job offer was not "definite" when she gave notice of her planned quit. Thus, claimant did not have good cause to quit under OAR 471-030-0038(5).

California Penal Code Sec. 290.002 and 290.005 (June 6, 2016) state that out-of-state residents employed or working in California for more than 14 days or for an aggregate period of more than 30 days in a calendar year are required to register according to the Sex Offender Registration Act. Claimant voluntarily left work because the employer scheduled her to work more than 30 days in one calendar year in Yreka, California and the law enforcement agency with jurisdiction over the sex offender registry in Yreka, California refused to register claimant as a sex offender there. Claimant faced potential arrest and prosecution in California and Florida if she violated California's laws regarding registering as a sex offender there. In Order No. 18-UI-114093, the ALJ concluded, and we

agree, that claimant faced a grave situation due to the legal jeopardy she faced if she continued to work in California without being registered there as a sex offender, which the local sheriff refused to do.[1]

However, the ALJ further concluded that claimant failed to show that it was futile to ask her employer to reduce her work in California so she did not exceed the 30-day limitation before she was required to register as a sex offender in California, and thus had a reasonable alternative to quitting when she did.[2] We disagree. The record shows that claimant would have exceeded the 30-day limitation in June 2018, and therefore would have had to stop working in California immediately. Based on the record, the employer did not appear amenable to reducing claimant's time working in California because it was disinterested in her criminal restrictions, and preferred claimant to other opticians due to her qualifications and availability despite not paying claimant for travel time commuting to California. We therefore conclude that relying on the employer to change claimant's work schedule so that she no longer worked in California was not a reasonable alternative for claimant because it was unlikely the employer would do so, and the risk claimant faced of criminal charges were she to continue working in California.

In sum, claimant notified the employer of her intention to quit work with good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Thus, ORS 657.176(8) does not apply to this case. Accordingly, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 18-UI-114093 is set aside, as outlined above.

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

DATE of Service: <u>September 10, 2018</u>

NOTE: This decision reverses an order that denied 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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[1] Order No. 18-UI-114093 at 4.
[2] *Id.*