

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0792

Affirmed
Disqualification
Eligible Weeks 21-18 through 22-18

PROCEDURAL HISTORY: On June 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct within 15 days of her planned voluntary leaving without good cause (decision # 132630). Claimant filed a timely request for hearing. On July 12, 2018, ALJ Snyder conducted a hearing, and on July 20, 2018, issued Order No. 18-UI-113549, affirming the Department's decision. On August 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why she was unable to present this information during the hearing, or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. Accordingly, EAB considered only the information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Northwest Enforcement, Inc. employed claimant, last as a security staff person, from September 2016 to May 24, 2018.

(2) Claimant initially worked for the employer as a flagger under government contracts and received the "prevailing wage" for that position pursuant to federal law. Federal law also required the employer provide claimant and similarly situated flaggers with health and welfare benefits, which included health care benefits, up to a certain minimum amount that was included in the revenue paid the employer for work under the government contracts. The employer paid claimant the prevailing wage for her flagger work and also provided her with health care benefits. To comply with federal law, the employer paid claimant and similarly situated flaggers the balance between its health care costs and the required minimum amount in additional wages.

(3) In October 2017, claimant was working as a flagger at one of the locations where the employer provided flaggers for construction projects. The contractor of the site where claimant was working contacted the employer and complained about claimant's conduct and requested that claimant be

removed from its construction site and not be allowed to return. The employer complied and removed claimant from that job and transferred her to a security staff position which offered less work hours and overall wages.

(4) In November of 2017, the employer determined that it had under calculated its costs for employee health care premiums and had erroneously paid claimant and similarly situated employees supplemental wages to meet the minimum amount for health and welfare benefits required under federal law. The employer requested that claimant and similarly situated employees pay the employer back for the supplemental wages it had erroneously paid either by a lump sum or through a payment arrangement. Claimant expressed to the employer that she did not feel that she should be required to repay the amount that the employer failed to deduct for healthcare premiums from her paychecks.

(5) In February 2018, the employer met with claimant to discuss the creation of a payment arrangement to reimburse it the \$4000 it had erroneously paid claimant over a substantial period of time. Claimant refused to pay the money back in part because she did not have it and in part because she did not believe she was obligated to because it was the employer's mistake.

(6) After their February meeting, claimant's hours were reduced which claimant believed was due to her refusal to reimburse the employer and the employer attributed to claimant's refusal to work graveyard shifts on its security detail. In March 2018, as a result of her reduction in work hours, claimant no longer qualified for health care benefits, which ended at that time.

(7) The employer continued to press claimant for a repayment arrangement which claimant refused to enter into. In April, 2018, the employer began to deduct \$50 per paycheck from her wages, which claimant had not consented to, to recoup its previous overpayment, which claimant believed was illegal under state wage and hour laws and so informed the employer.

(8) After deducting approximately \$200 from claimant's wages, the employer sent claimant a letter informing her that it would no longer deduct any sum from her wages.

(9) On May 24, 2018, shortly after receiving the employer's letter, claimant gave the employer notice that she was quitting, effective June 7, 2018. Claimant gave the employer notice because it refused to return the deductions it had taken from her paycheck, it refused to return her to the flagger position, she experienced stress and anxiety from her work environment and because she foresaw no future with the employer.

(10) Later on May 24, 2018, the employer discharged claimant from her employment informing her that it would not need her to work between that date and June 7, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, not for misconduct, within fifteen days of claimant's planned leaving 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 May 24, 2018 that she was quitting work on June 7, 2018. However, the employer did not allow claimant to work through her notice period and discharged her on May 24, 2018. Because claimant was willing to continue working for the employer until June 7, but was not allowed to do so by the employer, the work separation was a discharge. The record fails to show that the employer discharged claimant due to claimant’s willful or wantonly negligent violation of standards of behavior which the employer had the right to expect of claimant, or an act or series of actions that amounted to a willful or wantonly negligent disregard of the employer’s interest. We therefore conclude the employer discharged claimant, not for misconduct, on May 24, 2018.

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 discharges 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. Claimant notified the employer she would end her employment on June 7, 2018. The employer discharged her, not for misconduct, on May 24, 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 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 the employer for an additional period of time.

Claimant gave the employer notice she was quitting because she believed its wage deductions from her paycheck were illegal, it refused to return the deductions it had taken, it refused to return her to the flagger position, she experienced stress and anxiety from her work environment and because she foresaw no future with the employer. Audio Record ~ 5:25 to 6:30; 21:45 to 22:45. Although it is not reasonable to expect an employee to continue working indefinitely for an employer that fails to comply with state wage and hour laws, the Oregon Court of Appeals has consistently held that individuals have good cause to leave work due to unlawful payroll practices only where the evidence shows those practices had previously impacted the individual and were likely to continue unresolved. *See Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where employer’s past unlawful payroll practices had impacted claimant but were unlikely to reoccur, claimant did not have good cause to leave work); *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when unlawful payment practices had impacted claimant and were likely to reoccur). Assuming, *arguendo*, that the employer’s wage deductions were illegal, claimant did not dispute that at the time claimant quit, the employer had informed her that it

would no longer deduct \$50 payments from her wages without her consent. Accordingly, her complaints had not been futile and claimant failed to show that no reasonable and prudent employee in her circumstances would have continued to work for the employer for an additional period of time. Claimant also quit, in part, because the employer had not returned her to a flagger position which paid greater wages and provided greater hours. However, the employer asserted that it was unable to return claimant to a flagger position because the flagger jobs had reduced in number and were mostly on call. The employer also asserted that claimant had additional opportunities for graveyard shifts which she did not take advantage of. Audio Record ~ 31:00 to 36:00. Viewing the record as a whole, the evidence on this issue was no more than equally balanced and for that reason claimant failed to establish that no reasonable and prudent security employee in claimant's circumstances and exercising ordinary common sense, would have concluded she had no reasonable alternative but to quit when she did.

Finally, claimant quit in part because she was experiencing increasing anxiety working for the employer and because she foresaw no real future with the employer and wanted to pursue "other avenues." Audio Record ~ 16:00 to 17:30; 21:45 to 22:45. However, claimant did not assert or show that her anxiety was so severe that she ever obtained treatment for her condition, and although pursuing "other avenues" in her circumstances was understandable, she did not establish that it amounted to good cause for quitting work under OAR 471-030-0038(4).

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 weeks including May 20 through June 2, 2018 (weeks 21-18 through 22-18), which are the weeks in which the actual discharge occurred through the week prior to the week of the planned quit date.

DECISION: Order No. 18-UI-113549 is affirmed.

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

DATE of Service: September 11, 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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