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

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DS 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0815

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 85608). The employer filed a timely request for hearing. On August 6, 2018, ALJ Murdock conducted a hearing, and on August 14, 2018, issued Order No. 18-UI-114923, concluding that the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause. On August 22, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also 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 as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Dr. Crawlspace employed claimant from April 2, 2018 until June 13, 2018 to manage a crew that provided services and products for customers' crawl spaces.

(2) The employer expected claimant to request time off work in advance of work if he needed to miss work, and to report to work when the employer scheduled him to do so. Claimant understood the employer's expectations as a matter of common sense.

(3) Although the general manager provided claimant with training, claimant became dissatisfied with his job because he did not receive sufficient training and support from the employer for him to perform the work as quickly and efficiently as the employer expected, at times resulting in claimant receiving warnings regarding his performance. Sometimes claimant's crew was unprepared when claimant reported to work in the morning because they did not have a job sheet listing the crew's assignments for the day, which caused claimant and his crew to report late to work sites. Claimant felt warnings that resulted from those occasions were unfair because he did not have control over the training he received,

the time allotted to complete the jobs, or preparing the job sheets. Claimant complained to the general manager about the crew being unprepared in the morning, but claimant did not believe the situation improved after he complained. Claimant's job was not in jeopardy from the warnings.

(4) Several weeks before June 12, 2018, the employer approved claimant's request for time off to attend a morning appointment on June 12, 2018. The general manager understood that claimant would report to work after claimant's morning appointment. Claimant's understanding was that the general manager would send him the day's work site address if the employer needed claimant to report to work after his appointment ended.

(5) On June 9, 2018, claimant told the general manager that he was leaving work early because he injured his knee while working, and that he was quitting work on June 23, 2018 due to dissatisfaction with his working conditions.

(6) On June 10, 2018, claimant sent the owner an email explaining why he was dissatisfied with his job. Claimant and the owner discussed whether claimant would be willing to revoke his notice to quit work and claimant told her he would discuss his concerns and possible revocation with the general manager the next time he spoke with the general manager. Claimant was not willing to revoke his notice to quit until after he spoke with the general manager and felt assured that his working conditions might improve. Shortly thereafter, claimant sent an email to the general manager, again expressing the reasons he was dissatisfied with his working conditions. Claimant did not state he would consider revoking his notice to quit in that email.

(7) At 8:00 p.m. on June 10, 2018, claimant learned of an appointment the following morning and sent a text message to the general manager asking for permission to miss work the next morning to attend the appointment. The general manager gave claimant permission to miss work and told him he did not have to report to work on June 11, 2018.

(8) On June 12, 2018, claimant missed work to attend an appointment during the morning, and did not report to work after his appointment ended because the general manager did not send him the work site address or otherwise contact claimant.

(9) On June 13, 2018, claimant planned to discuss possibly continuing to work after June 23 with the general manager. He reported to work, at which time the general manager discharged claimant for giving short notice of his absence on June 11, 2018 and for failing to report to work after his appointment on June 12, 2018.

CONCLUSION AND REASONS: We agree with the ALJ and conclude the employer discharged claimant not for misconduct within fifteen days of a planned quit not for 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 June 9, 2018 that he was quitting work on June 23, 2018. Although claimant discussed possibly revoking his resignation with the owner, he was not willing to do so unless the general manager was willing to address claimant's dissatisfaction with his working conditions. Claimant planned to discuss his concerns with the general manager on June 13, 2018. However, the general manager discharged claimant on June 13, without claimant and the general manager discussing whether claimant could continue to work after June 23, and prohibited claimant from working through his notice period. Because claimant was willing to continue working for the employer until June 23, but was not allowed to do so by the employer, the June 13, 2018 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 because he gave the employer short notice of his absence on June 11, and did not report to work or contact the employer after his appointment on June 12. The employer gave claimant permission to miss work on June 11 and the record does not show that merely asking the employer to miss work, even if on short notice, was a willful or wantonly negligent violation of standards an employer has the right to expect of an employee. Thus, claimant's conduct on June 11 was not misconduct. Nor was claimant's failure to report to work on June 12 misconduct, because the record fails to show by a preponderance of the evidence that claimant's failure to report to work or contact the employer was based on anything other than a misunderstanding. The record does not show claimant knew or should have known the employer expected him to report to work that afternoon. In sum, the employer discharged claimant on June 13 not for misconduct.

However, ORS 657.176(8) provides that when an individual has notified an employer that he will quit work on a specific date, and the employer discharged 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 June 23, 2018. The employer discharged him, not for misconduct, on June 13, 2018, 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 proves, by a preponderance of 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).[1]

[1] Although claimant had been diagnosed with anxiety in March 2018, and postpartum depression after his employment ended, the record does not show that either condition was for claimant a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). Audio Record at 28:49 to 29:50. Thus, we did not apply the modified standard for a person with such an impairment to this case.

Claimant left work because he was dissatisfied with the insufficient support and training he received at work. Although claimant was persuasive that he was experiencing frustration and difficulties at work, he did not show they were objectively grave conditions at the time he gave notice that he would quit work. To the extent claimant quit work because he received warnings for inadequate performance, claimant did not show he had no reasonable alternative but to leave work for that reason. Claimant was dissatisfied that he received the warnings, especially because he felt he did not control his ability to avoid the warnings. However, his employment was not in jeopardy due to the warnings when he quit. Although we infer that claimant felt stress due to the warnings, he did not allege that the stress from the warnings was so grave that he had no reasonable alternative but to quit due to work stress. Claimant failed to show that no reasonable and prudent person in his circumstances would have continued to work for the employer for an additional period of time.

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 eligible for benefits for the week from June 10 through June 16, 2018 (week 24-18), 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-114923 is affirmed.

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

DATE of Service: <u>September 25, 2018</u>

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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