EO: 200
BYE: 201927

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

876
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0897

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 143749). The employer filed a timely request for hearing. On September 7, 2018, ALJ Schmidt conducted a hearing, and on September 11, 2018 issued Order No. 18-UI-116344, affirming the Department's decision. On September 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered the employer's written argument only to the extent it was based on the hearing record.

The employer asserted that it should receive another hearing because the hearing proceedings were unfair or the ALJ was biased. The employer asserted that the ALJ unfairly allowed claimant to testify regarding her safety concerns at work and did not allow an employer witness the opportunity to rebut claimant's testimony. Claimant testified that she would not have left work when she did had she not received an offer of other work. Transcript at 29. Thus, the testimony and argument regarding claimant's dissatisfaction with her working conditions were of limited relevance because claimant quit work to accept an offer of other work, and not because of her working conditions. We disagree that the ALJ failed to give the employer an opportunity to present all its relevant evidence. The owner testified regarding the employer's attempts to address claimant's safety concerns. Moreover, the ALJ asked the employer's owner near the end of the hearing, "Is there anything else you wanted to add that I have not already heard?" The employer's owner responded, "Not that I can think of." Transcript at 39.

We reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). We therefore deny the employer's request for another hearing.

FINDINGS OF FACT: (1) Free Loader Tavern employed claimant from April 2018 until July 1, 2018 as a bartender.

(2) Claimant's regular work schedule with the employer was Fridays from 2:00 p.m. to 9:00 p.m., Saturdays from 12:00 p.m. to 9:00 p.m., and Sundays from 5:00 p.m. to 1:30 a.m. on Monday. Claimant was not normally scheduled to work any other days. The employer paid claimant minimum wage, $10.25 per hour. Claimant earned tips in addition to her wages.

(3) On Thursday, June 28, 2018, another employer, Calapooia Brewery, offered claimant a permanent bartender position to begin on July 6, 2018. The offered work was not contingent on claimant satisfying any conditions after the offer and before she began work. The offered work was for 18 hours per week and paid $10.50 per hour.

(4) On June 29, 2018, claimant told the employer's owner by telephone that she planned to quit after she completed her regular shifts for June 30 and July 1, 2018. Claimant sometimes feared for her safety when she worked alone in the employer's business, so she told the owner she would work the two shifts unless she felt unsafe, then she would have to leave work sooner. Because claimant was the only employee scheduled to work during her June 30 and July 1 shifts, the owner preferred to have another employee cover claimant's final two shifts rather than take a chance that claimant would leave work during her shifts. The owner found another employee to cover claimant's shifts on June 30 and July 1.

(5) Later on June 29, 2018, claimant reported to work for her shift. At the end of her shift, the owner told claimant she had found another employee to work claimant's last two shifts "because [claimant] threatened to walk off her shift." Transcript at 6. Claimant told the owner, "I wouldn't have done that" (Transcript at 6), that the owner had misunderstood her, and that she intended to complete the shifts unless something happened that made her fear for her safety. Transcript at 6. The owner replied, "[W]ell I didn't know that. You – you said you were going to do that." Transcript at 6. The owner told claimant that she "had to fill [claimant's] shifts." Transcript at 39. Claimant did not work after June 29.

(6) Claimant's weekly unemployment benefit amount was $146.

CONCLUSION AND REASONS: The employer discharged claimant, not for misconduct, within fifteen days of a planned quit for good cause.

The first issue this case presents is the nature of claimant's work separation. 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).

On June 29, 2018, claimant told the employer's owner that she was giving notice that she planned to quit at the end of her shift on July 1, 2018. At the end of her shift on June 29, claimant was still willing to

work on June 30 and July 1. The owner did not allow claimant to do so because she believed claimant might leave the business unattended during those shifts. Because claimant was willing to continue to work two more shifts and the owner did not allow claimant to do so, the separation on June 29 was a discharge. The employer asserted at hearing and in its written argument that it did not discharge claimant because the employer never used the term, "discharged." However, the nature of a work separation is determined by applying the applicable rule to the facts of the case, and not by the terms used by the parties.

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) 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). A claimant who leaves work to accept an offer of other work has shown "good cause" if the offer of work is definite, pays an amount equal to or in excess of the weekly benefit amount or more than the work left, begins in the shortest length of time reasonable under the circumstances, and is reasonably expected to continue. OAR 471-030-0038(5)(a).

However, 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 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, 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.

The owner discharged claimant less than fifteen days prior to claimant's planned quit date of July 1 because she believed that claimant might leave the tavern unattended during her final shifts. However, although claimant stated she would leave work before July 1 if she felt threatened, the record does not show that claimant intended to leave the tavern unattended. Claimant explained to the owner at the end of her June 29 shift that she would not have left the tavern unattended. An employer does not have the right to expect an employee to refrain from quitting, and here the record does not show that claimant intended to leave the business unattended. The employer therefore discharged claimant, not for misconduct. The remaining issue is whether claimant's planned quit would have been without good cause.

The offer of work from Calapooia Brewery was definite with a start date on July 6, 2018, and was reasonably expected to continue because it was a permanent position. The work was expected to pay more than claimant's weekly benefit amount of $146, and the offered start date of July 6 was the shortest length of time reasonable under the circumstances because claimant would not have worked again for Free Loader Tavern until that same day. In its written argument, the employer questioned whether claimant was given an offer of work because claimant refused to tell the owner who made the offer. Based on the record, we have no reason to doubt the credibility of either party's testimony and find claimant's testimony about the job offer credible. Moreover, the employer had the opportunity to cross-examine claimant at hearing regarding the offer of other work, and the employer did not do so.

Transcript at 34-37. We conclude that under OAR 471-030-0038(5)(a), claimant's planned quit was with good cause to accept an offer of other work.

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. Because claimant was discharged, not for misconduct, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 18-UI-116344 is affirmed.

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

DATE of Service: October 19, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.