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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

2014-EAB-0376

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 30, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164658). Claimant filed a timely request for hearing. On February 24, 2014, ALJ Murdock conducted a hearing, and on March 4, 2014, issued Hearing Decision 14-UI-11638, concluding claimant voluntarily left work without good cause. On March 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the outset of the hearing, claimant offered into evidence documentation of a December 10-11 email exchange between claimant and the employer. The ALJ admitted all but two pages of that exchange, claimant's December 11, 2013 1:38 a.m. email to the employer, as Exhibit 2, reasoning that the email and other documents not admitted were "immaterial or unduly repetitions." Hearing Decision 14-UI-11638 at 1. However, all of the emails sent by the parties between the employer's December 10 "concerns" memorandum and its December 11 10:21 a.m. "Notice of Employment Termination" email were relevant and material to the nature of the work separation and related issues. 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 entire email exchange in question is relevant, and its admission into evidence is necessary to complete the record in this case. Accordingly, the two page email, marked EAB Exhibit 1, is admitted into the record. Any party that objects to the admission of EAB 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.

EAB considered the parties' written arguments to the extent they were based on record.

FINDINGS OF FACT: (1) Kramer and Associates employed claimant as an associate attorney from September 9, 2013 to December 11, 2013.

(2) Beginning at the end of September, claimant was twice hospitalized for an internal infection that caused him to miss work for approximately two weeks. Claimant felt pressured to and did return to work before he felt well enough to do so. After his return to work in October, claimant did not miss work due to illness.

(3) On December 10, 2013, the employer's principal (Kramer) had "Concerns" regarding claimant's work performance and described them in a memorandum to claimant that began with the statement that the memorandum was "not discipline, not probation, not termination, but a check-in with my concerns." Exhibit 2-C. He described his concerns as relating to case reviews, pending cases, file management, time management, responding to office messages, deadlines, style issues and time spent in the office. He asked claimant to think about the listed concerns and then meet with him in person with or without first replying to the memorandum in writing. Claimant reviewed the memorandum late that morning, considered it "absolutely offensive" and informed Kramer by email around noon that his interpretation of the memorandum was that it was "inappropriate and smack[ed] of hostility" which he believed was caused by the medical condition that affected him soon after he was hired and "just another precursor" to his "constructive termination." Exhibit EAB 1-1; Exhibit 1 at 14-15. He added that he was "incredibly upset", was not going to respond to the memorandum and was leaving for the day. Exhibit 1 at 15. Kramer responded by email at 12:26 p.m. that the memorandum was not disciplinary in nature and that he wanted to meet with claimant the following day at 10 a.m. "to clear the air" regarding his concerns and claimant's reaction and that he expected claimant to report for work by 9 a.m. Exhibit 1 at 13.

(4) At 2:53 p.m., claimant emailed Kramer that he had arrived late that morning because of health concerns regarding his minor child, that he considered Kramer's "concerns" memorandum a veiled attempt to illegally "force [him] out" because of his health condition that previously kept him out of the office and that he would not be at work until he had a chance to confer with "BOLI" (Oregon Bureau of Labor and Industries) and an employment attorney about Kramer's conduct. Exhibit 1 at 10-12. At 10:39 p.m. Kramer responded that claimant's emails had "seriously compromised" their relationship but that he was willing to go forward with their meeting the next day and a "frank discussion" about both his and claimant's concerns. Exhibit 1 at 9. He added that if claimant failed to attend, his employment would be terminated. At 11:28 p.m., claimant responded that he believed Kramer was not treating him like a professional, that he would not be in the next day because his son was ill and that he understood "that means my termination." Exhibit 1 at 9.

(5) At 11:56 p.m. that evening, Kramer emailed claimant that he wanted to be reasonable but claimant was making it difficult. He stated, "There is a lot of damage caused by your conduct to address and serious issues regarding your performance to address as well. I'm not sure we can come to common ground on these matters, but I'm willing to meet to discuss it." Exhibit 2 G. He then offered compromises for the meeting time on December 11 based on the son's illness and also offered to meet claimant on December 12 if a December 11 meeting was not possible. He concluded with, "If however, you want to separate (terminate your employment) under these circumstances I will respect that as well and we can characterize your separation in a neutral and acceptable manner."

(6) At 1:38 a.m. on December 11, claimant emailed Kramer reiterating his belief that Kramer had created a hostile work environment for him since his release from the hospital and that he intended to sue him if he had the legal grounds to do so. He stated that he believed Kramer had constructively

discharged him for illegal purposes "some time ago" based on his "incessant criticism" and "inappropriate comments" but that "today however, was the last straw." He closed his email with "Please coordinate with John so that I can gather my things. Also, stop using my Dictaphone." EAB Exhibit 1. At 3:48 a.m., claimant sent a final email to Kramer that that he considered a December 12 meeting unnecessary "GIVEN YOU'RE INTRACTABLE AND GROSLEY [sic]-DEFENSIVE POSTURE" and that he wanted to separate from the employment under the circumstances "BUT RESERVE MY RIGHT TO SUE YOU." Exhibit 1 at 6-7.

(7) Claimant did not report for work on December 11 or arrange a December 12 meeting with Kramer because he had decided to quit based on his dissatisfaction with his working conditions, what he viewed as Kramer's "abusive micro-management" and "constant questioning" of his professional competence. Exhibit 1 at 15.

(8) On February 13, 2014, claimant asked Kramer to be allowed to return to work. Exhibit 2-N

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant voluntarily left work without good cause.

In his written argument, claimant contended that the ALJ erred by considering the nature of his work separation for the first time at the hearing and by concluding that he voluntarily left work without good cause. Claimant asserts that he had no notice that that the nature of his work separation, i.e., whether it was a voluntary leaving or a discharge, would be an issue at the hearing, that he "never waived notice" of this issue, and that he was denied "the opportunity to be heard" on this issue. Claimant's March 31, 2014, written argument at 1-5. In support of his position, claimant cited *Kuraspediani v. Employment Division*, 38 Or App 409, 590 P2d 294 (1979) (EAB erred by concluding that claimant voluntarily left work when the referee treated the hearing as one involving a discharge; "injection of this new issue [voluntary leaving] at this stage of the proceedings denied claimant an opportunity to be heard on whether he quit without good cause..); *Chapman v. Employment Division*, 62 Or App 676, 662 P2d 19, rev. den., 295 Or 730, 662 P2d 1035 (1983) (EAB erred in denying claimant benefits because he voluntarily left work without good cause, when the only grounds for denying benefits argued at hearing was a discharge for misconduct; the hearing notice was insufficient to raise the issue of voluntariness) and *Johnson v. Employment Department*, 177 Or App 464, 34 P3d 716 (2001) (EAB erred in basing its decision on alleged instances of misconduct that the employer never raised at hearing). Also in support of his position, claimant cites OAR 471-040-025(8) which provides, in pertinent part:

> … (8) In any hearing, the administrative law judge shall render a decision on the issue and law involved as stated in the notice of hearing. The administrative law judge's jurisdiction and authority is confined solely to the issue(s) arising under the Employment Department Law. Subject to objection by any party, the administrative law judge may also hear and enter a decision on any issue not previously considered by the authorized representative of the Director and which arose during the hearing. The administrative law judge may continue the hearing or remand the matter to the authorized representative for consideration and action upon such issue(s) under the provisions of ORS 657.265. However, in no event shall the administrative law judge accept jurisdiction of a new issue and proceed with hearing on such issue when an interested party to such new issue has not waived right to notice.

Claimant's reliance on this rule and the cases he cites is misplaced. The record is silent regarding whether the authorized representative considered the voluntary quit issue before issuing the

administrative decision concluding the employer discharged claimant. Although claimant expressed surprise at the outset of the hearing that the nature of the work separation would be considered, the ALJ notified him that it was the normal practice and if the separation was determined to be a voluntary leaving, it was his burden to establish good cause leaving work. Audio Record ~ 3:30 to 8:30. Several times during the hearing, the employer asserted that the separation was a quit; the ALJ then offered to continue the hearing, but claimant declined, asserting "I would just like to rely on the papers I've already submitted without further hearing and let Your Honor make her decision." Transcript at 31. Unlike the claimants in *Kuraspediani, Johnson and Chapman*, claimant was not denied the opportunity to be heard on the nature of his work separation; the ALJ clarified the scope of the hearing at its outset and offered to continue the hearing to another day so that claimant could present additional evidence. Claimant declined the invitation for a continuance, however. Accordingly, the ALJ did not err in addressing the nature of the work separation.

Work Separation. The Department concluded the employer discharged claimant, the ALJ concluded claimant quit and claimant asserted at hearing that he was "constructively discharged [i.e." force[d]…out"] prior to the actual discharge." Transcript at 20. However, OAR 471-030-0038(2) (August 3, 2011), rather than a party's characterization, determines the nature of a work separation. Under that provision, 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; 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, the work separation is a discharge.

Claimant's responses to Kramer's emails demonstrated that claimant understood that Kramer was willing to meet with him on December 11 or 12 for a "frank discussion" regarding claimant's emails and work performance as well as claimant's concerns, and that claimant was unwilling to continue the employment for an additional period of time to do so. By directing Kramer to coordinate with another employee "so that [claimant could] gather [his] things" and telling him that he wanted to separate from the employment, claimant demonstrated that he was unwilling to continue working for the employer. t. Because claimant could have continued the employment for an additional period of time but chose not to do so, the work separation was a voluntary leaving.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) proves, by a preponderance of the 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). 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 asserted that he was discharged and did not present the precise reason for his decision to leave work. Transcript at 33. From his email correspondence, it appears claimant quit because he believed that Kramer essentially forced him to quit, i.e., constructively discharged him, because he had missed two weeks of work beginning at the end of September. However, claimant did not leave work until shortly after he received Kramer's "Concerns" memorandum on December 10, 2013. Based on

claimant's reaction to that memorandum and its proximity to claimant's decision to leave work, more likely than not, that memorandum, rather than Kramer's alleged "abusive micro-management" of claimant after he returned from the hospital, about which claimant provided little evidence, triggered claimant's decision to leave work. Exhibit 1 at 15. Consequently, that event was the proximate cause of claimant's voluntary leaving and the proper focus of our analysis.

Viewed objectively, the "Concerns" memorandum was nothing more than an evaluation of claimant's work performance in which Kramer, claimant's supervisor, noted areas for improvement. The memorandum made no reference to claimant's absence from work two months before. We agree with the ALJ that nothing in the record establishes that Kramer's concerns were other than legitimate or that Kramer did not have the right to personally address those issues with claimant. Hearing Decision 14-UI-11638 at 4. Harassment at work can, under some circumstances, amount to good cause. *See McPherson v. Employment Division*, 285 Or 541, 557 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits"). However, on this record, claimant failed to establish that Kramer's management of him was "abusive" or tantamount to harassment. Moreover, he refused to meet with Kramer "to clear the air" and have a "frank discussion" regarding both Kramer's and his concerns. Claimant failed to show that taking that objectively reasonable step would have been futile and that no reasonable and prudent associate attorney, of normal sensitivity and exercising ordinary common sense in his circumstances, would conclude, before having taken it, that he had no reasonable alternative but to quit work.

Claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-11638 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: <u>April 23, 2014</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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.