EO: 700
BYE: 201450

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-0520

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 123423). Claimant filed a timely request for hearing. On March 14, 2014, ALJ Wipperman conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13098, concluding the employer discharged claimant for misconduct. On April 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rossbauer's Supermarkets, Inc. employed claimant as a deli clerk from June 17, 2011 until December 23, 2013.

(2) The employer expected claimant to refrain from behavior that insulted or offended coworkers or created hostility in the workplace. Claimant was aware of the employer's expectations.

(3) Beginning after claimant was hired, claimant had an ongoing poor relationship with a particular coworker. On several occasions, claimant and the coworker approached the employer's managers separately to complain about the other's behavior. The store manager concluded that there was an "ongoing thing between these two." Transcript at 19.

(4) On April 24, 2013, the employer issued a verbal warning to claimant for certain unspecified "rude comments" that she had made to the coworker. Exhibit 1 at 9. The employer advised claimant that she "need[ed] to be able to work with her coworkers and not to make rude comments." *Id.*

(5) On July 11, 2013, the employer's store manager issued a written warning to claimant noting that claimant "continue[d] to have problems getting along with a coworker" and had made "snide comments" to the coworker. Exhibit 1 at 8. The warning stated it was a "last and final" warning and that if claimant's behavior again violated the employer's expectations, claimant was subject to discharge. *Id.* When he gave claimant the warning, the store manager told claimant that she would be in "serious trouble the next time." Transcript at 10.

(6) On December 17, 2013, the coworker and two other employees reported to the store manager that claimant had insulted the coworker and struck the coworker with a shopping cart. Transcript at 5. The first employee stated that claimant had said "rude things" to the coworker and engaged in "name calling." Exhibit 1 at 5. The second employee stated that claimant had pushed a shopping cart against the coworker and that claimant had called the coworker a "stupid old lady." Exhibit 1 at 6. On December 17, 2013, the store manager issued another written warning to claimant for her alleged behavior toward the coworker on that day and suspended claimant from work "indefinitely." Exhibit 1 at 7. The store manager did not discharge claimant because he did not have the authority to impose discharge as a disciplinary sanction.

(7) On December 18, 2013, claimant called the employer's human resources manager about the indefinite suspension from work. The human resources manager told claimant that the employer intended to discharge her, and that if she disputed the employer's decision she "didn't have a chance." Transcript at 13. The manager also told claimant that if she filed a union grievance, he was "positive that [she] would lose." Transcript at 17. The manager told claimant that she had a week to decide whether to resign or be discharged. The store manager believed that claimant's discharge was "inevitable" after the indefinite suspension. Transcript at 23.

(8) On December 23, 2013, claimant quit work to avoid being discharged by the employer.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

In Hearing Decision 14-UI-13098, the ALJ concluded that claimant's work separation was a discharge based on the testimony at hearing that a discharge was the "inevitable outcome" of the indefinite suspension that the employer had levied on claimant. Hearing Decision 14-UI-13098 at 3. We disagree because the undisputed facts in the record do not support this characterization when considered against the applicable regulations. The regulations provide that if claimant could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). Although claimant was suspended at the time that she resigned, the employer had not yet made a final decision not to allow her to continue to work. While the employer's ultimate decision on claimant's work status might have been a foregone conclusion, the fact remains that during the period of the suspension, both claimant and the employer were still in a work relationship with each other. It was claimant who first manifested an intention to sever the work relationship when she submitted her resignation. Claimant's work separation was a voluntary leaving on December 23, 2013.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Leaving work without good cause includes a resignation to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). A claimant who quits work must otherwise show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Based on the regulation specifically applicable to leaving work to avoid a discharge, this decision must necessarily assess whether the discharge claimant sought to avoid by her resignation was a discharge for misconduct. In this respect, the issues addressed in this decision are similar to the issues the ALJ addressed in the hearing decision. However, we disagree with the ALJ's conclusion that the employer's discharge of claimant would have been for misconduct. Hearing Decision 14-UI-13098 at 4.

OAR 471-030-0038(3)(a) (August 3, 2011) 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To constitute an isolated instance of poor judgment a claimant's behavior in violation of the employer's expectations must not have caused an irreparable breach of trust in the employment relationship or otherwise have made a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D).

For purposes of this misconduct analysis, we assume that claimant's behavior on December 17, 2013 was at least a wantonly negligent violation of the employer's standards. However, the evidence in the record is insufficient to establish, more likely than not, that claimant's behavior repeatedly violated the employer's expectations and that her behavior on December 17, 2013 was not excusable an isolated act of poor judgment. As to the employer's verbal warning issued to claimant on April 24, 2013, there was no evidence about the nature of the alleged "rude comments" claimant supposedly made to the coworker and it is impossible for us to determine whether those unspecified comments might have willfully or with wanton negligence violated the employer's expectations. Exhibit 1 at 9. As to the written warning issued to claimant on July 11, 2013, no detail was provided about the "snide comments" that claimant allegedly made to the coworker, and there was no testimony to flesh out whether claimant had actually engaged in a willful or wantonly negligent violation of the employer's expectations. Exhibit 1 at 8. From the testimony of the store manager, there was nothing that indicated claimant was the aggressor in the interactions with the coworker prior to December 17, 2013. Transcript at 19. From the manager's perspective, it appears that claimant and the coworker had a mutual dislike for each other and conflicting personalities, which was corroborated by claimant's own testimony. Transcript at 7-10, 19. Based on the lack of specific evidence about claimant's alleged behavior before December 17, 2013 or that claimant instigated those interactions with the coworker, it cannot be concluded, more likely than not, that the incidents on April 24, 2013 or July 11, 2013 demonstrated claimant's willful or wantonly

negligent behavior. As such, claimant's wantonly negligent violation of the employer's expectations on December 17, 2013 appears to have been an isolated act of misconduct. Nor was claimant's behavior on December 17, 2013, the type of behavior that exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship. Although it is not to be encouraged, an employer can expect some conflicts between coworkers and some behavior that, if viewed in isolation, appears hostile. Claimant's behavior on December 17, 2013 was not so far beyond the limits of acceptable behavior that an objective employer would conclude that it caused an irreparable breach of trust in the employment relationship. Since claimant's behavior met the requirements of OAR 471-030-0038(1)(d)(A) and OAR 471-030-0038(1)(d)(D), it is excused from misconduct under OAR 471-030-0038(3)(b). As a result, the employer's threatened discharge of claimant would not have been for misconduct, and OAR 471-030-0038(5)(b)(F) does not prevent claimant from showing that her resignation was for good cause.

McDowell v. Employment Department, 348 Or 605, 236 P3d 722 (2010) holds that a claimant who quits work to avoid a discharge that would not be for misconduct has good cause to leave work under the general provisions of OAR 471-030-0038(4) if, balancing the likelihood of a future discharge and the impact of the discharge on claimant's ability to secure work in the future, a reasonable and prudent person would reasonably believe that she faced such a grave situation that leaving work was the only reasonable course for her to take. EAB decisions issued after *McDowell* have consistently held that a claimant has good cause to leave work to avoid a discharge that is not for misconduct if claimant's discharge was inevitable. *See e.g., Kevin B. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013) (claimant had good cause to quit to avoid inevitable discharge, not for misconduct, and accept a severance agreement); *Mark A. Sorensen* (Employment Appeals Board, 12-AB-2907, November 28, 2012) (claimant had good cause to quit work to avoid inevitable discharge, not for misconduct); *Susan L. West* (Employment Appeals Board, 12-AB-2961, November 16, 2012) (claimant had good cause to leave work to avoid an imminent or inevitable discharge that would not have been for misconduct). In this case, claimant's testimony that the employer's human resources manager had told her that she could not avoid discharge if she contested it or filed a union grievance was not rebutted by the employer's witness. Transcript at 13, 23-24. The store manager supported the statement of the human resources manager when he testified that, in his opinion, claimant's discharge after the December 17, 2013 indefinite suspension was "inevitable," and that in his eighteen years as a manager he was aware of only one employee throughout all of the employer's stores who was not discharged after an indefinite suspension. Transcript at 23, 26. On these facts, claimant's conclusion that her discharge in the near future was guaranteed, and that there was nothing that she could do to stop it, was highly reasonable. We also infer from the record that claimant's discharge for an alleged inability to work with others would stigmatize her future employment prospects. To find a new job in her chosen field, it is reasonable to assume that claimant would be required to show an ability to get along with coworkers, which she would find quite difficult after the employer had discharged her for the alleged manner in which she treated her coworker. Applying the standards enunciated in *McDowell* and the EAB decisions issued after it, on the facts, claimant demonstrated that she had good cause under OAR 471-030-0038(4) to resign from work when she did.

Claimant had good cause to leave work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13098 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 6, 2014

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.