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BYE: 201504

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-0549

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150137). Claimant filed a timely request for hearing. On March 31, 2014, ALJ Han conducted a hearing, and on April 1, 2014 issued Hearing Decision 14-UI-13897, concluding claimant voluntarily left work without good cause. On April 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written 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 him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Multnomah County School District #1 employed claimant as a probationary campus monitor at a high school from August 28, 2013 until January 27, 2014. As a condition to his hire, the employer required claimant to obtain and maintain a certification as a security professional through the Oregon Department of Public Safety Standards and Training (DPSST).

(2) The employer expected claimant to behave appropriately when he interacted with students at the high school. The employer had no written standards that specifically defined this expectations. Claimant interacted with the students appropriately, as he understood that term.

(3) Sometime before January 2014, it came to claimant's attention that a particular student had threatened violence at the school. Claimant saw the student leaving school one day, and took the student to a fast food restaurant and treated him to a hamburger. Claimant intended to befriend the student and gain the student's trust to avert any future violent behavior. After confiding in claimant for several hours, the student asked claimant to purchase a pack of cigarettes for him. Claimant volunteered to purchase some condoms for the student after the student admitted he was having unprotected sexual relationships. The student was 18 years old. Claimant purchased these items for the student. The next day, claimant told his supervisor what he had done because he thought his behavior "was riding the line." Transcript at 25. The supervisor was "very upset" at claimant and told claimant that his behavior with the student had not been appropriate because "it's all in the perception." Transcript at 26.

(4) Sometime before January 23, 2014, claimant saw two female students in the school hallway who did not have hallway or library passes. In a previous encounter with one of these students, claimant had asked the student how she was doing in a particular class and had obtained the student's permission to check on her progress with the teacher of that class. Claimant was concerned that the student's failure to attend the class would result in her failing it, and would lead her to drop out of school. On this day in January 2014, claimant took that student aside and told her that he had learned from her teacher that she was failing the class. Claimant did not touch the student during the encounter. Claimant might have told the student, as he often told other students, that he loved her as a student at the high school and did not want to see her fail by not attending their classes. Transcript at 30. Claimant then escorted the students to the class that they were missing.

(5) Sometime before January 23, 2014, the student to whom claimant had spoken about her grades reported to a teacher that claimant had rubbed her arm, had told her that he loved her and had checked her grades using the school's electronic database. Exhibit 1 at 3-5. The teacher reported the student's statement to the school administration. The second student provided a statement to the administration that stated that claimant was "weird" and had once entered her car to see if it was comfortable. Exhibit 1 at 6. The employer thought that by touching the student, checking the student's grades in the electronic system and saying he loved the student, claimant had behaved inappropriately with the student.

(6) On January 23, 2014, claimant received a letter from the school's principal requesting that he attend a meeting on January 27, 2014 and letting him know that he had the right to have a union representative at the meeting. Claimant attended the meeting with two union representatives. At the meeting, the school representatives read the statements from the students to claimant and his representatives and listened to claimant's account of his interaction with the students. Although this was a fact-finding meeting and not a pre-disciplinary meeting, the employer believed the statements of the two students and "most likely" would have discharged claimant after an investigation was concluded. Transcript at 5, 36. At this point in the meeting, the principal asked to meet with the union representatives alone in his office. Claimant waited outside in the hallway. When the union representatives returned to claimant, one of them told him "if she was a parent and heard all of these things, she'd be gunning for me," which claimant interpreted as her belief that the employer would discharge him. Transcript at 18. The representatives also told claimant that if he disputed the employer's allegations, the employer would arrange to have his DPSST certification revoked. *Id.* Both representatives recommended that claimant resign to avoid a discharge and the loss of his DPSST certificate. On January 27, 2014, claimant quit work principally to avoid the loss of the DPSST certificate. Claimant thought that if he no longer had a DPSST certificate he would not be able to obtain future employment in the security field.

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

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he 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 leaving work 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 his employer for an additional period of time.

In Hearing Decision 14-UI-13897, the ALJ concluded that claimant did not show good cause to leave work. The ALJ reasoned that claimant was precluded from showing that he had good cause to leave work because he quit to avoid a potential discharge for misconduct within the meaning of OAR 471-030-0038(5)(b)(F).. Hearing Decision 14-UI-13897 at 3. We disagree.

To determine the applicability of OAR 471-030-0038(5)(b)(F) to claimant's work separation, it must be first be determined whether the employer's discharge of claimant or its threat to have claimant's DPSST certification revoked would, in fact, have been for misconduct. Although claimant is disqualified from benefits under OAR 471-030-0038(5)(b)(F) if he resigned to avoid a *potential discharge* for misconduct, the word "potential" in the regulatory phrase modifies the word "discharge" and not the word "misconduct." That regulation does not allow for claimant's disqualification if the record only supports that claimant engaged in *potential misconduct*. The ALJ should have, but did not, analyze whether sufficient evidence was presented at hearing to establish claimant's actual misconduct by a preponderance of the evidence. 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.

In this case, the employer's witness presented little evidence on how claimant would have known of the employer's expectations. The witness conceded that the employer did not have written standards defining what was and was not appropriate interactions with students and, although the witness thought claimant received training about appropriate boundaries with students, she was not certain. Transcript at 8. Claimant testified that the employer did not give him any training on appropriate interactions with students and that the DPSST training he received also did not address interactions with students. Transcript at 31. The most that can be reliably concluded about the employer's standards and expectations is that they are based on common sense understandings. As such, claimant's misconduct will be shown only if his behavior was outside any reasonable interpretations of an appropriate interaction with a student.

Although the employer accepted the students' accounts of what had happened during the January 2014 interaction, claimant denied he engaged in any inappropriate behavior. Claimant denied that he checked

the grades of the one student in the employer's system, and stated he could not have done so because he did not have access to the system. Transcript at 29-30. Claimant denied that he touched the student during the interaction. Transcript at 29. Claimant denied that he told the student that he loved her with a romantic intention, but that he made the innocuous statement that he loved her as one of the high school students he monitored and that he did not want to see her fail at school. Transcript at 29, 30. Claimant's first-hand testimony about the interaction is entitled to greater weight than the hearsay evidence that the employer presented about the students' statements. Moreover, the students' written statements generally appear impressionistic, and do not necessarily rule out that claimant's account of the interaction might be correct. *See* Exhibit 1 at 3-5, 6. More likely than not, claimant's testimony about the content of his interaction with the students was accurate. Based on claimant's account, his behavior during that interaction was not contrary to all reasonable interpretations of an appropriate interaction with high school students. Any threat to discharge claimant or to revoke his DPSST certification based on that behavior was not for misconduct. Accordingly, OAR 471-030-0038(5)(b)(F) is not applicable to claimant's decision to leave work, and that regulatory section does not prevent him from showing good cause under the general provision of OAR 471-030-0038(4).

McDowell v. Employment Department, 348 Or 605, 236 P3d 722 (2010) holds that a claimant may establish good cause to leave work under OAR 471-030-0038(4) if he resigned to avoid a virtually certain discharge that would not have been for misconduct and the discharge would have had a seriously stigmatizing impact on claimant's future employment prospects. Although the standard to determine good cause is objective, the court emphasized that "the objective inquiry depends on what claimant in fact knew and reasonable should have known when he made his decision, not on an assessment of how events in fact would have played out."

In this case, although the employer's witness testified that the employer had not made a final decision to discharge claimant when he decided to resign, she stated that a discharge decision was "most likely," and the vehemence with which she expressed her disapproval of claimant's alleged behavior strongly suggests she, at least, had made up her mind about the issue of claimant's discharge. Transcript at 5, 12, 13. The employer's witness did not dispute at hearing that the principal had told claimant's union representatives during the January 27, 2014 meeting both that the employer intended to discharge claimant and to arrange to revoke claimant's DPSST certification if he did not resign. Claimant had no reason to question that his union representatives were accurately conveying communications from the principal. On these facts, even though the employer might not have made a formal decision to discharge claimant and the employer might not have had the authority to revoke claimant's DPSST certificate, a reasonable inference for claimant to draw was that his discharge and the revocation of his DPSST certificate was virtually certain to occur if he did not resign. The reasonableness of claimant's decision must be gauged in the context of the pressures of a meeting in which claimant's job was at stake, and the absence of time to research whether the employer had the authority to impose the sanctions that the principal had threatened. Claimant testified that a revocation of his DPSST certificate would render him unable to obtain future employment in Oregon as a security guard. Transcript at 18, 19. Claimant's belief was reasonable since many governmental entities and private employers require a DPSST certification as a condition for hire in the area of security services. *See* http://www.oregon.gav/DPSST/pages/index.aspx. Based on the threatened revocation of his DPSST certificate and the impact that it would have on his ability to find work in his chosen field, claimant demonstrated that, under the circumstances, a reasonable and prudent person working in the field of

security services, would have resigned when the employer threatened to arrange for a revocation of his DPSST permit if he did not do so.

Claimant demonstrated good cause for leaving work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13897 is set aside, as outlined above.

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

DATE of Service:

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.