

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0605

*Reversed
Disqualification*

PROCEDURAL HISTORY: On March 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75645). Claimant filed a timely request for hearing. On April 3, 2014, ALJ Kirkwood conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14495, reversing the Department's decision. On April 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath County School District employed claimant as a special education teacher at a high school from July 30, 2011 until January 17, 2014.

(2) During claimant's first two years of teaching for the employer, claimant received very positive performance evaluations. At some point, the special education director and the school principal asked claimant to begin implementing changes in the special education program that were intended, to the extent possible, to move disabled students from self-contained classes to classes offered in the regular education program. The regular education teachers were initially hostile to including disabled students in their classes. Some of those teachers sent communications to claimant that suggested that she "should keep the special needs student in [her] class so [we] can teach [our] non-disabled students." Transcript at 10.

(3) At some point, claimant began to make what became numerous complaints to the special education director and the school administration about the need to educate regular education teachers on the needs of the special education students in regular classes and to provide more overall support for the changes claimant was trying to implement. Starting sometime before the spring of 2013, the resistance of the regular education teachers to claimant's efforts, and the lack of support that claimant perceived from the school administration, caused claimant distress. Claimant began to experience depression and anxiety "on and off." Transcript at 8. In early October 2013, claimant's anxiety worsened and she started

having regular panic attacks at school. Claimant discussed her concerns about the special education program and the hostility she perceived from other teachers and the school administration with the school's principal and vice-principal "pretty much on a daily basis." Transcript at 8. These administrators told claimant that she needed to decide whether she was going to stay at the school despite its problems or leave. Claimant thought she was being "pushed out" of her job. Transcript at 9. In approximately November 2013, claimant began to look for another teaching position at a different school district.

(4) Sometime in the fall of 2013, the special education director began holding weekly sessions with a group of regular education teachers who had resisted including special education students in their classes. Transcript at 11. Around this time, the school administration also spoke to the resisting teachers to express disapproval of the way in which those teachers communicated to claimant their reluctance to accommodate special needs to students in their regular classes. Transcript at 12.

(5) In approximately early December 2013, a regular education teacher spoke loudly and at length to claimant in the special education classroom in front of other staff. This teacher criticized claimant's view that disabled students should attend classes with the general student population. This interaction was reported to the employer's human resources director. The human resources director reprimanded the regular education teacher for the comments he had made to claimant.

(6) In early December 2013, claimant reported to the employer that she was going to be away from the school to attend a meeting and left the school building for approximately three hours. Claimant had signed out of the building and had indicated with whom she was going to meet and the location of the meeting. The principal suspected claimant was not actually attending a meeting and he and the special education director inquired further into the meeting. They contacted the two people with whom claimant was supposed to have met and both people said there had been no meeting with claimant. The principal thought that claimant had been dishonest about what she was doing during the time she was signed out of the building.

(7) In December 2013, claimant had a job interview with the Clover Park School District in Washington state. Shortly thereafter, the Clover Park School District offered claimant a job if the employer gave her an acceptable reference. Claimant had not notified that employer that she was looking for a new position. The teaching position for Clover Park School District paid \$42,500 per year and the employer paid claimant \$42,000. Claimant expected the new position to start immediately after Clover Park School District received an acceptable reference from the employer.

(8) On December 17, 2013, the school principal met with claimant to discuss her three hour absence earlier in the month. The principal told claimant that the two people with whom she had indicated that she was meeting both had said there had been no meeting scheduled and no meeting occurred. Claimant denied she had been dishonest when she signed out. Claimant said that there was a meeting, and that she had gone to the meeting location and had called the other participants to the meeting from the parking lot when she discovered they were not there to meet with her. The principal asked claimant to meet with him later to continue a discussion of this incident after he was able to investigate her explanation.

(9) On December 18, 2013 and thereafter, claimant did not report to work. At some point after her absence from work began, claimant submitted a request for approval of a leave under the Family Medical Leave Act. Claimant's physician certified that a leave was necessary for claimant as a result of anxiety and depression. The physician ultimately certified a leave for claimant of an indefinite duration. The employer approved the leave request. Around this time, claimant notified the employer that she wanted all communications to her from the employer to be through her union representative. When claimant was on leave, claimant's symptoms from anxiety and depression lessened. Transcript at 7,

(10) Sometime shortly after December 18, 2013, the employer started a disciplinary investigation to determine whether claimant had been dishonest about the reason she had been absent earlier in December 2013 and whether or not that absence was authorized.

(11) Sometime in late December 2013 or early January 2014, the employer received a request from the Clover Park School District to provide a reference for claimant. This was the first notice the employer had that claimant was seeking other employment. The employer's human resources director determined that, if he responded to the reference inquiry, he would need to tell that potential new employer that claimant was under investigation by the employer for alleged dishonesty. The human resources director called claimant's union representative to discuss the requested reference and to find out whether claimant intended to remain employed by the employer. He also told the representative what type of response he needed to give Clover Park School District in response to reference inquiry if he responded at all. In that discussion, he told the union representative that "the only way I am comfortable giving a neutral letter of recommendation [to claimant] is if I have a letter of resignation in hand." Transcript at 25. The human resources director did not tell claimant's union representative that it was unlikely claimant's teaching contract would be renewed for school year 2014-2015 due to teacher complaints about her or for any other reason. Transcript at 33. He did not tell any union representatives that the employer intended to discharge claimant for dishonesty or otherwise as a result of her absence in December 2013. Transcript at 27. Based on claimant's employment record, the human resources director thought it most likely that if the employer's investigation concluded that claimant had been dishonest, claimant would have been disciplined but not discharged. It was the human resources director who made recommendations to the school board about the retention or discharge of all teachers.

(12) Sometime in January 2014, claimant's union representative told claimant that the employer would have a job available for her after she returned from her FMLA leave. Transcript at 16. However, the representative told claimant that she would need to resign from her job to assure that the employer would supply a neutral job reference to the Clover Park School District and not mention the disciplinary investigation, which would remain pending so long as claimant remained employed. The union representative also told claimant that she would "never work at another district" if claimant "tried to proceed [to obtain a new teaching job] without a neutral or positive reference" from the employer. Transcript at 14. Claimant told the representative that she would resign. Claimant decided to resign in order to obtain the reference that would allow her to complete the application process for the job offer at the Clover Park School District. Shortly after, claimant's union representative told the human resources director that claimant would resign.

(13) On January 13, 2014, the employer sent a letter to claimant requesting that she schedule a meeting with the principal to discuss the findings of the employer's investigation of her absence from work in

early December and to learn claimant's account of the facts surrounding the incident. Claimant never responded to schedule the meeting.

(14) On January 14, 2014, claimant wrote a letter to the employer's human resources director disputing what she thought were the results of the employer's investigation of her December 2013 absence. Claimant asked the personal director to "consider an alternative reference other than 'neutral' for future employment inquiries. Exhibit 1 at 26. Claimant did not mention in that letter anything about any symptoms from anxiety or that those symptoms prevented her from returning to work.

(15) Sometime after approximately January 14, 2014, the human resources director and claimant's union representative negotiated the terms of claimant's separation from the employer, including severance compensation and the neutral employment reference. On January 17, 2014, claimant signed the separation agreement and quit work.

(16) During claimant's employment, claimant was aware of the functions of the employer's human resources department. On one occasion, claimant had called the human resources director for advice on how to handle some workplace rumors involving her alleged personal relationship with another employee. Claimant did not seek the assistance of the human resources office in dealing with the hostility she perceived in the workplace from regular education teachers or the school administration.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

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). If a claimant leaves work to accept new work, good cause exists only if, among other things, that offer of the new work is definite. OAR 471-030-0038(5)(a). Although claimant did not provide a great deal of testimony about the anxiety and depression she experienced when she went on FMLA leave, it is assumed for purposes of this decision that these conditions were permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-0605, the ALJ concluded that, if claimant quit work to accept the teaching position offered by the Clover Park School District, that job offer was contingent on an acceptable reference from the employer at the time claimant left and did not meet the definiteness requirement necessary to establish good cause under OAR 471-030-0038(5)(a). Hearing Decision 14-UI-0605 at 3. We agree for the reasons that the ALJ cited. However, the ALJ concluded that claimant established good cause to leave work based on depression and anxiety. Hearing Decision 14-UI-0605 at 4. The ALJ reasoned that, since claimant was on a FMLA leave resulting from these conditions at the time she decided to quit, "it would not have been reasonable for her to continue on medical leave rather than secure a job in a different work environment." Hearing Decision 14-UI-0605 at 4. We disagree.

From the record, it appears that claimant actually decided to resign when she did not as a result of any anxiety and depression she experienced, but because she needed a neutral reference from the employer for the Clover Park School District and the employer could not give her one while its disciplinary investigation into her behavior in early December 2013 was still ongoing. *See* Transcript at 5, 24, 25; Exhibit 1 at 26. Although claimant's desire to obtain a new job may have been due in part to the symptoms of depression and anxiety that she had experienced in the workplace, that does not change the fact that the precipitating cause of claimant's decision to leave work was her need to obtain at least a neutral employment reference from the employer. That claimant did not even allude in her initial examination at the hearing to the disciplinary investigation that prevented the employer from giving her a neutral reference suggests that she was attempting to minimize her contribution to the situation that necessitated her resignation. *See* Transcript at 4-17. The timing of claimant's commencement of the FMLA leave, one day after the principal discussed with claimant the preliminary results of the employer's investigation into her honesty and asked for a follow-up meeting after a further investigation into the explanations that claimant provided to him, also suggests to us that claimant very much wanted to avoid that investigation and the impacts it would have on the reference that the employer would provide for her.

The employer's decision not to supply a neutral reference for claimant to another school district while its investigation was ongoing was understandable and reasonable. It does not appear to have been an act of hostility or retaliation toward claimant. If claimant's underlying reason for wanting to avoid the employer's investigation was a concern that the employer's allegations would be substantiated, a resignation to avoid the consequences of misconduct is not good cause for quitting. *See generally* OAR 471-030-0038(5)(b)(F). If claimant was not motivated by concerns over the ultimate results of the employer's investigation, she still did not show, on this record, that her inability to immediately obtain a neutral reference from the employer unless she resigned was an objectively grave reason for her to leave work. Claimant did not present any evidence that it was somehow imperative for her to immediately accept the job offered by the Clover Park School District, or that Clover Park School District would not wait until the employer's investigation was concluded before it would withdraw the job offer. Claimant did not present any evidence that would support a conclusion that it created an unreasonably grave situation for her to remain employed while on FMLA leave, participate in the employer's investigation and seek to clear herself of the employer's charges, which would enable her to obtain at least a neutral reference. Although claimant also contended that she also had concerns about whether the employer was going to renew her teaching contract after school year 2013-2014, and asserted that union representatives had told her as much, she did not demonstrate, more likely than not, that these concerns were reasonable and constituted a grave reason for her to quit work. Transcript at 13, 37. The employer's human resources director disputed that he had ever made such statements to any union representatives and testified that the employer was unlikely to discharge claimant even if its investigation determined that claimant had been dishonest. Transcript at 27, 28, 33, 34. His testimony appeared informed, certain and credible, and based on it, it appears unlikely that union representatives told claimant that her position was in jeopardy. On the facts in this record, a reasonable and prudent special education teacher who had depression and anxiety, exercising ordinary common sense, would not have quit work to secure a neutral reference from the employer for a new job unless she reasonably believed that the job offer was going to be withdrawn before she could successfully defend herself in that investigation and there were objectively critical factors requiring her to have that particular job.

Because claimant did not show the existence of facts that would have caused a reasonable and prudent teacher to leave work when she did, claimant did not show good cause for quitting.

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

DECISION: Hearing Decision 14-UI-14495 is set aside, as outlined above.

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

DATE of Service: May 14, 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>.

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