

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0609

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100627). Claimant filed a timely request for hearing. On March 25, 2014, ALJ Shoemake conducted a hearing at which the employer did not appear, and on March 27, 2014 issued Hearing Decision 14-UI-13608, affirming the Department's decision. On April 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Wal-Mart Associates, Inc. employed claimant as a cashier from April 25, 2007 until December 4, 2013.

(2) On April 16, 2013, claimant injured her back at work. Sometime after she was injured, claimant filed a worker's compensation claim with the employer's insurance carrier. Claimant subsequently aggravated the injury to her back. The employer approved claimant's request for an intermittent leave of absence due to her ongoing back injuries. Beginning in approximately early October 2013, claimant was unable to work any shifts because of her back.

(3) Sometime after early October 2013, when she was away from work on leave, claimant retained the services of an attorney to assist her in reaching a settlement of her worker's compensation claim with the employer. Claimant's attorney instructed claimant to refrain from discussing the pending worker's compensation claim with any of the employer's representatives.

(4) By the end of November 2013, claimant's attorney told her that he and the employer had reached a settlement of the worker's compensation claim. The terms of the settlement were that the employer agreed to pay claimant \$7,100 in return for which claimant agreed to resign. Claimant's attorney told

claimant that, if she did not accept this payment and agree to resign, the employer intended to discharge her because she was a potential insurance liability. See Audio at ~8:31, ~24:36. On approximately November 27, 2013, claimant signed a settlement agreement with the employer.

(5) On December 4, 2013, claimant's work separation became effective and claimant quit formally quit work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-13608, the ALJ concluded that claimant voluntarily left work without good cause. The ALJ reasoned that, despite the advice given to claimant by her attorney, claimant failed to establish that her discharge was "imminent" and she therefore had the "reasonable alternative of continuing to work for as long as the employer allowed her to work." Hearing Decision 14-UI-13068 at 2. We disagree.

The employer did not appear at the hearing and no witnesses testified on its behalf. There is no evidence in the record to rebut claimant's testimony that she resigned because her attorney advised her to do so, and that her attorney told if she did not accept the employer's settlement agreement and resign, the employer was going to discharge her. Audio at ~8:08, ~24:36. The reasons claimant was able to provide about the grounds on which the employer intended to discharge her if she did not accept the employer's settlement do not constitute misconduct. Under *McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010), the Supreme Court reasoned that when a claimant's discharge not for misconduct was a virtual certainty and would be seriously stigmatizing to claimant's future employment prospects, his work separation was not disqualifying. In cases subsequent to *McDowell*, EAB has balanced the certainty of a claimant's discharge with the stigmatizing impact of the discharge to determine whether a claimant had good cause to leave work. In general, EAB has found good cause to leave work when a claimant has demonstrated that his or her discharge was inevitable and reasonably likely to occur in the near future. See e.g., *Kenneth B. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013) (claimant had good cause to leave work when the employer offered him a severance agreement and his discharge, not for misconduct, was inevitable); *Mark A. Sorensen* (Employment Appeals Board, 12-AB-2907, November 28, 2012) (claimant had good cause to quit work to avoid an inevitable discharge, not for misconduct); *Deborah Zelinski* (Employment Appeals Board, 12-AB-0436, March 16, 2012) (claimant had good cause to leave work to avoid being discharged, not for misconduct, and to receive a severance package). EAB has not required that, to qualify for unemployment insurance benefits, a claimant must sacrifice all other considerations, including financial

incentives, in favor of a *de minimus* amount of continued employment. *See Kevin B. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013).

The ALJ's characterization of claimant's discharge at the time she resigned as the mere "possibility of a future discharge" and not "imminent" is not reasonable based on this record. Hearing Decision 14-UI-13608 at 2. Claimant's attorney had told claimant that the employer intended to discharge her if she did sign the settlement agreement and agree to resign. From the attorney's statement, it can be inferred he was repeating to claimant what the employer and told him, and that the employer's intended discharge of claimant was inevitable and likely to occur imminently if she did not sign the settlement agreement. The only thing realistically left for claimant to decide, after her attorney told her the employer's stated intentions, was whether to wait until she was told she was discharged or to accept the financial incentives of the settlement agreement. No reasonable and prudent person employee of normal sensitivity, exercising ordinary common sense would have rejected the settlement agreement, and its resignation requirement, in favor of a *de minimus* amount of continued employment.

Claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment benefits based this work separation.

DECISION: Hearing Decision 14-UI-13608 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 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>.

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.