

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0941

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On April 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101944). Claimant filed a timely request for hearing. On May 19, 2014, ALJ Frank conducted a hearing, and on May 28, 2014 issued Hearing Decision 14-UI-18443, concluding claimant voluntarily left work with good cause. On May 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Lane County School District 97J/Suislaw employed claimant as a classified instructional assistant in an elementary school from September 1, 2010 until April 18, 2013.

(2) During school year 2010-2011, claimant took an extended leave of absence from work for a brain tumor and brain surgery. Claimant returned to work for school year 2011-2012.

(3) On September 30, 2011, the employer placed claimant on a plan of assistance because it was concerned about claimant's punctuality, work attendance and how she reported work absences. Claimant successfully completed this plan on November 17, 2011. On December 13, 2011, the employer placed claimant on a second plan of assistance because it was concerned about the adequacy of her work performance, her concentration at work and the regularity of her work attendance. In February 2012, claimant took a leave of absence to receive in-patient treatment for chemical dependency and never completed the second plan of assistance. Claimant returned to work for school year 2012-2013.

(4) Sometime during fall 2012, the employer observed that claimant was regularly absent from work. During this period, claimant was ill a great deal. On February 27, 2013, claimant exceeded the maximum hours allowed for absences from work during school year 2012-2013 under the collective bargaining agreement. On February 27, 2013, the principal at the school where claimant worked

discussed with claimant his concerns about what he perceived were her excessive absences from work. The principal also discussed with claimant his concerns about reports he had received from other staff that claimant "barked" at them in front of students, scolded students inappropriately, and was not adequately supervising students when they were on the playground, in the cafeteria and entering or exiting the school buses. Transcript at 12. At approximately this time, the principal was very dissatisfied with claimant's work performance and wanted claimant to decide to leave work. During spring 2013, the principal began "looking for an alternate route to termination [for claimant] rather than finishing the school year." Transcript at 14. At that same time, the school superintendent decided that "it was time to sever ties [with claimant]." Transcript at 14. The superintendent and principal began to explore alternatives to induce claimant's work separation.

(5) At the end of March 2013, claimant learned that her mother was diagnosed with cancer and dying. The mother's pulmonologist estimated that the mother had only two weeks to live. Claimant was very close to her mother and distressed by this prognosis. Claimant thought "everything was unravelling because of my mother's impending death." Transcript at 23. On April 1, 2013, claimant was absent from work because she was "too emotional" and "could not stop crying" over her mother's condition. Transcript at 21. Claimant called the employer to notify it of her absence.

(6) Sometime in approximately early to mid-April 2013, claimant met with representatives of the employer. The representatives told claimant she was "going to be terminated." Transcript at 25. The representatives also told claimant that she could "try" another plan of assistance but, if she agreed to leave, the employer would give her a \$5,000 severance payment. Transcript at 25. Claimant called her union representative and told him that "I'd like to stay [at work] and I'd like, you know, to do a better job." Transcript at 25. The union representative conveyed claimant's decision to the employer's representative and, rather than accepting claimant's decision to remain working, the representatives offered to pay claimant a greater amount, \$6,000, if she would voluntarily agree to leave work. The union representative conveyed this counter-offer to claimant and told claimant, "I just think they really want you gone." Transcript at 25. Claimant accepted the counter-offer because "I was being shoved out the door." Transcript at 26. Had claimant not accepted the counter-offer and agreed to leave, the employer would have continued her employment under a plan of assistance for four to six weeks, which was the required duration of a plan of assistance under the collective bargaining agreement. Transcript at 29.

(7) On April 18, 2014, claimant entered into the work separation agreement, accepted the \$6,000 payment and voluntarily left 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). Leaving work without good cause includes resigning to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. oAR 471-030-0038(5)(b) (F). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612,

236 P3d 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.

Had the employer proceeded in this case with claimant's discharge, the discharge would not have been for misconduct. Other than claimant's absence on April 1, 2013, the events underlying the employer's complaints about claimant's work performance were too remote in time to have proximately caused the threat to discharge claimant in April 2012. *See* Transcript at 12. They had been known to the employer since at least February 27, 2013 and, by not earlier acting on them, the employer necessarily must have concluded that they were not of a sufficient magnitude to merit a discharge. In addition, the employer's witness, the school principal, also conceded in his testimony that it was claimant's absence on April 1, 2013 that led him to consider discharging claimant. Transcript at 6, 14. Although it might have caused her to accrue another absence that exceeded the maximum allowable hours of absence under the collective bargaining agreement, whether claimant's absence on April 1, 2013 was attributable to her willful or wantonly negligent violation of the employer's standards is not determined by how many prior hours she had been absent but by the reasons underlying that particular absence. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a maximum allowable absences policy, the last occurrence is considered the reason for the discharge and the circumstances of that absence must be assessed to determine whether claimant engaged in misconduct). Claimant's testimony that she was extremely distressed about her mother's condition and recent prognosis, and that her emotional state on April 1, 2013, she was too overwrought to report for work was credible. Transcript at 21, 31. An emotional state can constitute as exigent a circumstance as a physical illness. On this record, the employer did not demonstrate that, given the reasons underlying it, claimant's absence on April 1, 2013 was a willful or wantonly negligent violation of the employer's reasonable attendance standards. Since claimant did not resign to avoid a discharge for misconduct, her resignation is not disqualifying under OAR 471-030-0038(5)(b)(F).

A resignation to avoid a discharge that is not for misconduct may be for good cause to leave work under OAR 471-030-0038(4) if the discharge is reasonably certain under the circumstances. *See McDowell v. Employment Department*, 348 or 605, 236 P3d 722 (2010); *Mark A. Sorenson* (Employment Appeals Board, 12-AB-2907, November 28, 2012) (claimant had good cause to quit work to avoid an inevitable discharge, not for misconduct); *Mark R. Bailey* (Employment Appeals Board, 12-AB-1609, June 27, 2012) (claimant had good cause to leave work to avoid being discharged, not for misconduct, when his discharge was all but assured); *Donna Zelinski* (Employment Appeals Board, 12-AB-0436, March 16, 2012) (claimant had good cause to leave work to avoid being discharged, nor for misconduct, and receive a severance package). Under the circumstances as described in the record, the employer's superintendent and school principal had already decided that claimant's work separation was imperative, the employer had not accepted claimant's offer to continue working under a plan of assistance, but had instead responded with a counter-offer that enhanced the financial inducements for claimant to resign and claimant's union representative had concluded that the employer desperately wanted her to resign. It was eminently reasonable for claimant to conclude, as any reasonable and prudent person would have, that the employer badly wanted her to be gone and that, if she did not accept the severance offer, the employer would discharge her as soon as it could under the plan of assistance. On the undisputed facts in the record, claimant's discharge was inevitable. The only salient issue is whether claimant's discharge was sufficiently imminent at the time she resigned to satisfy the good cause requirement. In *Kevin G. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013), EAB held a claimant had good

cause to resign from work to avoid a discharge that would not have been for misconduct, when he accepted a severance agreement approximately two weeks in advance of the date on which he anticipated his discharge. EAB reasoned that, no reasonable person would have rejected a severance agreement with financial incentives "in favor of a *de minimus* amount of continued employment." Hearing Decision 13-AB-0206 at 4. In this case, claimant might have rejected the employer's enhanced counter-offer requiring her to resign and continued to work under the proposed plan of assistance for four to six additional weeks before being discharged. At the point she would be discharged, it is not likely that the employer would have provided any severance moneys to her. Given the short period of continued employment offered to claimant under the plan of assistance and the extreme unlikelihood that she could salvage her employment relationship during this limited time, no reasonable and prudent person would have rejected the substantial financial incentives of the severance agreement and opted to remain employed.

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

**DECISION:** Hearing Decision 14-UI-18442 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** July 22, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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