

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1778

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83332). Claimant filed a timely request for hearing. On November 6, 2014, ALJ Lohr conducted a hearing at which the employer did not appear, and on November 7, 2014 issued Hearing Decision 14-UI-28402, affirming the Department's decision. On November 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Milton-Freewater Unified School District employed claimant as a lead custodian from December 2006 until October 1, 2014.

(2) Until sometime in 2013, claimant had a good working relationship with his supervisor and they had a friendship outside of the workplace. In 2013, claimant and his supervisor's relationship "fell apart." Audio at ~ 12:38. Afterward, claimant perceived that his supervisor "harassed" him. Audio at ~ 15:48. Claimant thought that his supervisor spoke to him with "gritted teeth" and in an "angry" tone of voice. Audio at ~ 19:00. On November 8, 2013, claimant's supervisor placed him on a "plan of assistance" in which claimant was required to perform certain duties according to a timeline and claimant's performance under the plan was periodically evaluated. Audio at ~ 14:21, ~33:25. Claimant thought the plan of assistance was "ridiculous" and disliked the repeated evaluations under it. Audio at ~ 14:38. Claimant subsequently had several meetings with his supervisor and with a representative of the

employer's human resources about the plan of assistance. On one occasion, claimant met with the employer's superintendent to ask how to handle the aspects of his supervisor's behavior that he disliked. The superintendent told claimant that he needed to try to "get along with [his] boss whether [they] like[d] each other or not." Audio at ~13:18.

(3) Sometime in approximately 2014, claimant consulted with his union representative about his supervisor's behavior toward him. The union representative told claimant that he could not file a grievance against his supervisor because the supervisor's behavior did not violate the employer's contract with the union. Audio at ~16:36. Claimant did not file a grievance.

(4) On June 23, 2014, claimant's supervisor issued a verbal warning to claimant because he had made an error in recording his time on his timesheet.

(5) On approximately August 4, 2014, claimant's supervisor mentioned to him that he "really needed to try to find something different" and suggested that claimant apply for a newly opened position with the employer. Audio at ~10:16. On August 5, 2014, claimant applied for the new position but was not hired for it.

(6) On September 4, 2014, when claimant arrived at work, his supervisor asked him to report to the district office. At the office, the supervisor gave claimant a written warning for incorrectly reporting his time when he failed to designate that he had taken sick leave on a particular day. The warning stated that claimant was suspended from work for three days. It also stated that "further job action will be taken." Audio at ~22:27. After receiving the warning, claimant immediately drafted a resignation letter stating that he was quitting work effective October 1, 2014 and gave that letter to the employer. Claimant resigned because he thought he was going to be discharged.

(7) On October 1, 2014, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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 he 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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

Although claimant first appeared to contend that he quit work because the "stress level" from his supervisor's behavior was too great for him, the focus of claimant's justification for leaving was his belief that his supervisor intended to discharge him. Audio at ~ 9:44, ~10:16, ~26:28. Based on the weight of claimant's testimony, it appears, more likely than not, that he quit work to avoid the discharge that he anticipated. To establish good cause, a claimant who quits work to avoid a possible discharge, not for misconduct, must show, among other things, that his discharge was reasonably certain or

inevitable and likely imminent. *See Megan E. Lenzen* (Employment Appeals Board, 2014-EAB-0266, March 18, 2014) (good cause for leaving work not demonstrated when, despite claimant's belief that a performance improvement plan meant that she was going to be discharged, she did not show her discharge was inevitable, reasonably certain and imminent); *Laurie K. McCain* (Employment Appeals Board, 2013-EAB-2141, November 20, 2013) (claimant did not show good cause for leaving work when, although her supervisor had told her he "did not want her waiting around hoping she was not going to be discharged" and that he "wanted her to resign," she did not show that the employer was going to discharge her if she did not resign); *Melody G. Zehner* (Employment Appeals Board, 12-AB-2831, November 16, 2012) (claimant did not have good cause to leave work when she did not show that her discharge was "assured"); *Sharon N. Martin* (Employment Appeals Board, 12-AB-2196, November 19, 2012) (claimant did not have good cause to leave work to avoid a performance improvement plan that she thought would result in her discharge when she did not show that her discharge was inevitable).

Claimant testified that he inferred he was going to be discharged from his supervisor's comment on August 4, 2014, that he should "try to find something different" and from the written warning received on September 4, 2014, that he could be subject to further discipline. Audio at ~ 10:16, ~ 22:27, ~27:44. We also infer that claimant perceived the totality of the pattern of his supervisor's behavior as evidencing an intention to discharge him. Audio at ~9:44, ~26:20. These signs of the supervisor's ultimate intentions about claimant's continued employment were, at best, ambiguous. None of them, viewed together or alone, would have been construed by a reasonable and prudent person as demonstrating that his discharge by the employer was inevitable, reasonably certain and imminent. In fact, when the superintendent made his August 4, 2014 comment to claimant, the supervisor urged claimant to apply for a different position with the employer, which is not behavior that reasonably suggests that the employer ultimately intended to discharge claimant or to sever the employment relationship imminently. Notably, at no point in his testimony did claimant contend that his supervisor or any other employer representative ever clearly stated to him that he was going to be discharged or when that discharge might occur. Nor did claimant suggest a date or event upon which he anticipated that he was going to be discharged. While claimant contended at hearing that his union representative was told at some point that the supervisor intended to discharge him, claimant's testimony did not specify whether the representative told claimant of this statement before or after claimant had already submitted his resignation, and claimant's later testimony implies that he did not predicate his resignation on any statement that his union representative made to him and did not know what, if anything, might have been told to the representative about the employer's intentions before he decided to resign. Audio at ~ 10:16, ~26:20. Since the issue before us is the reasonableness of *claimant's belief* that he was going to be discharged imminently at the time he submitted his resignation, what the representative might have been told is irrelevant absent some showing that it was communicated to claimant before his resignation and was relied on by claimant in making his decision to resign. On the facts that claimant presented at hearing, a reasonable and prudent person, exercising ordinary common sense, would not have concluded, based on what he knew on September 4, 2014, that his discharge was reasonably certain and imminent, and would not have submitted a resignation on September 4, 2014.

Claimant did not meet his burden to show good cause for deciding to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-28402 is affirmed.

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

DATE of Service: December 31, 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. 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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