EO: 200
BYE: 201710

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
2016-EAB-0744

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120257). Claimant filed a timely request for hearing. On May 31, 2016, ALJ Menegat conducted a hearing, and on June 3, 2016 issued Hearing Decision 16-UI-60961, affirming the Department's decision. On June 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

We did not consider claimant's written argument because it referred to new information outside this hearing record and he did not certify that he sent a copy of it to the employer. ORS 657.275, OAR 471-041-0080, OAR 471-041-0090.

FINDINGS OF FACT: (1) Oregon State University employed claimant as a plumber at the Hatfield Marine Science Center from October 5, 2010 to February 29, 2016.

(2) Prior to November 3, 2015, claimant learned that his wife had become pregnant as the result of an affair. Claimant decided to clean his guns and store them with his parents so that he would not have access to them while dealing with his upsetting personal situation. On approximately November 3, 2015, claimant consumed alcohol and cleaned his guns, discharging a firearm during the process. As a result, claimant was arrested, charged with a felony, and jailed for a couple of days.

(3) Claimant planned to return to work upon his release from jail. On November 6, 2015, claimant received a call from his supervisor informing him he was on administrative leave and needed to return his keys and ID. He subsequently received a letter from the employer confirming the supervisor's report that he had been placed on administrative leave.

(4) The supervisor remained in close contact with claimant, attended some of claimant's court proceedings, and was generally very supportive of claimant, who considered the supervisor a trusted friend. They had several discussions about what would happen with claimant's job if he was convicted

of a crime. The supervisor told claimant he would be fired if convicted. Claimant thought it unlikely that the employer, a school organization, would continue to employ someone convicted of a gun-related felony, and trusted his supervisor was providing him with sound advice.

(5) In late January 2016, claimant's supervisor told claimant that his discharge was imminent and inevitable. Claimant's supervisor told him that he would lose the employer's contribution to his retirement account if he was fired, and that it was in his best interests to quit before the employer had the chance to discharge him so he could keep all of his retirement funds. Claimant asked the supervisor for clarification, and the supervisor repeated the same advice. The supervisor told claimant that he was giving him the same advice claimant's union representative should have been telling him.

(6) Claimant felt overwhelmed. He was facing jail time for a felony charge. He was going through alcohol treatment. He was coping with marital problems. Claimant felt as though the only thing he had left was his retirement account, and he thought he needed all of it to handle his living expenses, support his children and pay his legal expenses while he was unemployed and dealing with his legal matter.

(7) Claimant told the supervisor that he would consult his attorney. The supervisor did not discourage claimant from doing so, and offered to draw up claimant's resignation letter for him. Claimant told his attorney about the conversations he had with the supervisor. The attorney asked claimant if the supervisor was certain about the advice he was giving, and claimant said the supervisor had said he was. The attorney did not advise claimant about leaving work or about his retirement account.

(8) Claimant did not consult his union representative or human resources about his supervisor's advice. He had previously had negative experiences with both offices. He trusted that the supervisor was giving him the same advice he might otherwise have gotten through the union. He believed the supervisor was relaying information from the employer, and speaking on behalf of the employer. He trusted that the supervisor was acting in claimant's best interests and providing accurate and helpful information, and had no reason to distrust or disbelieve his advice.

(9) Claimant told his supervisor that he would resign. Claimant's supervisor prepared a resignation letter and brought it to claimant's home so claimant could sign it. Before claimant signed the letter, he asked the supervisor again if he was sure claimant was going to be fired, and the supervisor said he was. Claimant asked the supervisor if he was also sure claimant was going to lose a lot of his retirement if he was fired, and the supervisor said he was sure of that, too. Claimant then signed the resignation letter the supervisor had prepared, and the supervisor submitted it to the employer on claimant's behalf, effective February 29, 2016.

(10) At the time claimant's supervisor notified claimant of his imminent and inevitable discharge, the employer had not yet made any decisions about discharging claimant. After leaving work, claimant learned for the first time during the Department's investigation into his work separation that being discharged would not have had any effect on his retirement account, and that he had quit his job based on false or misleading information provided by his supervisor.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude claimant quit work with 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.

The ALJ determined that claimant quit work "because he was afraid that if he were terminated from employment his . . . retirement account would be reduced by the amount of the employer contributions."[1] The ALJ concluded that claimant quit work without good cause, reasoning that, although claimant "had no reason to disbelieve his manager" and "[t]here was no testimony at the hearing that would explain the manager's untruthfulness or his desire to have claimant resign from his position," claimant nevertheless "could have checked with his union representative to see if help might be available there, or he could have checked with Human Resources to get information . . . or he could have made direct contact with [the retirement system] to find out what the effects of he being [*sic*] terminated from employment might be."[2] However, we disagree with the ALJ's determination that those were reasonable alternatives to quitting.

Alternatives, including those suggested by the ALJ, are only reasonable if claimant knew or had reason to know of them, and had reason to believe such alternatives were necessary.[3] In this case, claimant had a good relationship with his supervisor. He believed, and had reason to believe, that his supervisor was trustworthy, knowledgeable, and acting in claimant's interests. Information claimant received from human resources, independently of his supervisor, corroborated the supervisor's report to claimant that he had been placed on administrative leave, which would have led claimant to reasonably believe that the supervisor had acted in coordination with human resources and was speaking on the employer's behalf with respect to claimant's situation. The supervisor had also indicated to claimant that he was providing claimant with the same information his union representative should have provided, from which claimant would reasonably have inferred not only that the information was accurate, but also concluded that the union representative, with whom claimant had previously had problems, was being derelict in his duty to support claimant, and led claimant to reasonably conclude that consulting the union about his situation was unnecessary. Additionally, when claimant told the supervisor that he was going to consult with his attorney about the supervisor's advice, not only did the supervisor did not

[1] Hearing Decision 16-UI-60961 at 3.

[2] *Id.*

[3] *See e.g. Early v. Employment Dep't.*, 274 Or. App. 321, 360 P.3d 725 (2015) (the employer was aware claimant was quitting work but failed to offer any remedies short of quitting, which was an implicit suggestion that there were none); *Krahn v. Employment Dep't.*, 244 Or. App. 643, 260 P.3d 778 (2011) (the employer did not respond to claimant's concerns about her working conditions by suggesting there were any steps the employer could or would take to alleviate her concerns; consequently, there was no reason for claimant to have further pressed the employer about taking such steps); *McDowell v. Employment Dep't.*, 348 Or 605, 236 P3d 722 (2010) (given the employer's failure to offer alternatives to claimant other than quitting, seeking alternatives would not be considered reasonable).

discourage claimant from doing so, it appears that claimant's consultation with his attorney did not cause claimant to doubt his supervisor's advice.[4] In sum, the record shows that claimant had reason to trust the information and advice his supervisor had provided to him about his situation, and did not have reason to doubt the information or seek corroboration from other sources.

Claimant acknowledged at the hearing, that, in hindsight, he should probably have verified the information and advice he was receiving from the supervisor against other sources. However, good cause does not involve a hindsight determination of whether the circumstances that informed claimant's decision to quit were true, or a hindsight assessment of how events might have played out if claimant acted otherwise.[5] Despite efforts to make sound decisions based on reliable information, reasonable and prudent people are sometimes misled by people they have reason to trust, and sometimes err in relying on bad advice. Good cause is determined by assessing what claimant knew or reasonably should have known at the time the events in question unfolded. The issue is not whether or not the employer would have discharged him or if he would have lost a portion of his retirement account, but whether claimant acted as a reasonable and prudent person in February 2015 when he assessed his situation, relied upon his supervisor's assurances and advice, and quit his job. We conclude that he did. Claimant therefore quit work with good cause, and is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-60961 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: <u>July 28, 2016</u>

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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[4] Nothing in this record suggests that claimant's attorney represented claimant with respect to his work separation or had any professional responsibilities as far as advising claimant about quitting work.

[5] *See accord McDowell v. Employment Dep't.*, 348 Or 605, 236 P3d 722 (2010) (so stating).