

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1135

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 111943). Claimant filed a timely request for hearing. On September 29, 2016, ALJ Murdock conducted a hearing at which the employer did not appear, and on September 30, 2016 issued Hearing Decision 16-UI-68423, affirming the Department's decision. On October 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Judicial Department employed claimant from January 17, 1997 until June 1, 2016, last as judicial specialist.

(2) The employer expected claimant to refrain from using its computer systems for personal purposes. Claimant thought she was permitted to make incidental personal use of her work email account.

(3) In January 2016, claimant was arrested for driving under the influence of intoxicants when she was not on duty. Shortly after, claimant entered an inpatient alcohol treatment program. When claimant was discharged from treatment in February 2016, the employer placed her on paid administrative leave. At that time, the employer notified claimant that she should remain available to work on an on-call basis.

(4) After February 2016, the employer sent two letters to claimant notifying her that it had started "pre-termination" proceedings." Audio at 9: 55. The employer met twice with claimant to discuss the status of her continued employment. At each meeting, the employer notified claimant it was "investigating" her personal use of her work email account and showed her a copy of the employer's policy prohibiting personal use of the employer's computer systems and information resources. Audio at ~9:52. Claimant had used her work email account to confirm some appointments with an attorney representing her in a

family law matter. Claimant sent a written response to the employer's allegations stating that she was not aware that this use of her work email account violated the employer's policy and that her coworkers likely also made incidental personal use of their work email accounts or the employer's computers. After February 2016, the employer did not call claimant to come into work, but never told claimant she was going to be discharged for her supposed violations of its policies, only that it was "still investigating." Audio at ~9:52.

(5) Sometime in late April 2016, claimant met with some employer representatives in the workplace. The representatives asked claimant to turn in her work keys and work badge, and claimant did so. Two boxes were on a desk in the room where the meeting took place, and the representatives told claimant her desk had been "all cleaned out," its contents were in the boxes, and they would be stored in a supervisor's office. Audio at ~7:45. The representatives told claimant they were continuing to investigate her alleged violations of the employer's policies and if "they came to the conclusion that [she] would still be there, [she] would get [the contents of the boxes] back." Audio at ~ 21:47; *see also* Audio at ~8:39.

(6) Sometime before April 27, 2016, claimant concluded the employer was going to discharge her for her alleged policy violations. Claimant based her conclusion on the fact that the employer representatives had asked for her keys and badge, had cleared out her desk for her, had not called her in to work since her administrative leave, and had begun and held disciplinary meetings. On April 27, 2016, claimant retained an attorney to represent her in dealing with the employer.

(7) On approximately April 28, 2016, the employer called claimant and asked her to come to a "due process" meeting on May 5, 2016. Audio at ~6:36, ~12:05; Exhibit 2 at 1. In that call, the employer representative to whom claimant spoke told claimant they wanted to discuss her alleged violations of the employer's policy. The representative "kept assuring [her] that [she] was still on administrative leave and they were [still] investigating whatever they were investigating." Audio at ~17:35. Despite the statement of the representative, claimant was almost certain the employer was going to discharge her.

(8) On May 4, 2016, the attorney claimant had retained notified the employer that claimant would resign in lieu of attending the due process meeting if the employer agreed to certain terms. Exhibit 1 at 1-2. On May 5, 2016, claimant and her attorney met with the employer to negotiate a separation agreement. The separation agreement stated that claimant agreed to resign effective June 1, 2016 if, among other things, the employer agreed not to contest her claim for unemployment benefits, and would only disclose to the Department only that claimant had resigned subject to the terms of the separation agreement unless required to supply additional information. Exhibit 2 at 2. Claimant signed the separation agreement on May 17, 2016, and the employer signed it on May 24, 2016. Exhibit 2 at 5.

(9) On June 1, 2016, claimant voluntarily left work.

(10) Except for employer's contention, first made around February 2016, that claimant had violated its policy about personal use of its computer and information systems, the employer had never issued any disciplinary warnings to claimant.

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). 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.

It is not good cause to resign from work to avoid what would otherwise be a discharge or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Here, the record fails to show claimant knew or should have known using her work email account to confirm some appointments with an attorney representing her in a family law matter probably violated the employer's expectations. Claimant therefore did not quit work to avoid a potential discharge for misconduct, and is not disqualified from receiving benefits under OAR 471-030-0038(5)(b)(F). We therefore must determine whether claimant quit work with good cause under OAR 471-030-0038(4).

It may be good cause for a claimant to quit work to avoid a discharge that would not be for misconduct. *See McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). However, assuming claimant believed she would be discharged for actions that were not misconduct, she did not show that the employer had made any decision to discharge her when she left work, or that the employer was doing anything more than holding meetings to investigate whether she had violated its policies. Nor did claimant contend that her attorney or anyone else told her she likely was going to be discharged. Claimant stated that she relied on the actions of the employer's representatives during the meeting in late April 2016, the employer's commencement of the formal disciplinary process, and the employer's failure to call her in to work when she was on administrative leave, to conclude her discharge would be imminently forthcoming. However, claimant conceded that those representatives had told her she would receive back her keys, badge and personal belongings if the employer decided she had not violated its policy or, if it concluded she had violated that policy, that discharge was not the proper disciplinary sanction for the violation and the employer reassured about her continued employment status on April 28, 2016. In view of the employer's constant reassurances that it was “still investigating” and the fact that claimant was a long-time employee with no disciplinary history, a reasonable and prudent person in claimant's circumstances would not have quit when she did, before the employer had completed its investigation and before the employer had concluded that she had violated its policy and that discharge was the appropriate sanction.

While claimant might have thought a resignation was the best way to ensure she received unemployment benefits and that she would prevail on her claim since the employer agreed not to contest her claim, an

agreement between the parties may not preclude the Department, an ALJ or EAB from inquiring into the circumstances surrounding the work separation to determine whether claimant is or is not disqualified from receiving benefits. Applying OAR 471-030-0038(4) to this work separation, claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-68423 is affirmed.

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

DATE of Service: October 27, 2016

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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