

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1181**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82603). Claimant filed a timely request for hearing. On September 22, 2016, ALJ Shoemake conducted a hearing, and on September 30, 2016 issued Hearing Decision 16-UI-68350, affirming the Department's decision. On October 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument and the entire hearing record.

**FINDINGS OF FACT:** (1) OEEO, LLC employed claimant from April 6, 2011 through May 11, 2016 as an environmental health and safety manager.

(2) Early in 2016, claimant reported his manager for allegedly engaging in unethical behavior.

(3) During 2016, some of claimant's superiors became dissatisfied with claimant's work performance. On May 6, 2016, claimant's manager and a human resources representative told him his performance required improvement and that he could elect to be on probation for 90 days or accept a separation agreement. The employer did not allege claimant had engaged in misconduct connected with work, but provided claimant a probation plan that contained approximately ten performance expectations for claimant to accomplish during the probationary period. Claimant's understanding was that the employer would discharge him at the end of the 90 days if he failed to comply with the expectations in the probation plan.

(4) One condition in the probation plan required claimant to “[show] improved collaboration with team members on hitting targets.” Audio Record at 11:27 to 11:49. Other conditions required claimant to meet target dates on his projects. Claimant considered the probation conditions to be “highly subjective,” and “extremely vague,” and did not believe he would be able to meet the probation plan conditions. Audio Record at 9:30 to 10:05. Claimant complained to his manager that the probation conditions were too subjective. The employer was unwilling to modify the document. Claimant also believed that being discharged would make it difficult for him to find future employment in his field because ethical behavior was an important requirement in his field, and if discharged, future employers might suspect the employer discharged claimant for unethical behavior.

(5) On May 11, 2016, claimant accepted the employer’s separation agreement.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude that claimant voluntarily left work without good cause.

**Work Separation.** The Department and the ALJ concluded that claimant voluntarily left work. At hearing and in his written argument, claimant asserted that his work separation was a discharge. Thus, the first issue to address is the nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) provides that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

Claimant met with his manager and a human resources representative on May 6, 2016, and they gave him the option of continuing to work for three more months, or voluntarily ending his employment. The discharge would occur pending the employer’s review after the 90-day probation period. The record does not show that the employer told claimant he was discharged before he left work on May 11, 2106. The preponderance of the evidence shows claimant could have continued to work for an additional period of time after May 11, 2016, and his decision to accept the separation agreement shows he was unwilling to do so. Thus, the work separation was a voluntary leaving.

**Voluntary Quit.** 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.

Claimant voluntarily left work because he believed the employer was going to discharge him. He chose to accept the employer’s separation agreement rather than wait for a discharge he believed to be inevitable. Leaving work without good cause includes resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). OAR

471-030-0038(3)(a) (August 3, 2011) 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.

Claimant's uncontroverted testimony at hearing establishes the reasonableness of his conclusion that his discharge was inevitable at the end of the probation period. Claimant considered the language of the plan to be "too subjective to even accomplish," and believed his manager, who claimant had reported for an ethics violation during 2016, "had it out for [him]," and would be able to assert that whatever performance improvements claimant made were insufficient to comply with the vague probation plan. Audio Record at 13:57 to 14:43. Thus, in the absence of evidence to the contrary, the record shows that claimant's inevitable discharge would not have been due to claimant's willful or wantonly negligent violation of the employer's expectations, but, rather, due to unclear performance expectations and bias on the part of claimant's manager. The record also shows claimant believed a discharge would cause future employers in claimant's field to question whether he performed his job in an ethical manner, a core requirement for claimant's job.

In his written argument, claimant compares this case to *McDowell* and argues that, "being terminated, rather than resigning pursuant to the separation agreement, was so grave that resigning was the only option [for claimant]." Written Argument at 3. However, the record does not show that the grave situation in this case, i.e., claimant's inevitable discharge and damage to his work reputation was "imminent," or quitting work his only reasonable alternative under the circumstances. It is undisputed that the probation period here was 90 days. In *McDowell*, the employer informed the claimant of his likely discharge less than three weeks prior to the probable discharge date, and the claimant there did not quit until that date. 348 Or at 609; *see also Aguilar v. Employment Department*, 258 Or App 453 (2013) (concluding that the claimant had good cause to voluntarily quit one day before the employer planned to discharge her). Here, claimant quit nearly three months before his discharge was "imminent."

Claimant did not allege, nor does the record otherwise show, that claimant had a reasonable basis to believe the employer would discharge him before the end of the 90 days. Moreover, although claimant testified that he had a new manager every year, causing "a lot of transition between bosses," and believed his manager "had it out for [him]," claimant did not describe work conditions that posed a grave situation such that claimant had no reasonable alternative but to quit until later in the probation period. Audio Record at 13:57 to 14:43. Nor does the record show that the terms of the separation agreement were so beneficial that no reasonable person would have continued to work for nearly three more months rather than accept the separation agreement.

For the reasons stated above, claimant failed to prove that he had good cause for leaving work when he did. Claimant is disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-68350 is affirmed.

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

**DATE of Service:** November 2, 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](http://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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