EO: 200
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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
2017-EAB-0272

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 150103). Claimant filed a timely request for hearing. On February 6, 2017, ALJ L. Lee conducted a hearing, and on February 14, 2017 issued Hearing Decision 17-UI-76920, affirming the Department's decision. On February 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: As a preliminary matter, the employer's witnesses, particularly claimant's supervisor, provided consistent and cohesive explanations of the events in question throughout the hearing. By way of comparison, it appeared that claimant was often challenged to recall the events at issue; for example, he was uncertain about who his supervisor was, did not recall his union representative's name, did not recall details about how September 6th became his separation date, and denied that his union representative negotiated with the employer about that date despite consistent testimony from the employer's firsthand witness that she had. *See e.g.* Transcript at 5, 9, 11-12, 13-14. At one point claimant also conceded that the employer's explanation about some of the events he could not recall "makes sense." *See e.g.* Transcript at 47. Because the consistent and cohesive testimony of the employer's witnesses has more indicia of reliability than claimant's for those reasons, where facts were in dispute we found facts in accordance with the employer's evidence.

FINDINGS OF FACT: (1) Multnomah County School District #1 last employed claimant as an instructional technology assistant from November 9, 2011 to September 6, 2016.

(2) The employer required claimant to move from one location to another before the 2016-2017 school year began. Claimant preferred the location he was in over the new location, and made his objections to moving locations known to the employer. Claimant thought his existing location was better suited to his work than the new location, and that moving would compound his existing workload concerns.

(3) On June 29, 2016, claimant's supervisor sent an email to staff, including claimant, in which she reminded staff of their "change of site location for next school year." Transcript at 24. Claimant replied, "I thought I made it clear I'm not moving." *Id.* Claimant and his supervisor subsequently exchanged other emails, in one of which claimant wrote, in pertinent part, "I replied last email that I'm not moving. There is no room at [the new location] to do my job or house any of my equipment. It makes absolutely no sense." Transcript at 25. In later communications, claimant said his supervisor was "being bossy" about the move, did not understand what the needs were, was "making an uneducated decision," and was "[m]aking his department useless." *Id.* Ultimately, claimant's work location moved to the new location.

(4) The employer considered claimant's communications with his supervisor about the move to have been disrespectful and insubordinate. On August 24, 2016, the employer met with claimant to discuss matters. The employer then scheduled a pre-termination meeting for August 30th.

(5) On August 30, 2016, the employer held the pre-termination meeting with claimant, a representative from the employer's human resources department, claimant's supervisor and claimant's union representative. Although the employer told claimant that termination was a possible outcome of the meeting, at the beginning of the meeting the employer told him the purpose of the meeting was "to get . . . his [claimant's] side or explanation as to why he should not be fired after looking or reviewing the information from the 24th." Transcript at 39. The employer also stated that the meeting was to collect information and human resources would make any decisions "because we didn't have the authority to make the decision at that meeting." Transcript at 39-40.

(6) During the August 30, 2016 meeting, either claimant or his union representative asked to speak privately. The supervisor and human resources person left the room. When they returned to the room, they were told that claimant had decided to resign "in lieu of termination." Transcript at 41. The employer replied, "Okay." Transcript at 42, 43. The parties then discussed when the termination would occur, and agreed upon a separation date.

(7) At the time claimant resigned, the employer had not yet made a decision about whether or not to end claimant's employment. That decision was "an H.R. decision" and could have been to discharge him or take other action, such as moving him to another school or program. At the August 30 meeting, claimant had not been told that his only choices were to quit or be discharged. Transcript at 44.

(8) Claimant did not return to work after August 30, 2016, and, pursuant to negotiation between claimant's union representative and the employer concerning claimant's resignation, the resignation became effective on September 6, 2016.

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

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. OAR 471-030-0038(2)(a) (August 3, 2011). 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).

At the time claimant told the employer on August 30th that he wanted to resign "in lieu of termination," the employer had not yet decided whether or not it was going to terminate his employment. Rather, the employer was in the process of collecting information for its human resources department so that the human resources department could make the ultimate decision whether to discharge claimant or keep him employed. Although the amount of continuing work available to claimant was uncertain given the circumstances, it is more likely than not that at the time claimant announced his resignation he could have continued working for the employer for some additional period of time. The work separation is, therefore, a voluntary leaving.

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). 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 quit work because he believed the employer planned to discharge him from his job, asserting that he had been told by "H.R. and the Union rep." at the August 30th meeting "that this was the end of the line. Like there's no other way that I was going to continue working whatsoever. It's not an option." Transcript at 10. He testified, "it was suggested that I should quit just because it would look better . . . if I was applying for another job rather than fired for insubordination." *Id.* As previously explained, however, we find it more likely than not that "H.R." did not tell claimant he was not going to be allowed to continue working or that the August 30th meeting "was the end of the line." According to the employer's evidence, which, on the whole, was more reliable than claimant's, the employer had not yet reached a decision about claimant's employment status, and did not tell him he was going to be discharged. In addition, claimant's supervisor was "surprised" when claimant and his union representative asked her and the human resources representative to leave the room and then learned, when she returned, that claimant had decided to quit. Transcript at 42. The reliable evidence in the record establishes that claimant was told that the purpose of the August 30th meeting was to hear claimant's side of things and to allow him to explain why he should not be discharged, and that, although discharge was one possible outcome, that human resources department would later make a decision about his employment. Given that, and the fact that no one had decided what to do about claimant's employment at the time he quit work, we conclude that claimant was not facing a situation of gravity, and that rather than quitting work he had the reasonable alternative of continuing to participate in the August 30th meeting and explain why he should not be discharged.

In reaching this decision we note that this case is distinguishable from those in *McDowell v. Employment Dept.* and progeny. *See McDowell v. Employment Dept*., 348 Or 605, 236 P3d 722 (2010). In *McDowell*, the Court concluded that claimant's work separation did not disqualify him from unemployment benefits because when the claimant in that case resigned he faced imminent discharge, he had exhausted whatever minimal pre-dismissal recourse he might have had, and, as a matter of law his discharge would not have been for misconduct. Here, however, the facts differ. Although termination of claimant's employment was a possibility at the time claimant quit, his discharge was not certain to occur, nor was it imminent. In addition, claimant's alleged belief that discharge was certain

was not based upon reliable evidence. Claimant had not exhausted the pre-dismissal process the employer offered, but rather cut it short in order to resign. Finally, given that the evidence suggests claimant was participating in pre-dismissal meetings because he was repeatedly insubordinate despite repeated attempts to redirect his behavior, and admitted as much to the employer, the record fails to show as a matter of law that claimant's potential discharge would not have been for misconduct. *See* Exhibit 1, notes of the August 24, 2016 meeting at 3. Based on the facts of this case, and applying the objective standard set forth in *McDowell*, we conclude that a reasonable person, using the information claimant had available to him at the time, who was facing the prospect of discharge, would not consider the prospect so grave a circumstance that resigning – before exhausting his pre-dismissal options – was the only reasonable option. Claimant voluntarily left work without good cause, and is, therefore, disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-76920 is affirmed.

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

DATE of Service: March 22, 2017

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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