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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0307

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142829). Claimant filed a timely request for hearing. On January 5, 2017, ALJ L. Lee conducted a hearing, and on January 13, 2017 issued Hearing Decision 17-UI-74665, concluding claimant voluntarily left work without good cause. On January 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On February 6, 2017, EAB issued Appeals Board Decision 2017-EAB-0069, reversing and remanding the matter to OAH. On March 3, 2017, ALJ L. Lee conducted a hearing, and on March 8, 2017 issued Hearing Decision 17-UI-78461, again concluding that claimant voluntarily left work without good cause. On March 13, 2017, claimant filed an application for review of Hearing Decision 17-UI-78461 with EAB. EAB considered the parties' written arguments when reaching this decision.

FINDINGS OF FACT: (1) Washington County employed claimant as an engineering associate from May 17, 2001 to July 28, 2016. Claimant understood the employer required him to hold a valid driver's license as a condition of employment.

(2) At all relevant time's claimant was an alcoholic. He struggled with sobriety and consumed alcohol off-duty. In 2012, police arrested claimant for driving under the influence of intoxicants (DUII); he failed a breathalyzer test and his license was suspended, but he obtained a hardship permit that allowed him to drive for work. The employer disciplined claimant but permitted him to continue his employment.

(3) While off-duty on June 2, 2016, claimant drove his son to his son's baseball game. He noticed others at the game sitting in a position that blocked some parking spots. He got out of his vehicle and commented "hey, you're blocking all the parking." January 5, 2017 hearing, Transcript at 33. He intended his comments in a joking manner but some took offense.

(4) Claimant had a half-full pint bottle of vodka in a bag on the floor of the back seat of his truck. He planned to consume the alcohol after driving his son home from the baseball park, but decided to drink it at the park after noticing that a friend who could drive him and his son home was at the park. Claimant consumed about three ounces of vodka, spoke to his friend about catching a ride home, then consumed the rest of the vodka. Claimant did not get into or start his vehicle after drinking.

(5) Within a half hour of arriving at the park, claimant was intoxicated. He was later told he was "loud," "obnoxious." and acting "like a jerk." March 3, 2017 hearing, Transcript at 18; January 5, 2017 hearing, Transcript at 33. People at the park called police; at least one reported that claimant "almost ran several of them over" with his vehicle when he arrived at the park. *Id*. Based on the complaints, police gathered that claimant had been intoxicated when he drove into the park and arrested him for DUII.

(6) Claimant did not know why he was arrested, thought perhaps it was for disorderly conduct or being drunk in public. He did not think his driver's license was in jeopardy. After his arrest, police asked claimant to submit to a breathalyzer test and quickly read a two-page document to him. Claimant did not understand the document that was read to him, did not understand that he had been arrested for DUII, and did not think he needed to submit to a breathalyzer. Claimant ultimately refused the breathalyzer, triggering a mandatory three-year driver's license suspension.[1]

(7) On June 13, 2016, the Oregon Department of Motor Vehicles (the DMV) notified the employer of claimant's pending license suspension. The employer planned to discharge claimant for losing his license, but, because claimant told the employer that he intended to contest the suspension and pursue a hardship permit if necessary, the employer decided to wait until the suspension was resolved.

(8) Claimant's license suspension was ultimately upheld, and his application for a hardship permit was denied. Effective July 27, 2016, claimant's driver's license was suspended. The employer considered keeping claimant employed in a position that did not require a driver's license but opted not to. The employer concluded that without driving privileges claimant was no longer qualified for his position, and planned to discharge him effective July 29, 2016.

(9) Claimant understood that he was going to be discharged at the end of his shift on July 29th and that if he was discharged he would be ineligible for hire in any other position with the employer, but if he resigned he could apply for any job he was qualified to perform. On July 28, 2016, claimant resigned to avoid being discharged the next day. Claimant later pled guilty to DUII.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

Claimant disputed that he quit work. For purposes of unemployment insurance, an individual voluntarily leaves work if, at the time of the separation, he could have continued to work for an additional period of time; he is discharged if he is willing to continue to work an additional time for the same employer but is not allowed to do so by the employer. OAR 471-030-0038(2)(August 3, 2011).

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[1] ORS 813.420(3), ORS 813.430(2).

There is no factual dispute that claimant submitted a letter of resignation at the end of his July 28, 2016 shift, nor is there any dispute that the employer planned to discharge claimant after claimant completed his July 29, 2016 shift. Because claimant could have had one additional day of continuing work at the time he resigned, the work separation was a voluntary leaving for purposes of unemployment insurance.

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.[2]

Claimant quit work to avoid a certain discharge; that discharge, however, would not have been for misconduct.[3] The employer planned to discharge claimant because, without a driver's license, he no longer qualified for the position he held. The conduct that must be examined to determine whether claimant's planned discharge was for misconduct is, then, the conduct that caused the license suspension. To the extent that conduct was his "obnoxious," "loud" or "jerk"-like behavior, being an obnoxious, loud jerk is not criminal conduct nor would one reasonably foresee that engaging in those behaviors would likely cause the loss of a driver's license. To the extent that conduct was his engagement in conduct that led to his arrest, it appears more likely than not that he was not conscious that he was engaging in unlawful conduct at any relevant point in time.[4] To the extent that conduct was his refusal to submit to a breathalyzer test, claimant established that at the time he refused the test he did not know that he had been arrested for DUII or that refusing the test would place his driver's license in jeopardy. As such, claimant's loss of license, although in violation of the employer's requirement that he hold one as a condition of employment, was not the result of willful or wantonly negligent behavior attributable to claimant as misconduct, and his planned discharge was not for misconduct.

Claimant therefore quit work to avoid a certain discharge that was not for misconduct. The ALJ concluded that claimant voluntarily left work without good cause, reasoning that although claimant's impending discharge "arguably" amounted to a grave situation and his "desire to preserve the option of

[2] If claimant's alcoholism was a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) the standard of a reasonable and prudent person with the characteristics and qualities of an individual with such impairment applies to this matter; however, the outcome of this decision would remain the same for the reasons explained herein.

[3] An individual who leaves work to avoid a discharge for misconduct or potential discharge for misconduct has left work without good cause. 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. Only misconduct connected with work is potentially disqualifying. ORS 657.176(2)(a). Although the conduct at issue in this matter occurred while claimant was off-duty, it was work connected because the consequences of that conduct affected or had the tendency to affect claimant's employment and ability to perform his job duties.

[4] We note that claimant pled guilty to DUII; that crime, however, requires only that an individual drive while intoxicated, not that he was aware of having done so or held any particular mental state during the act. *See* ORS 813.010(1).

returning to work for the employer is understandable," "continuing to work (albeit for only one day) and being discharged for failing to maintain valid driving privileges (which would not preclude claimant from finding work with other employers who do not require their professional engineer to drive) was a reasonable alternative to quitting." Hearing Decision 17-UI-78461 at 4-5. We disagree.

Whether quitting work in lieu of a prospective discharge is quitting for good cause depends on whether a reasonable person facing discharge would consider the prospect so grave that resigning was the only reasonable option. In this case, at the time claimant quit he knew he was going to be discharged at the end of his shift the following day and there were no options or processes through which he could attempt to retain his employment or protest the employer's decision to discharge him. He also knew that being discharged would foreclose any possibility that he could be rehired by his employer of 15 years whereas resigning would preserve the option that he could apply for a different job that did not require he hold a driver's license, or perhaps reapply for the same job after his license was reinstated, either way allowing him to resume his long-term employment with the employer. Any reasonable and prudent person in claimant's position would have reached the same conclusion – that the benefit of being eligible to resume working for his long-time employer outweighed the benefit of one day's wages – and, like claimant, would have quit work. We therefore conclude that claimant quit work with good cause.[5] He is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-78461 is set aside, as outlined above.[6]

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

DATE of Service: March 29, 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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[5] *See McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010) (claimant faced imminent discharge, without pre-dismissal remedies, and a discharge would be the "kiss of death" to his future employment prospects); *Reynolds v. Employment Department*, 243 Or. App. 88, 259 P.3d 50 (2011) (claimant faced imminent discharge without the possibility of pre-dismissal remedies); *see contra Dubrow v. Employment Department*, 242 Or. App. 1, 252 P.3d 857 (2011) (claimant had pre-dismissal remedies, discharge was not imminent, and claimant did not establish she would experience adverse consequences if discharged).

[6] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.