

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0431

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct connected with work (decision # 151905). The employer filed a timely request for hearing. On March 22, 2017, ALJ Meerdink conducted a hearing, and on March 24, 2017, issued Hearing Decision 17-UI-79541, concluding claimant voluntarily left work without good cause. On April 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why she was unable to present this information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The City of Redmond employed claimant as an airport security assistant from September 21, 2015 through January 19, 2017.

(2) In August 2016, the employer placed claimant on a performance improvement plan reportedly based on the frequency of reported errors she had committed, a lack of attention to detail in performing job responsibilities and failures to meet deadlines given to her by her supervisor. In October 2016, the employer extended the improvement plan to January 2017 based on its perception that claimant had not made sufficient progress in improving her work performance.

(3) In January 2017, the employer reached the conclusion that claimant had not made sufficient progress regarding her work performance to keep her on as an employee. On January 18, 2017, the employer, through its airport director, issued to claimant a Notice of Proposed Termination, setting out the reasons for its proposed action and advising her that it intended to terminate her employment at an 11:00 a.m. meeting the next day unless claimant provided it with additional facts for its consideration that might change its position.

(4) Overnight, claimant concluded that it was unlikely that anything she might do would preserve her employment and that being discharged would make it difficult to find replacement employment. At 9:00 a.m. on January 19, two hours before their scheduled meeting, claimant met with the employer's airport director and informed him that she was willing to resign if that action would preserve her ability to use the employer as an employment reference going forward. The director responded that it would and directed her to prepare a resignation letter if that was her desire. Claimant then prepared a resignation letter and forwarded it to the employer prior to the meeting.

(5) On January 19, 2017, claimant quit work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with 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; 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). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a).

Claimant resigned from work in lieu of being discharged. Had she not, the relationship between claimant and the employer would have continued until she was discharged from work later on January 19, 2017. Because claimant could have continued to "work" for the employer for an additional period of time, until the scheduled meeting later that day, had she not resigned when she did, the work separation was a voluntary leaving.

A claimant who leaves work voluntarily is disqualified from receiving 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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.

Claimant quit in lieu of being discharged. Under OAR 471-030-0038(5)(b)(F), an individual who resigns "to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct" has left work without good cause. Here, claimant's future discharge was all but assured; she had been issued a Notice of Proposed Termination on January 18, 2017 and given 12 hours to provide the employer with reasons to not terminate her employment to be presented at a 11:00 a.m. meeting on January 19, 2017. However, we agree with the ALJ that the record fails to show that claimant's impending discharge would have been for misconduct. Hearing Decision 17-UI-79541 at 2. "Misconduct" is defined, in pertinent 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(3)(a). Claimant provided first-hand testimony that she performed the essential functions of her position as well as she could in light of the limited training she asserted she received and the conflicting expectations

given to her by her direct supervisor. Audio Record ~ 20:00 to 22:00. Because the employer failed to show that claimant, either willfully, or with wanton negligence, failed to meet clearly defined performance expectations, the employer failed to establish that her performance failures constituted misconduct.

In written argument, as at hearing, claimant argued that she should not be disqualified from receiving unemployment insurance benefits because, even though she quit, continuing work likely was not available to her, and it was to her benefit to quit in lieu of discharge, primarily to improve the appearance of her employment record. However, the ALJ concluded that claimant quit work without good cause under OAR 471-030-0038(4), reasoning as follows:

Claimant bears the burden to establish that she faced a grave situation with no alternative but to quit. Although she preferred to avoid a discharge, she presented no evidence that a discharge would have prevented her from obtaining future work or that she was advised to quit. Claimant facing a discharge was not a grave situation.

Hearing Decision 17-UI-79541 at 2. We disagree.

Viewed objectively, any reasonable person given a letter of intent to terminate, 12 hours to come up with a reason to save her job before attending the meeting at which she likely would be terminated, who then went to the employer and said she would rather quit than be fired so she could still use the employer as a reference, and is then told that if she didn't want to be fired she needed to write a letter of resignation, would reasonably believe her discharge was not just imminent, but was also inevitable.

Based on those undisputed facts, the only option available to claimant at the time she quit work was deciding whether her work separation from employment she had held for a year and a half would be characterized, for purposes of her future work search and a reference from the employer as a discharge or as a voluntary leaving. Any reasonable and prudent person facing certain discharge from employment would, more likely than not, conclude she had no reasonable alternative but to resign in lieu thereof. Claimant therefore quit work with good cause, and is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-79541 is set aside, as outlined above.¹

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

DATE of Service: May 16, 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

¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

'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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.