

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0609

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 81740). Claimant filed a timely request for hearing. On May 4, 2017, ALJ Ballinger conducted a hearing, and on May 10, 2017, issued Hearing Decision 17-UI-82984, concluding that claimant voluntarily left work without good cause. On May 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The city of Corvallis (City) employed claimant as a police officer from March 21, 2011 until February 17, 2017.

(2) On April 26, 2016, claimant was stopped by a Klamath County deputy sheriff for speeding. Claimant, who was angry and frustrated about being stopped, asked the deputy “Do you always cite cops?” Transcript at 48. Claimant then apologized to the deputy for his remark, and the deputy gave him a citation for driving 18 miles over the speed limit. The Klamath County Sheriff’s office subsequently contacted the City to complain about claimant’s behavior with the deputy. On July 2, 2016, the City reprimanded claimant in writing for improperly using his position as a police officer, for violating law enforcement officer ethics, for engaging in conduct unbecoming of a member of the City police department, and for trying to benefit from his association with a police department. Transcript at 13.

(3) On July 14, 2016, claimant asked his supervisor, a City police department sergeant, for permission to attend a community event while on duty and in uniform; he told the sergeant that the event was scheduled to begin at 7 p.m. on July 14, but did not tell the sergeant what event he wanted to attend. The event claimant sought permission to attend was a meeting of the local chapter of the National Association for the Advancement of Colored People (NAACP); claimant did not intend to speak at the

meeting, but wanted to “bless” the meeting by purchasing and delivering pizza to the meeting participants. The sergeant gave claimant permission to attend the meeting. Although claimant did not specifically ask for permission to use his patrol vehicle to drive to the meeting, he understood, based on his previous attendance at numerous community events, that permission to attend an event also meant that he had permission to use his patrol vehicle to travel to and from the event. Transcript at 34.

(4) When claimant delivered pizza to the July 14 NAACP meeting, he was surprised to discover that reporters were present at the meeting. Claimant remained for a portion of the meeting, during which the NAACP president spoke about the legal standard for law enforcement officers’ use of lethal force,¹ and asked claimant to confirm his explanation of this standard. Claimant explained that the standard for law enforcement officers’ use of lethal force had recently changed and was different from the one described by the president. Transcript at 35. An individual attending the meeting, whom claimant had previously arrested, then “began to berate [claimant] and cuss [claimant] in front of the entire group.” Transcript at 36. Claimant responded by telling the meeting participants that he had not intended to speak at the meeting, that he intended only to “bless” the meeting by providing pizza, and that the relationship between African Americans and the police was “broken.” Claimant assured those attending the meeting that Corvallis police would “serve and protect” everyone, no matter what their color. He then thanked the meeting participants for the opportunity to provide pizza and left. Transcript at 37.

(5) After leaving the meeting, claimant became concerned that his superior officers would learn about his delivery of pizza to and his attendance at the meeting through media reports. When he arrived at the City police station to continue his work shift, claimant spoke to a lieutenant, told him about the pizza he bought for the NAACP meeting participants, and said that he had “wanted to do this nice thing and the media was there and I don’t know what to do.” The lieutenant responded that claimant had done a “nice thing and it’s not like we were going to tell you no if you talked to us about it. Just make sure that you are more specific next time.” Transcript at 46. Claimant was subsequently directed to take one half hour of personal time off for the time he spent delivering pizzas to and attending the NAACP meeting. *Id.*

(6) On July 20, 2016, the City placed claimant on administrative leave, pending investigation of his actions in regard to the NAACP meeting. After completing the investigation, the City concluded that claimant had allegedly committed the crimes of unauthorized use of a vehicle under ORS 164.135² and official misconduct in the first degree under ORS 162.415³ by holding himself out as a City representative without authorization. Based on a newspaper report about claimant’s statements at the NAACP meeting, the City also concluded that the statements claimant made at the NAACP meeting damaged the City’s relationship with the NAACP and constituted conduct unbecoming to a police officer in violation of City policies. The City also concluded that claimant had lied to his superior

¹ The transcript of the hearing inaccurately transcribed testimony about “lethal force” as “legal force.” Transcript at 12, 35 and 36.

² ORS 164.135(1) provides that a person commits the crime of unauthorized use of a vehicle when “[t]he person takes, operates, exercises control over, rides in or otherwise uses another’s vehicle...without consent of the owner.” Unauthorized use of a vehicle is a Class C felony. ORS 164.135(3).

³ Under ORS 162.415(1)(b), a “public servant” commits the crime of official misconduct in the first degree if, with intent to obtain a benefit or to harm another, the public servant “knowingly performs an act constituting an unauthorized exercise in official duties.” Official misconduct in the first degree is a Class A misdemeanor.

officers during the investigation. On November 29, 2016, the City notified claimant it was considering terminating his employment. Transcript at 13.

(7) Claimant is a member a bargaining unit represented by the Corvallis Police Officers' Association.⁴ Union representatives advised claimant that the City was going to discharge him and recommended that he resign in lieu of discharge, because a discharge would be "devastating" to his chances of finding another job, and could effectively end his career as a law enforcement officer. Transcript at 32, 39. On February 17, 2017, claimant and the City executed a settlement agreement which, among other things, stated that claimant voluntarily left work for the City and admitted no fault on the part of either party. Transcript at 40. If claimant had not agreed to resign his position, the City would have discharged him.

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

Nature of the work separation. 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).

In November 2016, the City announced its intention to discharge claimant. On February 17, 2017, claimant resigned his position as a City police officer. Had claimant not done so, the relationship between claimant and the City would have continued until the City acted on the intention it expressed in November and taken formal action to terminate his employment. Because claimant could have continued to "work" for the employer for some additional period of time, the work separation was a voluntary leaving.

Voluntary quit. 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 discharge was a certainty: the employer's human resources director testified that had claimant not agreed to resign, the city would have terminated his employment. We agree with the ALJ

⁴ We take official notice of the collective bargaining agreement between the City and the Corvallis Police Officers' Association, in effect from July 1, 2014 until June 30, 2017, available on line at: www.corvallisoregon.gov/modules/showdocument.aspx?documentid=8539. Any party that objects to our taking notice of this fact must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, the noticed fact will remain part of the record.

that the record fails to show that claimant's impending discharge would have been for misconduct, however. Hearing Decision 17-UI-82984 at 6. "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). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the City contended that it discharged claimant because he used a City vehicle to attend an NAACP meeting on duty time without permission, held himself out to be a City representative at the meeting, made statements that damaged the relationship between the City and the NAACP, and lied during the subsequent investigation of his activities. According to the City, claimant's actions violated City policy and allegedly constituted the commission of the crime of unauthorized use of a City vehicle in violation of ORS 164.135(1) and the crime of official misconduct in violation of ORS 162.414(1)(b). Claimant, however, contended that his supervisor gave him permission to attend the meeting on duty time in his uniform and that, based on past attendance at community events, he understood this permission included authorization to use his patrol vehicle to travel to and from the meeting. Claimant also asserted that he made no statements at the July 14 meeting that could be construed as damaging to the relationship between the NAACP and the City, and that he made no untruthful statements during the City's investigation into the events of July 14. The testimony of the City's witness about claimant's participation in the July 14 NAACP meeting was based solely on hearsay information obtained from claimant's superior officers in the police department and a news article in the local paper. Because claimant's first-hand evidence is entitled to greater weight than the employer's hearsay evidence, we found facts in accordance with claimant's testimony. The employer therefore failed to demonstrate that claimant's attendance at the NAACP meeting and use of his patrol vehicle to travel to the meeting was unauthorized, and failed to demonstrate that claimant made statements damaging to the City's relationship with the NAACP at the meeting. Because the testimony regarding statements claimant made during the City investigation is no better than equally balanced, the City has not met its burden to establish that claimant was untruthful. We therefore conclude that the employer did not meet its burden to show that claimant engaged in the misconduct for which it intended to discharge him.

Because claimant did not resign to avoid a discharge for misconduct, we then consider whether he demonstrated good cause for voluntarily leaving work under the general standard of OAR 471-030-0038(4). Claimant testified that his Union representatives advised him that a discharge would significantly and adversely affect his ability to find another job, and could effectively end his career in law enforcement. We therefore agree with the ALJ that the prospect of a discharge was a grave situation for claimant. The ALJ, however, concluded that claimant had the reasonable alternative of accepting the discharge, and then challenging the discharge through the grievance procedure in the collective bargaining agreement up to arbitration. Hearing Decision 17-UI-82984 at 7. We disagree.

Claimant understood that the grievance process was likely to be a lengthy one, and the outcome was uncertain. Transcript at 38. Claimant's union representatives advised him that even if a grievance concerning his discharge was taken to arbitration, it was possible the arbitrator would uphold the City's disciplinary action. Transcript at 39. In addition, the ALJ was incorrect in his assertion that *claimant* had the right "to submit the dispute [a grievance concerning his discharge] to arbitration." Hearing Decision 17-UI-82984 at 7. Under the terms of the 2014-2017 collective bargaining agreement in effect

between the City and the union which represented claimant, only the union has the right to refer a grievance to arbitration. *See City/Corvallis Police Officers' Association Agreement, Article 19.2, p. 30.* A reasonable and prudent person, faced with the prospect of a discharge that could conceivably end his career, would choose to resign rather than be discharged and grieve the discharge through a potentially lengthy process that offered no guarantee of a favorable result and no absolute right to present his grievance to a neutral arbitrator.

Claimant voluntarily left work with good cause. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-82984 is set aside, as outlined above.⁵

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

DATE of Service: June 7, 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.

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.

⁵ 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.