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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-0769

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 164322). Claimant filed a timely request for hearing. On June 19, 2017, ALJ S. Lee conducted a hearing, and on June 21, 2017 issued Hearing Decision 17-UI-86281, affirming the Department's decision. On June 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the comments claimant made on his application for review when reaching his decision.

FINDINGS OF FACT: (1) Rainbow, the predecessor in interest to Springfield Utilities Board (SUB), employed claimant beginning on June 18, 1990 until Rainbow was acquired by SUB sometime in 1992. After the acquisition, claimant's employment continued with SUB until April 18, 2017. Claimant's last position with SUB was as water utility man. As water utility man, claimant earned $31.25 per hour.

(2) Sometime before June 6, 2016, claimant was promoted to the position of water foreman. As water foreman, claimant supervised the activities of a crew. As foreman, claimant earned $41.00 per hour.

(3) The employer expected claimant to follow the safety protocols of the employer, the Occupational Safety and Health Administration (OSHA and any other agencies or entities that had regulatory authority over the employer's operations. The employer also expected claimant to refrain from behavior that was insubordinate. Claimant understood the employer's expectations as a matter of common sense and as he reasonably construed them.

(4) On June 6, 2016, claimant was supervising his crew in the field. Claimant assigned the task of cutting a steel water pipe to a crew member who had been working for the employer for less than a year. The crew member was using a saw. A poly gas pipe was immediately adjacent to the water pipe that the crew member was cutting. Although safety protocols required that a protective shield be placed between

the two pipes to protect the gas pipe from being inadvertently cut by the saw, claimant did not instruct that a shield be employed. As the crew member was making cuts in the water pipe, the saw jumped from the water pipe to the gas pipe and gouged the gas pipe, causing a gas leak. As a result of this incident, the employer gave claimant warning which stated that by not following safely protocols he had not taken proper steps to safeguard his crew.

(5) On August 6, 2016, claimant's crew was again in the field. The equipment operator was absent from the crew that day and claimant was operating the digger machine. While digging, claimant struck a power line. As a result of this incident, claimant received a warning which stated that he had put himself and his crew at risk when he struck the power line.

(6) On October 6, 2016, claimant and the employer entered into a last chance agreement. The employer required the last chance agreement as a condition of claimant's continued employment since it considered claimant's actions on June 6, 2016 and August 6, 2016 to have been serious safety violations. The agreement demoted claimant from his supervisory position of foreman back to the crew position of water utility man and reduced his pay accordingly. The last chance agreement also required that, as a condition of claimant's continued employment, he consistently adheres to the excavation construction standards of the Oregon State Utility Notification Center and the safety protocols and regulations of the employer, OSHA and any other agencies having regulatory authority over claimant's job activities and that he refrains from working in an unsafe manner.

(7) Sometime before March 27, 2017, the water superintendent received information that claimant "may" have failed to follow a direct order of his crew manager, "may" have been taking breaks from work at "inappropriate" times and that "it was believed" he "may" have been painting utility location lines on streets without using the appropriate method for determining the location of the underground utilities. Audio at ~48:20, ~50:28. On March 27, 2017, the employer placed claimant on paid administrative leave while it investigated these allegations. The employer considered the allegations to constitute possible safety violations and insubordination.

(8) Sometime after March 27, 2017, the employer interviewed claimant about the allegations. The employer's attorney also interviewed members of the crew on which claimant had been working about the allegations. The employer anticipated that the attorney would have the interviews transcribed, would prepare summaries of the interviews, would prepare proposed findings and would advise the employer whether, in the attorney's opinion, claimant's discharge should be considered. At that point, after reviewing the interviews and discussing them with the attorney, the employer's human resources officer would in the usual course prepare a final set of proposed findings, make a recommendation to the general manager and, depending on that recommendation, might prepare a letter to claimant that notified him of his due process rights and enclosed the findings and recommendations relayed to the general manager.

(9) Sometime after March 27, 2017, claimant discussed his situation as he understood it with his union representative. Although the employer's investigation was only in its preliminary phase, the representative advised claimant, "It's not looking good. It looks like SUB wants to terminate you." Audio at ~14:21. The representative told claimant that his available options were to resign, retire or be discharged. Claimant informed the representative that he wanted to retire. Claimant wanted to retire to avoid a discharge for safety violations and for the other violations the employer was investigating.

(10) A couple of days after the employer's attorney had conducted interviews of the crew, claimant's union representative contacted the employer's human resources manager and stated that claimant was interested in retiring, and inquiring whether the employer would waive the usual notice period for a retirement. The union representative also inquired if claimant's retirement would cause the employer to terminate its investigation. The human resources manager told the union representative that the employer's investigation would not necessarily terminate if claimant retired. The union representative then asked the human resources manager if the employer would prepare a separation agreement for claimant's signature and the manager agreed that it would. At the time the union representative relayed to the employer claimant's desire to retire, the employer had not spoken to the attorney about and did not yet know the contents of the interviews that the attorney had conducted. Nor had the attorney made any recommendations to the employer based on the interviews and the employer had not considered or discussed any findings based on the interviews. As a result, the human resources manager did not have any information on which to make a recommendation to the general manager about claimant's continued employment and, lacking information, the employer did not yet know or have enough information to decide whether it would or would not pursue claimant's discharge based on the interviews. Once the employer was informed that claimant intended to retire, the employer placed the investigation in abeyance while it prepared a separation agreement. Had claimant not decided to retire, he would have remained on paid administrative leave while the investigation continued and the employer decided whether to proceed to discharge claimant or not. Had the investigation absolved claimant or failed to establish that claimant engaged in violations of the employer's policy that merited discharge, claimant would have been allowed to return to work.

(11) On April 18, 2017, claimant and the employer signed the separation agreement. Upon signing, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

At the outset, claimant contended that he decided to retire and entered into the separation agreement because he thought that the employer would discharge him if he did not. Audio at ~30:13. Although claimant stated that the employer never conveyed "verbal words" to that effect to him, the union representative had stated to claimant that his options were to resign, retire or be discharged and a provision in the separation agreement stated that he could not seek future employment with the employer if he entered into the agreement. Audio at ~30:17, ~31:00, ~35:30; Exhibit 1 at 5. In contrast, the employer contended that claimant voluntarily resigned by entering into the separation agreement, and the employer was not unwilling to allow claimant to remain employed until its investigation concluded, at which time it would have then have decided whether or not to continue claimant's employment. Audio at ~56:20, ~56:50. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for properly characterizing a work separation as either a voluntarily leaving or a discharge. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

While claimant contended he considered the views of his union representative in determining what actions the employer would take if he did not decide to retire, claimant did not contend that that any

employer representatives ever told the union representative that the employer would, or likely would, discharge claimant if he did not retire. Claimant did not dispute that the employer said nothing to the union representative about its intentions with respect to claimant's continued employment since it had not even preliminarily processed the results of its employee interviews at the time the union representative spoke to the employer about claimant's intention to resign. Audio at ~56:30. On this record, it does not appear that the alleged evaluation the union representative gave to claimant was based on any information from the employer indicating that the employer was unwilling to allow claimant to continue working for it. As well, the separation agreement that claimant cited as showing the employer's unwillingness to allow him to continue working only applied by its terms to claimant's status with the employer after he had entered into that agreement and had retired. However, the distinction between a voluntary leaving and a discharge applies to the parties' intentions about the employment relationship prior to the separation. As such, provisions in the separation agreement that would become effective only after the separation occurred are not particularly informative as to the parties' willingness or unwillingness to continue the employment relationship before the separation. Further, claimant did not challenge the testimony of the employer's witness that, at the time claimant retired, the employer was willing to continue claimant's employment in a paid administrative leave status until at least the conclusion of its investigation, at which time it would make a decision about continuing or not continuing claimant's employment based on information it had gathered during the investigation. Audio at ~56:50. Given the employer's willingness to allow claimant to continue as an employee during its investigation and its uncertainty as to what the likely results of its investigation would be, it appears on this record that the employer had not expressed an intention to discharge claimant at the time he entered into the separation agreement and had done nothing that reasonably could be construed as showing that it was unwilling to allow claimant to continue working for it. Claimant's work separation was not a discharge, but a voluntary leaving as of April 18, 2017, the effective date of the separation.

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). Leaving work without good cause includes resigning to avoid a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). While under certain circumstances an individual who leaves work due to a reduction in the rate of pay may show good cause, good cause may not be shown if the individual's pay was reduced as a result of a transfer, demotion or reassignment. OAR 471-030-0038(5)(d)(A). The standard for showing good cause 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 testified that he signed the separation agreement and left work, in part, due to his belief that the employer was going to discharge him based on reports about his workplace behavior received by the general manager after claimant entered into the last chance agreement. To preliminarily evaluate whether claimant's leaving work to avoid a discharge for those reasons would not be for good cause, it must be determined if claimant's behavior underlying those reasons constituted 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. 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).

There is very little evidence in the record about the specific safety violations and the alleged insubordination that the employer was investigating at the time claimant left work, and for which claimant contended he left work to avoid being discharged. Audio at ~49:24 *et seq.* The employer failed to meet its burden to demonstrate that claimant's behavior concerning the allegedly unauthorized breaks constituted misconduct. For similar reasons, without more detail, we do not find that the employer met its burden to show that claimant's behavior in painting the utility location lines on the streets was misconduct. As well, since no information was provided about claimant's alleged insubordination, the evidence is insufficient to conclude that claimant's behavior was willful or wantonly negligent in that respect. In sum, the employer failed to meet its burden to show that the discharge which claimant resigned to avoid would have been for misconduct. According, OAR 471-030-0038(5)(b)(F) does not preclude claimant from showing that a leaving to avoid such a discharge was for good cause.

In *McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010), the Supreme Court held that a resignation to avoid a discharge that was not for misconduct could constitute good cause for leaving if, among other things, the discharge was inevitable and relatively imminent. In this case, claimant's discharge was not inevitable. At the time of claimant's resignation, the employer was in only the most rudimentary stages of its investigation of claimant's behavior, it had received no information about the contents of its attorney's interviews with claimant's coworkers, it had received no verbal summaries or recommendations from its attorney, its human resources manager had absolutely no information on which she could have issued proposed findings, and it lacked the information to make even a preliminary determination about whether it would pursue disciplinary sanctions against claimant or if it lacked the evidence to do so. In addition, at the time claimant entered into the separation agreement, his discharge was not imminent. Had claimant not resigned, but instead remained on paid leave, the employer would have continued its investigation until the investigation was concluded, would have processed the information gathered during the investigation, would have made reached a decision, and only then, if its decision was to pursue discharge, would have the discharge become imminent. At the time he resigned, the discharge that claimant sought to avoid was not imminent, as well as not inevitable. On these facts, given the substantial uncertainty as to whether the employer would decide to pursue claimant's discharge as a result of its investigation, as opposed to absolving him of wrongdoing or pursuing lesser disciplinary sanctions, and the uncertainty as to when the employer would make its decision, a reasonable and prudent person would not have resigned when claimant did, but would have waited until the investigation was completed before concluding that he was going to be discharged. Significantly, there is no evidence in the record that the employer would been unwilling to allow claimant to resign or retire if claimant had waited to do so until the investigation was more substantially completed, and the employer's likely reaction to it could be more definitely ascertained.

Claimant also contended at hearing that he had good cause to leave work because his pay had been reduced when the last chance agreement demoted him from water foreman to utility man six months earlier. Audio at ~38:00. However, it appears that the reduction in pay was not the proximate cause of

claimant's leaving work since he was willing to continue working at the reduced pay for six months and it was the new allegations of safety violations and insubordination that led to claimant's resignation. Even if the earlier pay reduction entered into claimant's decision to retire, that reduction was due to a reassignment or a demotion from water foreman back to utility man. Reductions in pay as a result of reassignments and demotions are not good cause to leave work. *See* OAR 471-030-0038(5)(d)(A).

Claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-86281 is affirmed.

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

DATE of Service: July 31, 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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