

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0986

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140621). Claimant filed a timely request for hearing. On July 24, 2017, ALJ Lohr conducted a hearing at which the employer did not appear, and on July 25, 2017 issued Hearing Decision 17-UI-88789, affirming the Department's decision. On August 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Head Start Lane County employed claimant from approximately August 1994 until November 30, 2016, last as a family support coordinator. Claimant worked for the employer for over 23 years. Claimant was 62 years old.

(2) On occasion during the last few years of her employment, claimant sometimes told her immediate supervisor about issues various staff members had with various managers, since she was a long-time employee and had a great deal of experience dealing with both staff and management. Claimant's supervisor warned claimant that she needed to stop acting as a general "advocate" for staff and raising complaints on their behalf, and further told claimant that she needed to "keep it on the down low" and "keep [her] mouth shut." Audio ~12:16, ~12:44. Claimant's supervisor told claimant that the affected staff members, not claimant, needed to bring forward any complaints they had about management to members of management.

(3) Sometime before approximately late October 2016, a new manager who had recently begun working for the employer started to assign an increasing number of her tasks to claimant for claimant to perform. The new manager was not one of claimant's supervisors. Claimant believed the new manager assigned these tasks to claimant because the new manager did not know how to perform them herself, but knew claimant did. Claimant resented performing the new manager's job duties because it did not allow enough time for claimant to meet with and advocate for client families, which was a major source of job satisfaction for claimant. In approximately late October 2016, claimant had a discussion with the new manager, in which claimant told the new manager, "You've got to stop telling me what to do. You are

giving me your job to do.” Audio at ~ 11:46. Claimant was not discourteous to the new manager in the conversation and did not raise her voice.

(4) In approximately late October 2016, after claimant’s conversation with the new manager, the employer’s human resources director held a meeting with claimant, claimant’s supervisor and a union representative. The human resources director made clear that the meeting had nothing to do with claimant’s job performance but was about claimant “dissing” management. Audio at ~12:48. The director told claimant that he was “going for [her] termination,” and if the employer had to fire her, the employer would “fight” any claim she later made for unemployment insurance benefits. Audio at ~8:24, ~12:40. The director then presented a resignation letter to claimant for her signature. Claimant’s supervisor and the union representative said nothing in response to the human resource director’s statements or actions. Claimant signed the letter because the other attendees at the meeting did not speak up for her and she did not want to jeopardize receiving unemployment benefits in the event she was discharged by the employer.

(5) In late October 2016, claimant voluntarily left work, effective November 30, 2016.

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

The first issue this case presents is the nature of claimant’s 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. 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Claimant contended she “had no choice” other than to sign the resignation letter that was proffered to her during the late October 2016 meeting and that, had she not, she feared she would be discharged and would jeopardize her receipt of unemployment benefits. Audio at ~8:24, ~14:27, ~14:56. However, by claimant’s account, the human resources director said to her only that he was “going for termination” and not that he, or the employer, would definitely or was even likely to discharge her if she did not sign the resignation letter that was presented to her at the meeting. The human resources director’s statement, standing alone, was at best ambiguous about the *employer’s* ultimate intentions, as distinct from his own preferences and its phraseology suggested that, while he was in favor of discharging claimant, the ultimate decision would be made by other employer representative(s), either alone or in consultation with him. It is further significant that claimant said nothing that suggested that her immediate supervisor, who was at the meeting, expressed any degree of agreement with the human resources director about discharging claimant or that the union representative, who presumably was present to protect claimant’s interests, advised claimant at any time that the employer was going to discharge her, that her discharge was inevitable or likely, or even that it would be in her best interest to resign rather than continue working. Viewed as a whole, there is insufficient evidence in the record to conclude, more likely than not, that the employer was unwilling to allow claimant to continue working for it at the time she quit. The first objective, unmistakable and unequivocal manifestation of an intention to sever the work relationship was by claimant when she signed the resignation letter that was given to her at the meeting. The preponderance of the evidence in this record shows that claimant’s

work separation was a voluntary leaving by signing the resignation letter at the conclusion of the late October 2016 meeting, severing the employment relationship, effective November 30, 2016.

A claimant who leaves work voluntarily is disqualified from the receipt of 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) (August 3, 2011). Leaving work without good cause includes resigning to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). 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 her employer for an additional period of time.

While the ALJ concluded that claimant voluntarily left work without good cause, reasoning that claimant resigned to avoid a discharge or potential discharge misconduct for insubordination based on the statements she made to the new manager in late October 2016 when she objected to performing more of the manager’s work, we disagree. Hearing Decision 17-UI-88784 at 2. The only information in the record about that conversation came from claimant since the employer was not present during the hearing. Nothing in claimant’s description of the conversation suggested that she defied the authority of the new manager, refused absolutely to perform the new manager’s tasks, was rude or disrespectful or did anything more that express displeasure to the new manager. There is insufficient evidence in the record to show that claimant was insubordinate or otherwise engaged in misconduct during the conversation she had with the new manager in late October 2016.

Since claimant contended that she left work to avoid being discharged by the employer, this record supports only that the discharge claimant allegedly sought to avoid would have been a discharge that was not for misconduct. Audio at ~8:24, ~12:34, ~23:28. Under appropriate circumstances, a claimant may have good cause to leave work to avoid a discharge that is not for misconduct. *McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010). Generally, those circumstances include that the discharge is reasonably certain and likely imminent at the time claimant quit work. *Id.* Here, as discussed above, the statement of the human resources directory about wanting to discharge claimant, standing alone, was at best equivocal as to the employer’s ultimate intentions and claimant cited no factors corroborating her speculations that she was going to be discharged, including, for example, that in the employer’s chain-of-command, the human resources director’s recommendation had a dispositive influence on the employer’s decision to discharge, that claimant’s immediate supervisor expressed agreement with the assessment of the human resources director or expressed that the employer intended to discharge claimant if she did not quit, or that claimant’s union representative had advised her that her discharge was inevitable or even likely or that, at a minimum, it was in her interests to resign. On this record, claimant did not show that her discharge was objectively likely when she decided to leave work. As such, even though claimant might have been concerned about the human resources director’s threat to contest her receipt of unemployment insurance benefits if the employer was required to discharge her, she did not show that the threat was likely to come to fruition since she did not make the threshold showing that the employer was likely to discharge if she did not resign. On this record, claimant did not show that the director’s statement that he was “going for [her] termination” and that the employer would “fight” her receipt of benefits if she did not resign was good cause for her to leave work when she did.

Other than the statement that the human resources director made to claimant in late October 2016, claimant cited no other reasons for why she signed the resignation letter and none are discernible from the record. Since claimant did not show that grave reasons caused her to leave work when she did, claimant did not show good cause for leaving work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-88789 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 5, 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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