EO: 200
BYE: 201901

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
2018-EAB-0336

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 72131). Claimant filed a timely request for hearing. On March 22, 2018, ALJ Janzen conducted a hearing, and on March 23, 2018 issued Order No. 18-UI-105836, affirming the Department's decision. On April 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based upon the hearing record.

FINDINGS OF FACT: (1) Lane County employed claimant as a commercial appraiser from July 28, 2014 to December 1, 2017.

(2) Between June 2016 and February 2017, the employer placed claimant on four work plans for failing to meet the employer's minimum production standards. On April 13, 2017, the employer suspended claimant. Claimant disagreed with the employer's assessment of his work performance, thought he showed improvement, and filed three union grievances disputing the employer's assessment of his work.

(3) On October 31, 2017, the employer conducted a pre-determination hearing to determine whether or not to suspend claimant for having failed to meet production standards. At the time, claimant was facing an oral warning, written reprimand, 1-day suspension and 3-day suspension, all of which had been held in abeyance for procedural reasons.

(4) After the October 31st meeting, the employer and claimant's union began to discuss how to resolve the dispute between claimant and the employer. On November 22, 2017, the president of claimant's union presented him with a settlement agreement the union had negotiated with the employer. In exchange for claimant's resignation, the employer promised a monetary settlement. The agreement would entitle claimant to monetary benefits that he could not receive if he continued to work and was

later discharged, and included the employer's agreement to tell future employers that he resigned with "no negative commentary." Transcript at 14.

(5) Claimant's grievances were still pending, but the union president and a steward advised claimant to accept the settlement and resign, and explained that in his opinion the employer was likely to discharge claimant if he did not quit. Claimant thought if he did not accept the settlement agreement that the next step the employer would take would have been to fire him. Claimant felt like he "couldn't win" at work and "really didn't have the chance of succeeding there." Transcript at 20. He also thought that having a discharge on his employment record would make it "much harder to get a job." Transcript at 21. When claimant discussed the settlement with the union president and a steward, they told him "they would sign it if they were me," and "it was probably best to move on [] somewhere where I'm not really valued." Transcript at 22.

(6) Effective December 1, 2017, claimant quit work to accept the settlement agreement.

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

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). 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.

Claimant quit work to avoid what was, more likely than not, a certain discharge; that discharge, however, would not have been for misconduct.[1] The planned discharge was likely to occur because of the employer's conclusion that claimant had, repeatedly and over time, failed to meet the employer's expectations with regard to his production. The employer's and claimant's evidence about whether or not claimant's production was inadequate differed; regardless, though, claimant sincerely testified that he thought his production showed improvement between work plans. *See also* Exhibit 3. As such, while claimant's production might have failed to meet the employer's standards over time, his efforts to meet those standards suggest that the failure was not the result of willful or wantonly negligent conduct attributable to claimant as misconduct.

Claimant therefore quit work to avoid what was, more likely than not, a certain discharge that would not have been for misconduct. The ALJ concluded that claimant voluntarily left work without good cause,

[1] 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).

reasoning that claimant's discharge was not imminent and at the time he quit work he was facing only a suspension from work.[2] The ALJ stated that claimant therefore "could have waited for the outcome of the suspension hearing, and waited to see if the employer took further disciplinary action, before deciding to quit."[3] 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 had been told by the union president and a steward that his discharge was inevitable and likely to be the next thing the employer pursued, making the prospect of his discharge reasonably imminent. The employer and union together, apparently without claimant's involvement, jointly negotiated a separation agreement to present to claimant with the intent to end the employment relationship. The employer's and union's mutual decision to negotiate a settlement agreement designed to end claimant's employment substantiate his feeling that he "couldn't win" at his job and had no chance of continued employment. He had also been advised that if he did not take the settlement agreement the employer would disciplinary steps, including suspensions, and the next step would be to discharge him. Claimant felt that being discharged was likely to have a negative effect on his future employment prospects, whereas accepting the settlement agreement would result in a neutral reference and no negative effects. Claimant also knew that if he agreed to resign, instead of facing what was described to him as an inevitable and fairly imminent discharge, he would receive a significant financial benefit that would not otherwise be available to him. Any reasonable and prudent person in claimant's position would have reached the same conclusion – that the benefit of resigning with a neutral reference and monetary payout outweighed the possible benefit any amount of continuing work might have offered – and, like claimant, would have quit work. We therefore conclude that claimant quit work with good cause.[4] He is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-105836 is set aside, as outlined above.[5]

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

DATE of Service: <u>May 10, 2018</u>

[2] Order No. 18-UI-105836 at 3.

[3] *Id.*

[4] *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).

[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.

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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