

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0697

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85718). Claimant filed a timely request for hearing. On June 20, 2018, ALJ Frank conducted a hearing at which the employer failed to appear, and on June 22, 2018 issued Order No. 18-UI-111889, affirming the Department's decision. On July 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lewis & Clark College employed claimant as a faculty outreach librarian from 1998 to April 30, 2018. Claimant's career was to work performing professional library work in higher education.

(2) Sometime before April 7, 2018, claimant's coworker alleged to the employer that claimant had touched her inappropriately and made bullying comments to her. Claimant denied the allegations. On April 7, 2018, the employer placed claimant on paid leave while it conducted an internal investigation regarding the allegations. On April 23, 2018, the employer concluded its investigation. Claimant was dissatisfied with the manner in which the employer conducted the investigation because he believed the human resources representative who conducted the investigation and claimant's supervisor had concluded that the allegations were true before the investigation began and without speaking to claimant about the allegations. Claimant was also dissatisfied that the allegations given to him were vague and the employer did not give claimant a full opportunity to respond to them.

(3) On approximately April 28, 2018, the employer informed claimant that the dean of the college was "inclined to terminate" claimant based on the investigation. Audio Record at 10:17 to 10:25. Claimant

told the employer why he dissatisfied with the investigation process. In response, the employer offered for claimant to begin an unpaid leave of absence while it conducted another, external, investigation. The employer did not specify who would perform the investigation or how or when it would be completed.

(4) Claimant was concerned that the external investigation would be unfair, and that the employer would discharge him at the end of the investigation. Claimant was also concerned that even if he continued to work for the employer, he would no longer be successful in his job because his immediate supervisor believed the allegations, no longer trusted him, and would not support him in the future. Claimant was also concerned that he would have difficulty finding other work as a librarian in higher education in the Portland area if the employer discharged him or made the allegations public. Claimant planned to remain in the Portland area due to familial obligations.

(5) On April 30, 2018, the employer offered claimant a settlement in lieu of awaiting the results of the external investigation. Claimant accepted the offer to avoid discharge and to preserve his reputation and ability to find other work and resigned on April 30.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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) (January 11, 2018). For purposes of applying that rule, an individual who leaves work to avoid a discharge for misconduct or a potential discharge for misconduct has left work without good cause. 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 his employer for an additional period of time.

The ALJ concluded that claimant quit work without good cause, reasoning essentially that awaiting the result of the external investigation was a reasonable alternative to quitting work on April 30, 2018 because a reasonable person who was innocent of the allegations would have welcomed the opportunity for exoneration and because the record did not show the external investigation would be flawed like the internal investigation.¹ The record does not support the ALJ’s conclusions.

On April 30, 2018, claimant accepted a settlement offer and resigned that day. The record shows that, more likely than not, claimant resigned to avoid what he thought was a likely discharge at the end of the proposed external investigation, especially because the dean had already stated that he was inclined to discharge claimant, and claimant observed that human resources and his supervisor had already concluded that he had committed the alleged acts. Moreover, the employer only offered the external investigation option after claimant complained about flaws in how the employer conducts the internal investigation. Had claimant left work to avoid a potential discharge for misconduct, his resignation

¹ Order No. 18-UI-111889 at 2.

would have been without good cause. *See* OAR 471-030-0038(5)(b)(F). However, the record does not show that claimant's discharge would have been for misconduct. "Misconduct" means 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 denied having engaged in the alleged conduct and the record does not show that claimant knew or should have known that anything he said or did to the coworker was a violation of the employer's expectations. Because claimant quit work to avoid a discharge that was not for misconduct, claimant is not disqualified from benefits under OAR 471-030-0038(5)(b)(F).

It is thus necessary to determine if claimant quit work for good cause pursuant to OAR 471-030-0038(4). The potential discharge posed a grave situation for claimant and we disagree with the ALJ that the external investigation was a reasonable alternative to accepting the settlement agreement and resigning on April 30. First, had claimant agreed to the external investigation, he faced an indefinite period of unpaid leave. Although claimant did not disclose the terms of the settlement agreement, we presume that the settlement agreement probably offered some protection of claimant's reputation, and quitting pursuant to a settlement agreement with any terms beneficial to claimant would be preferable to the loss of employment without such agreement. As a matter of common sense, it is clear that claimant would have experienced damage to his reputation if he were discharged, and even more if the employer made public the allegations of inappropriate touching and bullying. This would have made finding other work particularly difficult for claimant in a narrow field such as professional library work in higher education within a small geographic location. No reasonable and prudent person faced with a choice between discharge without a settlement that presumably provided some protection for claimant's reputation, and discharge after an indefinite period of unpaid leave with no settlement, would have rejected the settlement option where, as here, either option more likely than not resulted in his inevitable loss of employment. Claimant therefore quit work with good cause and is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-111889 is set aside, as outlined above.²

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

DATE of Service: August 10, 2018

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.

² This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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