

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0857

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114743). Claimant filed a timely request for hearing. On August 14, 2018, ALJ Shoemake conducted a hearing, and on August 22, 2018 issued Order No. 18-UI-115337, affirming the Department's decision. On August 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Providence Health & Services employed claimant from February 9, 2011 until March 9, 2018, last as a dental clinic manager.

(2) The employer expected claimant to perform her work duties satisfactorily. Claimant understood the employer's expectations as a matter of common sense.

(3) Beginning around 2017, the employer developed concerns about claimant's ability to manage the clinic. At that time, an employer representative was assigned to help claimant improve her leadership and management skills. Between 2017 and February 8, 2018, the executive director of children's developmental health met several times with claimant about deficiencies in her performance as manager. As the meetings continued and despite claimant's efforts, the employer did not note that claimant's performance was improving. Claimant came to believe that she was going to be discharged for inadequate work performance.

(4) On February 8, 2018, the executive director and another employer representative met with claimant to discuss continued shortcomings in her performance as a manager. During that meeting, claimant asked if the employer intended to discharge her, and claimant was told, "Not today." Audio at ~14:13.

(5) Sometime after the meeting on February 8, the employer decided to discharge claimant due to inadequate work performance. While claimant had tried to be a better manager, the employer had concluded that claimant did not have the skills to manage the dental clinic effectively. Sometime after the February 8 meeting, claimant received notice of a meeting scheduled for February 23, 2018 at 4:00 p.m. between her and the executive director and a human resources partner. The executive director intended to discharge claimant during that meeting. Claimant was not informed of this intention.

(6) On February 22, 2018, claimant spoke to the executive director about the upcoming meeting and asked, “Is there any way I could stay on as manager?” to which the executive director replied, “Not at this time.” Audio at ~17:38. Although no employer representative ever told claimant directly that the employer intended to discharge her at the February 23 meeting, claimant concluded that she was going to be discharged.

(7) On February 23, 2018, sometime before the scheduled meeting, claimant notified the employer that she was resigning effective immediately. Claimant resigned to avoid being discharged. Had claimant not resigned, the employer would have discharged her for inadequate work performance.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

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) (January 11, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant 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). However, a claimant who leaves work to avoid a discharge that would not be for misconduct may under appropriate circumstances have left work for good cause. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

In Order No. 18-UI-115337, the ALJ concluded that claimant voluntarily left work without good cause. While the ALJ acknowledged that the employer “had concerns about claimant’s work performance” and claimant left work because “she felt her job was threatened,” the ALJ reasoned that “claimant did not show that the employer’s concerns about her work performance amounted to a situation of such gravity that it left her no reasonable alternatives but to quit work.” Order No. 18-UI-115337 at 2. We disagree.

The hearing testimony of the employer’s executive director was that, as of the morning claimant quit, the employer’s assessment of claimant’s work performance went beyond having mere “concerns” about it and a decision had been made to discharge claimant at a meeting scheduled for that afternoon. Audio at ~27:49, ~28:29. The ALJ’s decision overlooked the finalized nature of the employer’s discharge decision in concluding that claimant did not show that grave reasons caused her to leave work when she did. In considering whether claimant’s resignation to avoid the employer’s imminent discharge constituted good cause to leave work, the first issue is whether the employer’s discharge would have been for misconduct or not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. A claimant's inefficiencies resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). Here, the executive director evaluated the causes for claimant's deficient work performance as an "inability to perform at [the] standards of a leader" and "not hav[ing] the ability to do it – to lead her ministry," rather than being due to any volitional or consciously aware behavior on claimant's part. Audio at ~28:46, ~30:00. Based on the executive director's assessment, the employer's decision to discharge claimant was due to her inadequate work performance arising from a lack of skills, rather than due to any willful or wantonly negligent behavior. Accordingly, claimant's decision to leave work to avoid that discharge falls outside the disqualification of OAR 471-030-0038(5)(b)(F) since that discharge would not have been for misconduct.

McDowell v. Employment Department, 348 Or 605, 612, 236 P3d 722 (2010) holds that a claimant's decision to leave work to avoid a discharge that would not have been for misconduct may be for good cause if, at the time of that decision, the discharge was inevitable and imminent and a discharge would have a negative impact on claimant's future job prospects. Here, the employer's discharge decision had already been made when claimant resigned, it would have been effected only a few hours after claimant submitted her resignation, and claimant likely could have done nothing to forestall the discharge other than to have resigned. Audio at ~27:56, ~28:29, ~30:10. There was no evidence in the record suggesting or tending to suggest that having a discharge on her employment record would not have had a stigmatizing impact on claimant's job prospects. Absent evidence to the contrary, it is inferred as a matter of common sense that a discharge for deficient work performance from a management position in a specialized field like health care would have an adverse effect on claimant's efforts to secure future employment in that field. On this record, claimant showed good cause for leaving work to avoid the employer's impending discharge, not for misconduct.

Claimant showed good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-115337 is set aside, as outlined above.

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

DATE of Service: October 4, 2018

NOTE: 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.

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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