

FILED: September 5, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARIA L. AGUILAR,
Petitioner,

v.

EMPLOYMENT DEPARTMENT
and SALEM-KEIZER SCHOOL DISTRICT,
Respondents.

Employment Appeals Board
12AB0227

A151042

Submitted on July 18, 2013.

Jovanna L. Patrick and Hollander, Lebenbaum & Gannicott filed the brief for petitioner.

Denise G. Fjordbeck, Attorney-in-Charge, waived appearance for respondent Employment Department.

No appearance for respondent Salem-Keizer School District.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

EGAN, J.

Reversed and remanded.

1 EGAN, J.

2 This petition for judicial review comes to us following an Employment
3 Appeals Board (board) decision to deny claimant unemployment benefits. Claimant
4 contends that the board erred by adopting an administrative law judge's (ALJ) order that
5 concluded that claimant did not have "good cause" for voluntarily resigning her position,
6 despite the fact that employer was going to discharge claimant the following day. For the
7 following reasons, we reverse and remand.

8 Except where noted otherwise, the pertinent facts are not disputed and we
9 therefore describe them consistently with the board's findings and the record that supports
10 those findings. *McDowell v. Employment Dept.*, 348 Or 605, 608, 236 P3d 722 (2010).
11 "In light of the board's factual findings, we then determine whether its conclusions
12 reasonably follow from the facts found, that is, whether its conclusions are supported by
13 substantial reason." *Strutz v. Employment Dept.*, 247 Or App 439, 442, 270 P3d 357
14 (2011) (internal quotation marks omitted).

15 Claimant worked for employer, the Salem-Keizer School District, for 14
16 years as a teacher. Claimant was a full-time fourth grade teacher during the 2010-11
17 school year. Employer intended to place claimant at the head of a third-grade bilingual
18 classroom for the 2011-12 school year. On August 23, 2011, however, employer
19 informed claimant that it would terminate her employment¹ because she lacked certain

¹ The ALJ found that claimant resigned after she was told that "she would most likely be discharged" the following day, a finding that the board adopted. However, claimant, the only person to testify at the hearing, testified that employer had

1 endorsements to her teaching certificate that are required to teach in a bilingual
2 classroom. The only evidence in the record indicates that claimant was not told until
3 June 2011 that she would be assigned to a bilingual classroom for the upcoming school
4 year. Claimant testified that she had, prior to receiving the discharge notification, taken
5 some of the course work that is required to obtain the endorsements, but she apparently
6 did not complete all the necessary courses.

7 After receiving employer's notification of its decision to terminate her
8 employment, claimant met twice with employer's representatives in hopes of finding a
9 position that would not require her to possess the bilingual teaching endorsements that
10 she had failed to obtain. While discussing her options, she was told by employer, in her
11 words, that "I could resign and that--that was about it." Claimant also testified that she
12 asked to be placed on leave in order to pursue and obtain the relevant endorsements and
13 that employer denied the request. According to claimant, she signed an agreement stating
14 that, if she resigned, employer would not oppose a decision by her to seek unemployment
15 benefits. The agreement also purportedly stated that, if she were subsequently rehired by
16 employer following a resignation, she would regain the seniority that she was then

unequivocally told her that she *would* be terminated on October 11, 2011. Although the board was not required to believe claimant, the board could make a contrary finding only if "it could articulate substantial reasons for rejecting claimant's uncontradicted testimony * * *." *McDowell*, 348 Or at 615 n 5. Neither the board nor the ALJ made any attempt to explain why it chose to disregard claimant's uncontradicted testimony in that one regard. Thus, we agree with claimant that there is nothing in the record to support the board's finding that employer was "most likely"--rather than "certainly"--going to terminate claimant's employment on October 11, 2011.

1 currently entitled to, an offer that would not obtain if she were discharged.

2 Claimant's attorney and a union representative were present at those
3 meetings. Claimant was subsequently advised by both of them that it would be very
4 difficult for her to obtain another teaching job if she was terminated because she would
5 have to reveal that fact to potential future employers. Claimant was also informed that it
6 would be easier for her to obtain future employment as a teacher if she resigned.
7 Accordingly, claimant resigned on October 10, 2011, one day before the date that
8 employer had informed her that she would be terminated.

9 Claimant subsequently sought unemployment benefits. The Employment
10 Department (department) denied benefits on the ground that her decision to voluntarily
11 leave work to avoid being discharged did not constitute good cause. Claimant then
12 sought and received a hearing before an ALJ. Employer did not appear at that hearing
13 and claimant was the only witness. In a final order, the ALJ denied benefits on the same
14 basis as the department. Claimant appealed to the board, which adopted, in full, the
15 ALJ's order affirming the denial of benefits. This timely petition for judicial review
16 followed.

17 Claimant first asserts that the board erred by failing to make its own
18 findings and conclusions, as claimant contends that it was required to do by ORS
19 183.470(2). The board's decision read, in relevant part, "[The board] reviewed the entire
20 hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision
21 under review is **adopted**." (Boldface in original.) Relying on *Opp v. Employment Dept.*,

1 242 Or App 673, 259 P3d 15 (2011), claimant contends that the board was required to
2 specifically adopt the ALJ's findings and conclusions, as opposed to adopting the
3 "hearing decision under review." In *Opp*, we reversed a board determination that
4 "affirmed without opinion" an ALJ decision. *Id.* at 675 (boldface omitted). We stated
5 that such a determination failed to comply with ORS 183.470(2)² because the board's
6 order was "entirely devoid of findings or conclusions." *Id.* at 676. That is not the case
7 here. In this instance, the board stated that it was adopting the ALJ's hearing decision
8 and specifically cited the statutory authority that permitted it to adopt the ALJ's findings
9 and conclusions. *See* ORS 657.275(2) ("The board may enter its own findings and
10 conclusions or may *adopt* the findings and conclusions of the administrative law judge, or
11 any part thereof." (Emphasis added.)). The decision thus sufficiently conveyed the
12 board's intent to adopt the ALJ's factual findings and legal conclusions.

13 Claimant next asserts that the board erred in concluding that she did not
14 have good cause to resign her job. A claimant is disqualified from collecting
15 unemployment benefits if, as pertinent to this case, that claimant "[v]oluntarily left work
16 without good cause." ORS 657.176(2)(c). Claimant in this case concedes that she
17 voluntarily resigned her position, and the relevant question is thus whether she had good

² ORS 183.470(2) provides:

"A final order shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the agency's order."

1 cause to do so. The Supreme Court has articulated the good cause standard as "whether a
2 reasonable person of normal sensitivity, exercising ordinary common sense, would have
3 considered the circumstances to be sufficiently grave that he or she had no alternative but
4 to resign." *McDowell*, 348 Or at 614.

5 This case is similar to *McDowell*. There, a probationary teacher violated a
6 school policy by showing his students a video clip containing profanity. *Id.* at 608. The
7 school's personnel director informed the claimant that he was going to recommend the
8 claimant's discharge at an upcoming school board meeting. The claimant was not
9 advised about whether he would have an opportunity to be heard at the board meeting. A
10 union attorney advised the claimant that there was "absolutely no chance" that the school
11 board would overrule the discharge recommendation and, accordingly, advised the
12 claimant to resign before being discharged. *Id.* at 609. The claimant did so on the same
13 day that the school board was scheduled to meet. He subsequently sought unemployment
14 benefits.

15 The issue before the Supreme Court was whether the claimant had good
16 cause for resigning when he did. *Id.* at 613. In applying the good cause standard, the
17 court relied heavily on the fact that the claimant knew that a professional stigma attached
18 to discharged teachers and that a discharge would make it more difficult for him to obtain
19 employment as a teacher in the future. It also emphasized the fact that the employer had
20 informed the claimant that he could resign; the Supreme Court took that fact as evidence
21 that "a reasonable and prudent person likely would take the employer's comments to be

1 tacit encouragement to quit in lieu of being discharged to spare the repercussions of a
2 discharge on future employment opportunities." *Id.* at 615. In light of the above factors,
3 the court concluded that "the board's factual findings, and the evidence in the record that
4 supports those findings, required the good cause determination to be resolved in
5 claimant's favor." *Id.* at 614. So too, here.

6 The uncontested evidence in this case is that claimant knew, after being so
7 advised by her attorney and a union representative, that a discharge would seriously
8 hamper her future efforts to find another teaching job. After being told that her
9 employment was going to be terminated, claimant made two unsuccessful attempts to try
10 to find an alternative position with employer. Claimant also attempted to negotiate a
11 leave arrangement so that she could obtain the required endorsements for the position that
12 employer had recently assigned her. She was also told by employer of certain additional
13 benefits of resigning, namely, that employer would not contest her decision to seek
14 unemployment benefits and that, if she were subsequently rehired by employer, she
15 would regain the seniority that she had accumulated over her 14 years of service to
16 employer. She resigned one day before employer was set to discharge her. Given the
17 benefits that would obtain by resigning--or, more accurately, the detriments that would be
18 avoided by doing so--a reasonable and prudent person of normal sensitivity, exercising
19 ordinary common sense, would not continue her employment to its inevitable cessation
20 one day later. Claimant had good cause for voluntarily resigning.³

³ Given our disposition on claimant's good-cause argument, we need not, and do

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Reversed and remanded.

not, reach her argument that she was entitled to unemployment benefits under ORS 657.176(7).