IN THE COURT OF APPEALS OF THE
STATE OF OREGON

LANE COUNTY,
Petitioner,

v.

EMPLOYMENT DEPARTMENT
and William T. Stich,
Respondents.

Employment Appeals Board
2018EAB0336; A167928

Submitted March 11, 2019.

Stephen E. Dingle and Sara Chinske filed the brief for petitioner.

Denise G. Fjordbeck waived appearance for respondent Employment Department.

William T. Stich waived appearance *pro se*.

Before Ortega, Presiding Judge, and Powers, Judge, and Landau, Senior Judge.

LANDAU, S. J.

Affirmed.

LANDAU, S. J.

In this unemployment compensation case, Lane County seeks review of a decision of the Employment Appeals Board (EAB) that concluded that claimant left work with good cause and was entitled to receive unemployment benefits. The county argues that EAB erred in that the record shows that claimant voluntarily quit work without good cause and therefore was disqualified from receiving benefits. We affirm.

We take the following facts from EAB's findings. The county employed claimant as a commercial appraiser from July 2014 to December 2017. In 2016, the county determined that claimant was not meeting its minimum production standards and placed him on four successive work plans over several months. Claimant received a "needs improvement" rating at the conclusion of each work plan, and the county took increasingly severe disciplinary actions against claimant. At the conclusion of the fourth work plan, claimant had received an oral warning, a written reprimand, and a one-day unpaid suspension.

Claimant disputed the county's "needs improvement" ratings, and his union filed three grievances on his behalf. In October 2017, the county conducted a predetermination hearing to determine whether claimant would receive a three-day suspension for his continued failure to meet the minimum production standards. Had the county imposed the three-day suspension and claimant's performance not improved, the next step in the county's discipline process could have been termination.

Before the county decided to impose the three-day suspension, however, claimant's union contacted the county to discuss how to resolve the dispute. Following negotiations between the county and the union, the union president and a union steward presented claimant with a proposed settlement agreement under which claimant would voluntarily resign his position in exchange for monetary benefits and the county's agreement to tell future employers that claimant resigned with "no negative commentary." If claimant had not accepted the settlement, and the county had discharged

him, he would not have been entitled to the monetary benefits. Both the union president and the steward told claimant that his eventual discharge was imminent and inevitable. As a result, they both advised claimant to accept the settlement and resign. Claimant agreed and resigned his position effective December 1, 2017.

Claimant then sought unemployment benefits, which the Employment Department denied. Claimant sought a hearing, and the administrative law judge affirmed the denial, concluding that claimant was disqualified from receiving benefits because he had voluntarily left work without good cause. Claimant then sought EAB review.

Claimant argued that he left work with good cause, because he did not feel that he had a chance of succeeding there and that if he didn't accept the settlement the county's next step would have been to fire him, which would have made it much more difficult for claimant to obtain future employment. Additionally, claimant pointed out that both the union president and the steward told him that his discharge was imminent, that they would accept the settlement if they were in his place, and that it was best for him to move on. The county argued to EAB that claimant did not leave work with good cause because he was facing only a three-day suspension and the grievance process had not yet concluded.

EAB agreed that claimant left work with good cause. The board's final order explained:

> "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 [that] continuing work might have offered—and, like claimant, would have quit work. We therefore conclude that claimant quit work with good cause. He is not disqualified from receiving unemployment insurance benefits because of this work separation."

(Footnote omitted.)

The county now argues that EAB erred in concluding that claimant was not disqualified from receiving unemployment benefits. According to the county, EAB's decision

erred in essentially two respects. First, it argues that EAB erred in crediting claimant's belief that discharge was likely to occur. The county insists that it is undisputed that other, predismissal remedies remained on the table and that there is a complete absence of evidence in the record that it had intended to discharge claimant. Second, the county contends that EAB erred in concluding that a reasonable person under the circumstances would have voluntarily quit, especially given that there is no evidence of his impending discharge.

A claimant is disqualified from receiving unemployment benefits if the claimant "[v]oluntarily left work without good cause." ORS 657.176(2)(c). "Good cause" is a delegative term that the Employment Department has authority to interpret by rule. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228-29, 621 P2d 547 (1980); *Estrada v. Federal Express Corp.*, 298 Or App 111, 121, 445 P3d 1276 (2019). Employment Department administrative rules specify that "good cause" exists when "a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. *** [F]or all individuals, the reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The burden of showing that the claimant had good cause to leave employment rests with the claimant. *Young v. Employment Dept.*, 170 Or App 752, 755-56, 13 P3d 1027 (2000).

In reviewing an EAB decision about whether a claimant had good cause to leave work, we apply a substantial evidence standard to any factual findings. ORS 657.282; ORS 183.482(8)(c); *Campbell v. Employment Dept.*, 256 Or App 682, 683, 303 P3d 957 (2013). As to the determination of good cause itself, our role is to determine whether, in light of EAB's factual findings, the standard set out in the department's rule has been satisfied as a matter of law. *Nielsen v. Employment Dept.*, 263 Or App 274, 277, 328 P3d 707 (2014).

On the issue of this court's review of a determination of "good cause," the Supreme Court's decision in *McDowell v. Employment Dept.*, 348 Or 605, 236 P3d 722 (2010), is especially instructive. In *McDowell*, the claimant worked as a high school teacher. After he showed his class a film clip

including a dramatic monologue that contained profanity, the school district placed the claimant on administrative leave. The district's personnel director told the claimant that he would be recommending claimant's discharge. The claimant sought advice from his union representative and a union attorney. The union attorney advised the claimant to resign before being discharged. The claimant did just that and then applied for unemployment benefits. EAB ultimately concluded that the claimant had voluntarily left work without good cause. *Id.* at 608-09. The board reasoned that it was not clear that the district actually was going to discharge the claimant. Leaving work because an employer *might* discharge an employee, EAB said, is not enough, especially when other, predismissal remedies remained available. *Id.* at 615-16.

The Supreme Court reversed. The court emphasized the objective nature of the standard for determining whether a claimant left work without "good cause":

> "When, as here, an employee is facing a prospective discharge, whether resigning in lieu of that prospective discharge is for 'good cause' depends not on a hindsight determination of whether, in fact, claimant would have been discharged by the school board. The issue depends, instead, on whether a reasonable person facing that prospect of discharge would consider the prospect so grave a circumstance that resigning was the only reasonable option."

Id. at 619. The court concluded that, given the union attorney's advice that the district was going to fire the claimant and given that discharge would have created serious problems for him in obtaining future employment, a reasonable person of normal sensitivity and exercising ordinary common sense would have believed that leaving work was the only reasonable course for him to take. *Id.* at 620.

With the foregoing standards in mind, we turn to the county's contentions in this case. First, the county's contentions that there was no evidence that it was going to discharge claimant and that other predismissal remedies remained unexplored are beside the point. As in *McDowell*, the issue here is not whether the county would have actually discharged claimant, but whether, under the circumstances,

a reasonable person would have thought that resigning was the only reasonable option.

Second, as to whether the board erred in determining that claimant had good cause for resigning, it is undisputed that claimant thought that he was going to be discharged. Given the advice of his union representative and steward, that belief was reasonable. As in *McDowell*, in light of that advice and understanding, whether the county actually planned to discharge claimant is not material. And, as in *McDowell*, claimant understandably was concerned about the difficulties of finding new employment following discharge. Under the circumstances, EAB did not err in concluding that a reasonable person of normal sensitivity and exercising ordinary common sense would have believed that leaving work was the only reasonable course for him to take.

Affirmed.