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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

2014-EAB-0853

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 144218). Claimant filed a timely request for hearing. On April 29, 2014, ALJ Vincent conducted a hearing at which the employer did not appear, and on May 2, 2014 issued Hearing Decision 14-UI-16763, affirming the Department's decision. On May 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's representative submitted a written argument on claimant's behalf. In that argument, the representative asserted as fact certain information that was not in the hearing record. Because neither claimant nor his representative showed that factors or circumstances beyond claimant's reasonable control prevented claimant from offering this new information during the hearing, as required under OAR 471-041-0090 (October 29, 2006), EAB has considered only evidence received into information at the hearing when reaching this decision. EAB has also drawn its own inferences from the evidence in the record, rather than accepting claimant's characterization of that evidence.

FINDINGS OF FACT: (1) SAS Retailing Merchandising, LLC employed claimant as a project coordinator from June 17, 2013 until February 11, 2014. Claimant was assigned to work as a project coordinator for the employer's client, the Fred Meyer division of the Kroger Company. Claimant's work site was located at the Fred Meyer corporate offices.

(2) At hire, claimant understood that the employer intended to promote him to the position of account manager if he performed certain duties well and if the employer was awarded a particular contract from the Kroger Company. After claimant's supervisor left, his manager became Mark Oliverio (Oliverio),

the employer's vice-president for the Pacific Northwest region. In August 2013, Oliverio had told claimant that he was "still on track" for the promotion to account manager. Audio at 10:23.

(3) On January 8, 2014, claimant met with Oliverio at a restaurant near claimant's worksite. Oliverio wanted to discuss claimant's work performance. Audio at ~9:50. Oliverio mentioned to claimant that if claimant "didn't like what [Oliverio] had to say in the meeting, [claimant] may not want to continue with the company." Audio at ~ 12:30. Oliverio then told claimant that he did not like the way that claimant dressed at work and that claimant was overweight and he needed to lose some weight. Oliverio also told claimant that claimant needed to make more "small talk or [have more] non-work-related conversations" with the Kroger employees that he worked with and that claimant needed to shorten some of his email communications. Audio at ~ 12:50. Oliverio told claimant that if he did not make the requested changes that "this is not going to work out for you going forward." Audio at ~ 12:47. Oliverio also told claimant that he was going to make be making his "final decision to keep [claimant] on the team or not by the end of the second week in February," which claimant interpreted to mean by February 14, 2014. Audio at ~ 13:20.

(4) After January 8, 2014, Oliverio assigned claimant to train two employees to take over claimant's position as project coordinator. After claimant completed the training, claimant was not informed of his new position.

(5) On February 11, 2014, Oliverio, an account manager, some other managers and claimant were working in a restaurant near the Portland airport. Claimant observed that two of the managers were training a woman for the position of account manager that claimant thought he was going to receive. In the restaurant, claimant performed work creating spreadsheets on a laptop computer beginning at 7:00 a.m. During this time, claimant had only one thirty minute break. By 5:30 p.m., claimant's eyes were tired because the lighting in the restaurant was dim and his right hand was "swollen" from manipulating the computer mouse. Audio at ~ 23:58. Claimant held up his hand and told Oliverio at that time that he wanted to go home. Audio at ~25:59. In response, Oliverio gestured with his own hand, moving his fingers close together, and told claimant that claimant "was this close to not being on the team any anymore." Audio at ~26:11. Oliverio also commented to claimant, "I don't know if I can trust you to get the job done. You need to work faster." Audio at ~ 24:02. Claimant stayed working for forty-five more minutes until he completed the spreadsheets

(6) On February 11, 2014, after claimant completed the spreadsheets, claimant quit work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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. Although claimant testified that he developed eye strain when working for the employer and

needed to get glasses, and that he had started to develop an "arthritic type of carpel tunnel syndrome" in the hand that he used to manipulate a computer mouse, he did not present sufficient evidence to establish that either of these symptoms were permanent or long-term physical impairments within the meaning of 29 CFR §1630.2(h). Audio at ~15:19. Accordingly, we assess whether claimant had good cause to leave work from the perspective of a reasonable and prudent person without impairments.

Claimant's testimony was, in some respects, troubling. For example, although he generally contended at certain points in his testimony that Oliverio had told him on January 8, 2014 that he was going to be discharged if he did not lose weight, when he specifically described the content of that conversation, claimant did not mention any such definitive statement from Oliverio. *See* Audio at ~12:47. ~36:21; Written Argument at 3. When testifying that his supervisor had not responded to his requests for a larger computer monitor to alleviate his eye strain, claimant first stated that he asked the supervisor if the supervisor had contacted the human resources department about his request. Audio at ~17:28. Then, as his testimony developed, after claimant was asked the reason that he had not contacted the human resources department himself about these issues, claimant described the employer's human resources department as being "purely administrative" and not providing any traditional human resources services to employees, making his earlier question to his supervisor about contacting human resources nonsensical Audio at ~19:12; ~33:26. In addition, claimant's testimony that he was first made aware that he was not going to be promoted into the account manager position on February 11, 2014, when he observed the managers training the new manager, was contradicted by other parts of his testimony when he stated he was "basically told" at the January 8, 2014 meeting that he was not going to be promoted into the account manager position. Audio at~21:11, ~36:21. The inconsistencies in claimant's testimony, and the aspects of it that seemed rehearsed to rule out that he had any recourse other than to tolerate Oliverio's allegedly abusive behavior, cause us to question whether it should be taken at face value. *See* Audio at ~18:03, ~28:28, ~33:26.

As best can be determined from the record and claimant's written argument, claimant left work on February 11, 2014 because his hand was swollen after spending the day typing and manipulating a mouse, his eyes were tired and he thought that Oliverio was not appreciative of his efforts that day. With respect to his physical condition, although claimant contended that his hand was "swollen" from manipulating the mouse, nowhere does he contend that he was in pain or that he was reasonably unable to perform more work. Audio at ~23:07. Nowhere does claimant state that he told Oliverio that he was in pain, that his hand required him to cease working that day or on any other day or that his health or eyesight was being jeopardized. Although claimant's representative baldly asserts in his written argument that claimant told Oliverio that he was in pain on February 11, 2014, that is not supported by the actual evidence in the record. *See* Written Argument at 4; *see also* Exhibit 1 at 7. On this record, although Oliverio might have been more sympathetic to claimant's apparent discomfort, claimant did not demonstrate that his physical condition or the state of his health rose to the level of an objectively grave reason to leave work. Nor, when claimant described any of Oliverio's specific statements made to him, did he show that they were callous or so insensitive that they constituted the type of oppressive or abusive work environment that EAB has previously held were good cause to leave work. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits); *Beth A. Jackson* (Employment Appeals Board, 13-AB-0502, April 2, 2013) (ongoing unwanted sexual advances and touching despite making complaints); *Brenda A. Kordes* (Employment

Appeals Board, 12-AB-3213, January 8, 2013) (ongoing sexual harassment); *Stephen G. Wilkes* (Employment Appeals Board, 12-AB-3173, December 14, 2012) (ongoing verbal abuse despite complaints); *James D. Hayes* (Employment Appeals Board, 11-AB-3647, February 9, 2012) (sexist and ageist remarks); *Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011) (supervisor's ongoing verbal abuse and fits of temper); *Shirley A. Zwahlen* (Employment Appeals Board, 11-AB-2864, December 12, 2011) (management's ongoing ageist comments and attitudes); *Denisa Swartout* (Employment Appeals Board, 11-AB-3063, October 28, 2011) (corporate culture hostile to women); *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011) (supervisor's regular fits of temper and verbal abuse). From claimant's descriptions of Oliverio's behavior, it appears that Oliverio may have been demanding, not particularly communicative, oriented on claimant's work productivity and not especially sympathetic to claimant's needs or preferences. However, none of the evidence that claimant presented about Oliverio shows, more likely than not, that Oliverio's behavior was other than within the range of acceptable tolerances.

With respect to Oliverio's lack of appreciation for claimant's efforts on February 11, 2014, claimant failed to show, more likely than not, that a failure to express gratitude was an objectively grave reason to leave work. Although claimant contended that Oliverio's attitude and statements that day and on earlier days indicated that Oliverio intended to discharge claimant on February 14, 2014, claimant did not provide any specific evidence that was Oliverio's actual and specific intention. Audio at ~26:47, ~40:40. The actions and statements on which claimant relied to support this conclusion were all ambiguous expressions of the Oliverio's intentions. Construing the evidence in claimant's favor, although claimant showed he was not going to be promoted to account manager, he did not show, more likely than not, that Oliverio did not intend to continue his employment in some capacity after February 14, 2014. EAB has consistently held that, to constitute good cause to leave work, a claimant must show that his or her discharge, not for misconduct, was inevitable and imminent. *See Heather Q. Muma* (Employment Appeals Board, 2014-EAB-0520, May 6, 2014) (good cause shown when claimant's employer told claimant she could not avoid discharge); *Kevin B. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013) (good cause show when a discharge was inevitable and imminent); *Mark A. Sorenson* (Employment Appeals Board, 12-AB-2907, November 28, 2012); *Susan L. West* (Employment Appeals Board, 12-AB-2961, November 16, 2012) (good cause shown when resigned to avoid an imminent and inevitable discharge) *and compare Melody G. Zehner* (Employment Appeals Board, 12-AB-2831, November 16, 2012) (claimant did not have good cause to leave work when her discharge was not assured); *Sharon N. Martin* (Employment Appeals Board, 12-AB-2916, November 19, 2012) (claimant did not have good cause to quit work to avoid a performance improvement plan she thought would result in her discharge, but discharge was not inevitable); *Dora Sue Redford* (Employment Appeals Board, 12-AB-2914, November 19, 2012) (claimant did not have good cause to quit work to avoid a performance improvement plan she thought would result in her discharge, but discharge was not assured). Although Oliverio was not apparently satisfied sufficiently with claimant's work to promote him to account manager, claimant did not present evidence establishing that if he did not receive the promotion his discharge was assured and imminent. On the facts as presented by claimant, a reasonable and prudent person, exercising ordinary common sense, would not have quit work until the employer clearly communicated that it did not intend to continue his employment in some capacity after February 14, 2014.

Claimant did not show good cause to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-16763 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: July 2, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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