EO: 300
BYE: 201439

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-0973

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 83902). Claimant filed a timely request for hearing. On May 23, 2014, ALJ Shoemake conducted a hearing, and on May 29, 2014, issued Hearing Decision 14-UI-18648, affirming the administrative decision. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) From December 29, 1998 to February 28, 2014, the U.S. Department of Agriculture employed claimant, last as resource assistant.

(2) The work of a resource assistant is meticulous and exacting. Claimant had difficulties accurately performing her work, and found her inability to do so very stressful. The employer made several efforts to assist claimant in improving her work performance, including arranging for claimant to work with a resource specialist and reducing claimant's workload. Claimant was unable to work successfully with the resource specialist, and was upset when the employer took duties away from her.

(3) Claimant sought counseling for the problems she was having at work, and also spoke to her supervisor and the chief steward for the union. Claimant's supervisor told her there was nothing he could do. The union steward also told claimant that the union could do nothing for her.

(4) By November 2013, claimant began experiencing anxiety and panic attacks so severe that she could no longer function in her job. On December 2, 2013, the employer approved Family Medical Leave Act (FMLA) leave for claimant.

(5) Claimant's doctor released her to return to work on January 21, 2013. Claimant called in sick that day, because she experienced severe anxiety and vomited at the thought of returning to work.

(6) On January 22, 2014, claimant went to work but experienced a panic attack soon after she arrived. Claimant left her work site; after approximately 45 minutes, she returned and continued to work for the rest of her shift.

(7) On January 23, 2014, claimant was unable to work because she was experiencing anxiety and panic attacks and called in sick. On January 24, 2014, claimant called her supervisor, told him she was unable to work that day, and explained that she would get an appointment with her doctor.

(8) Claimant's doctor concluded that claimant was unable to work from January 21, 2014, through March 28, 2014. Claimant's doctor did not recommend that she quit her job, however. The employer approved FMLA leave for claimant for that period.

(9) By letter dated February 24, 2014, the employer notified claimant that her FMLA leave would be exhausted on February 27, 2014, and ordered claimant to return to work on February 28, 2014. The letter explained that claimant could request additional leave, but cautioned that "although your medical condition may continue, the obligation of the Agency to approve leave for your continued absence is discretionary. If you cannot return to work, you could be placed on unauthorized status and/or removed based on your non-availability for duty." Exhibit 1.

(10) By email dated February 27, 2014, claimant submitted her resignation, effective February 28, 2014. Claimant left her job because she was unable to work due to the severe anxiety and panic attacks she experienced when she attempted to work.

CONCLUSION AND REASONS: We disagree with the ALJ. 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant suffered from severe anxiety and experienced panic attacks, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and

prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-18648, the ALJ concluded that "[w]hile claimant's stress was a concern, she failed to show that it amounted to a grave situation." The ALJ asserted that "[c]laimant's physician released claimant to return to work without restrictions." We disagree. Contrary to the ALJ' conclusion, claimant's doctor had not released claimant to return to work on February 28, 2014, the date on which claimant resigned her position. In regard to the gravity of claimant's situation, the record shows that claimant's panic attacks and anxiety were crippling; at the thought of returning to work after two months of leave, claimant vomited. Claimant could never successfully perform her job after her leave ended; she was able to work for only a day before her symptoms became so severe that the doctor concluded she could not work. Under these circumstances, we conclude that claimant's situation was grave.

Claimant established that she had no reasonable alternatives to quitting her job. Although she could have requested additional leave, there is no evidence that the leave, if granted, would have been paid. It is unlikely the leave would have been paid, given the amount of time off claimant had already taken. Any additional leave granted to claimant would not have been job-protected under FMLA. (Exhibit 1 – Employer's February 24, 2014 letter). Taking a protracted, unpaid, and unprotected leave of absence is not a "reasonable alternative" to leaving work under OAR 471-030-0038(4). *See Sothras v. Employment Div.*, 48 Or App 69, 616 P2d 525 (1980).

Nor do we agree with the employer's contention that claimant could have sought help from the union or utilized the assistance of the employer's alternative dispute resolution (ADR) process. Neither alternative offered any meaningful solution for the problems claimant faced. The union had already refused to help claimant.[1] While an ADR process might be useful in resolving a conflict between coworkers, it could do little, if anything, to alleviate claimant's severe anxiety and panic attacks.

Under the circumstances of this case, a reasonable and prudent person with claimant's impairments would have considered the situation so grave that she had no reasonable alternative but to quit work. Claimant voluntarily left work with good cause, and is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-18648 is set aside, as outlined above.

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

DATE of Service: <u>July 15, 2014</u>

[1] At the hearing, the president of the union local which represented claimant testified that had claimant asked, the union could have requested that the employer make "reasonable accommodations" for claimant's impairments, such as a reassignment or reduced workload. The union president noted, however, that any such accommodations "would have hinged upon medical determination of her capabilities to do the job." (Transcript at 36). On February 28, 2014, the date on which claimant resigned her position, her doctor had made a "medical determination" that claimant was not capable of performing her job. Thus, even if the claimant had again sought help from the union, it could have done nothing for her.

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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