

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1331

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125313). Claimant filed a timely request for hearing. On July 22, 2014, ALJ Wipperman conducted a hearing, and on August 1, 2014 issued Hearing Decision 14-UI-22687, concluding the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause. On August 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Murray Smith & Associates, Inc. employed claimant from December 21, 2005 to June 6, 2014 as an administrative manager.

(2) In March 2013, claimant was diagnosed with multiple sclerosis (MS). Claimant's doctor advised her that stress could trigger a MS episode, when claimant would experience outward symptoms of MS.

(3) Before May 2014, claimant's employer notified claimant it planned to implement organizational changes, including creating a new administrative operations position. Claimant was concerned the new position would affect her job.

(4) On May 22, 2014, the employer's assistant director told claimant the employer was going to conduct an open application process for the new administrative operations position, and invited claimant to apply. Claimant did not meet the minimum education and experience qualifications stated in the job description. The duties for the new position included many of claimant's duties as administrative manager. The assistant director told claimant it would have continuing employment for claimant if she were not selected for the new position. Claimant experienced anxiety from the information she learned on May 22, 2014.

(5) On May 23, 2014, claimant began to experience increased MS symptoms including trouble concentrating and walking, stomach problems, blurred vision, speech problems, lack of balance, and the

inability to sleep. That evening, claimant's leg "gave out" while she was on a bus, causing her to fall. Audio Record at 13:20 to 13:34. Claimant's symptoms worsened on May 24 and 25, 2014.

(6) Claimant did not discuss her working conditions or the change in her medical condition with her doctor during May 2014.

(7) Claimant did not ask the employer for time off work.

(8) On May 26, 2014, claimant notified the employer that she would quit work on June 6, 2014 because she believed work-related stress triggered her MS episode and would continue to worsen her symptoms and cause new ones.

(9) The employer permitted claimant to telecommute and work from home on May 29 and 30, 2014 because claimant was not able to travel to work due to her MS symptoms.

(10) On May 28, 2014, the employer's human resources representative told claimant her employment would end on May 30, 2014 because it would be in claimant's "best interest." Audio Record at 16:15 to 16:30. Claimant worked until May 30, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause.

The first issue in this case is whether claimant quit work or was discharged. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Claimant notified the employer on May 26, 2014 that she was quitting work on June 6, 2014. However, the employer did not allow claimant to work through her notice period. Because claimant was willing to continue working for the employer until June 6, but was not allowed to do so by the employer, the May 26, 2014 work separation was a discharge.

The record fails to show that the employer discharged claimant due to claimant's willful or wantonly negligent violation of the standards of behavior which the employer had the right to expect of claimant, or an act or series of actions that amounted to a willful or wantonly negligent disregard of the employer's interest. We therefore conclude the employer discharged claimant, not for misconduct. *See* OAR 471-030-0038(3)(a).

However, ORS 657.176(8) provides that when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that she is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date.

Claimant notified the employer she would end her employment on June 6, 2014. The employer discharged her, not for misconduct, on May 30, 2014, less than 15 days prior to her planned quit date. Therefore, we must determine whether claimant's planned quit would have been without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of 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 had multiple sclerosis, 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.

Claimant quit work because her multiple sclerosis symptoms worsened after claimant experienced increased anxiety at work due to learning new information about the new administrative operations position. However, claimant did not request accommodation for her condition before quitting work. The employer allowed claimant to telecommute and work from home during the MS episode that preceded her decision to quit. Thus, it is reasonable to infer that the employer would allow claimant to telecommute as an accommodation for her condition. Claimant failed to show that continuing to work, and if necessary, requesting further accommodation for her condition, would have been futile. Additionally, rather than leave work, claimant had the option of requesting time off work to recover from her symptoms. Claimant did not show that the factors causing the increased stress in May 2014 would continue. Claimant had the option of continuing her employment until she knew if she would be hired for the new administrative operations position, or until she knew what her duties would be after that position was filled. Absent a showing that these reasonable options were futile, we cannot find that claimant had no reasonable alternative but to quit work.

In sum, claimant notified the employer of her intention to voluntarily quit work without good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits except that she is eligible for benefits for the week from May 25 through 31, 2014 (week 22-14), which is both the week in which the actual discharge occurred and the week prior to the week of the planned quit date.

DECISION: Hearing Decision 14-UI-22687 is affirmed.

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

DATE of Service: September 11, 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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