

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1403

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 111041). Claimant filed a timely request for hearing. On July 15, 2014, ALJ Frank conducted a hearing, and on August 8, 2014 issued Hearing Decision 14-UI-23056, affirming the Department's decision. On August 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Consumer Cellular employed claimant as a call center customer service representative from August 20, 2012 to May 16, 2014. Claimant worked in a high call volume environment and spoke to customers during the duration of her eight hour shift.

(2) On January 30, 2014, there was a "meltdown" in the call center computer room that produced toxic fumes, caused claimant to lose her voice and led to her and other employees leaving work. Audio Record ~ 8:00 to 8:45.

(3) After January 30, claimant, who had preexisting asthma, often experienced laryngitis after taking calls for approximately two hours that caused her to take unpaid leave for the remainder of the work day. In March 2014, claimant's physician verified that claimant's laryngitis condition constituted a "serious health condition" under the Family and Medical Leave Act (FMLA), required her to be off work continuously between March 20 and 24 and thereafter, intermittently, at the estimated rate of four days per month. Exhibit 1.

(4) Between March 24 and May 16, 2014, claimant's laryngitis condition was exacerbated by her call work, caused her to miss approximately 40 more hours of work and was not improving. Claimant's leaves were unpaid, caused her to fall behind in her rent and expenses and claimant, who was the sole source of support for her and her dependent child, became in danger of being evicted. On May 16, 2014, claimant was unable to work due to her laryngitis. Audio Record ~13:10 to 13:35. Rather than take additional unpaid leave, she notified her employer that she was resigning for health reasons, specifying, "I need to take an extended period of time off the phones to recover my voice." Exhibit 1. She requested her retirement pay of approximately \$1700 "to pay rent and groceries" and "survive until I get healthy enough to work again." Exhibit 1.

(5) At the time claimant resigned, the employer had no other positions available for her.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant had good cause to voluntarily leave work.

To qualify for unemployment benefits, claimant must prove that she quit work for good cause. ORS 657.176(2)(c). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). Claimant had episodic laryngitis, a "serious health condition" under FMLA, that was expected to continue through at least August 20, 2014, and was likely a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). Therefore, we analyzed claimant's decision to leave work using the standard of a reasonable and prudent person with the characteristics and qualities of an individual with such impairment. OAR 471-030-0038(4).

Claimant quit work for health reasons, specifically, "the need to take an extended period of time off [work] to recover [her] voice" and return to gainful employment sufficient to support her and her dependent child. On May 16, she was unable to work and "had no idea" when she would be able to return. Audio Record ~ 13:00 to 13:30. In Hearing Decision 14-UI-23056, the ALJ concluded claimant left work for that reason without good cause, reasoning,

While claimant's testimony regarding her symptoms on May 16, 2014 does not necessarily lack credibility, there is no evidence to suggest that she would have had any reason to believe that the symptoms would continue indefinitely...Even if gravity had existed, claimant had the reasonable alternative of simply taking additional leave.

Hearing Decision 14-UI-23056 at 3. However, claimant's "serious health condition" under the Family and Medical Leave Act (FMLA) was estimated by her health care provider to incapacitate her at least four days per month indefinitely. Exhibit 1. Moreover, "simply taking additional leave" was not a reasonable alternative available to claimant under the circumstances. The additional leave would have been unpaid and the amount of unpaid leave claimant had taken by May 16 had put her in a precarious financial condition to the extent she was in danger of being evicted. The intermittent leave she had taken had proven to be inadequate to allow her to recover her voice long term and full time leave would have put her in even greater financial straits. Quitting work and gaining access to her retirement was the only alternative available that would provide what she needed - time away from the environment exacerbating her health problems, access to retirement funds to pay her back rent and retain her

residence, and time to find a new job in a different, lower volume, more suitable call environment that would not strain her voice. *See, also, Taylor v. Employment Division*, 66 Or App 313 (1984), *Sothras v. Employment Division*, 48 Or App 69 (1980)(leave without pay for an unknown and possibly protracted period is not a reasonable alternative to quitting work).

In Hearing Decision 14-UI-23056, the ALJ also speculated that claimant's laryngitis condition was exacerbated by her smoking habit and reasoned that the gravity of her situation was the result of her own deliberate actions and apparent failure to engage in a smoking cessation program. Hearing Decision 14-UI-23056 at 3. However, his assertion was without evidentiary support other than an off-comment by the employer's witness that in her lay opinion claimant's smoking might have contributed to the laryngitis, and not any medical documentation or evidence that a physician had suggested to claimant that she would cure her laryngitis if she quit smoking.

Claimant did not have reasonable alternatives to leaving work under the circumstances described. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-23056 is set aside, as outlined above.

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

DATE of Service: September 30, 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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