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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
2015-EAB-0369

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 152911). Claimant filed a timely request for hearing. On March 24, 2015, ALJ R. Frank conducted a hearing, at which the employer failed to appear and claimant appeared with her attorney, and on March 27, 2015 issued Hearing Decision 15-UI-35885, affirming decision # 152911. On April 3, 2015, claimant filed an application for review of Hearing Decision 15-UI-35885 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the parties' written arguments. Both parties' arguments contained information not offered into evidence at the hearing. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. In its argument, the employer asserted that it failed to appear at the hearing and offer evidence at that time because, due to an "administrative oversight," notice of the hearing was not received by the "appropriate staff." That assertion does not establish that the employer's failure to appear at the hearing and offer information into evidence at that time was due to factors or circumstances beyond its reasonable control. EAB therefore did not consider the employer's new information when reaching this decision.

In her argument, claimant asserted that the ALJ did not allow her to answer questions fully, interrupted her numerous times, and did not call her witnesses to corroborate her testimony. We reviewed the

hearing record in its entirety, and although the ALJ periodically interrupted claimant's testimony, he did so only when claimant's answers were non-responsive to the question asked. Given that the employer did not appear at the hearing to dispute claimant's testimony and that the ALJ did not disregard any of claimant's testimony as lacking in credibility or plausibility, claimant did not show that the ALJ's failure to allow her to corroborate her testimony was prejudicial to her position. Moreover, at the outset of the hearing, claimant's representative indicated that he had only one additional witness, claimant's acupuncturist, and at the end of the hearing agreed that the testimony would not be necessary if the ALJ would later admit the acupuncturist's chart records into the hearing record, which he did. Audio Record ~ 6:25 to 8:30; 41:45 to 45:10; Exhibit 2. Viewed in its entirety, the record shows that the ALJ inquired fully into the matters at issue and gave claimant, who was represented by an attorney, a reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Portland State University employed claimant, last as the English Department office manager, from March 19, 2004 to December 12, 2014.

(2) For several years prior to the end of her employment, claimant intermittently suffered from migraine headaches and was prescribed medication for the condition in 2013.

(3) As office manager, claimant had multiple responsibilities including those related to office staffing, budget, student graduation, student awards and departmental compliance with payroll and civil rights laws. In 2014, claimant experienced increased stress over staff shortages based on medical leaves and allegations regarding intra-departmental nepotism, sexual harassment, irregular performance evaluations, mismanagement of departmental finances, unreasonable performance expectations, payroll errors and embezzlement of funds. Many of the allegations did not directly involve claimant, but as office manager she felt some responsibility for the office environment. Her migraine headaches increased in frequency and she sought and obtained treatment in the form of prescription medication and acupuncture.

(4) Claimant took a week of vacation from August 25 through September 3, 2014. When she returned to work, she learned that the departmental chair who acted as claimant's supervisor had been removed and an assistant dean would supervise the department in the interim. The assistant dean notified claimant that she was being placed on a "work plan" as "a tool to assist [claimant]" in performing her duties that required her to forward all her email communications to the assistant dean for monitoring. Exhibit 1. Claimant considered the subsequent email critiques she received a "continuous stream of criticism" and felt she was "under a microscope." Exhibit 1. On September 13, 2014, the assistant dean notified claimant that a faculty member about whom claimant had complained in the past had been selected to serve part time as claimant's supervisor, which caused claimant additional stress.

(5) In late September, claimant concluded she could no longer focus or function in her position due to her increased stress level and frequency of migraines and the employer was only "looking for a reason to fire [her]", which she wanted to avoid. Exhibit 1. On September 23, 2014, claimant resigned her position, effective December 12, 2014 for those reasons.

(6) When claimant resigned, she had 500 hours of accrued sick leave and seven weeks of accrued vacation available to her but was "under the impression" she was not yet to a point where she could

request a medical leave of absence for her stress and migraines. Exhibit 1. She did not consult with the employer's human resources office or her medical providers about obtaining a medical leave of absence and her medical providers did not recommend that she quit work.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 migraine headaches over several years and we assume, without deciding, that her condition was a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with such 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 the employer for an additional period of time.

Claimant quit when she did, in part, because she believed the stress and migraines she was experiencing made it impossible for her to focus enough to adequately perform her job and would lead to increased errors, giving the employer sufficient cause to fire her. Exhibit 1. However, claimant was aware that the employer had granted several members of her department medical leaves of absence under the Family and Medical Leave Act (FMLA) during 2014 and understood that she had over 700 hours (which totals more than 17 weeks) of accrued paid vacation and sick leave available to her. Exhibit 1. Despite that knowledge, claimant did not assert or show that she even inquired of the employer or her medical providers about obtaining FMLA leave for herself given what she believed were her debilitating stress levels and migraines. Claimant failed to show that seeking paid medical leave for an extended period of time was an unreasonable or futile alternative to permanently severing her employment relationship when she did and that no reasonable and prudent person with the characteristics and qualities of an individual with her impairment would have availed herself of that option and continued to work for the employer for an additional period of time.

Claimant also quit, in part, because she believed that her work plan was "disciplinary" in nature and because her communications were constantly monitored, the employer was "looking for a reason to fire [her]." Although claimant believed she eventually would be discharged and was being encouraged to resign, she also understood that she had the opportunity to continue to work under the plan, while attempting to conform her work performance to the employer's expectations, and that it was possible the employer would allow her to continue working indefinitely. Moreover, on this record, her potential discharge would not have been for misconduct, because there was no evidence she was consciously indifferent to the employer's expectations.[1] We have consistently held that individuals who quit work to

[1] Because this record does not show that claimant's potential discharge would have been for misconduct, OAR 471-030-0038(5)(b)(F) does not apply.

avoid an immediate or imminent discharge, when the discharge would not have been for misconduct, and the only issue remaining was to negotiate advantageous separation terms, have quit work for good cause.[2] However, this case is distinguishable. Claimant's discharge was not inevitable, nor would it have been immediate. And, claimant did not assert or show that being discharged would have been a particularly onerous burden, either specifically for herself or generally for individuals in her profession. Claimant did not specify any reason why the possibility of being discharged under the employer's work plan was such a grave situation that no similarly situated reasonable and prudent person with the characteristics and qualities of claimant's impairment would have continued working for the employer and done the best they could under the circumstances alleged.

Because claimant had reasonable alternatives to leaving work, claimant failed to show that the reason or reasons that prompted her decision to leave work constituted good cause under ORS 657.176(2)(c). Accordingly, claimant is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-35885 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: <u>June 4, 2015</u>

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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[2] *See Susan L. West* (Employment Appeals Board, 12-AB-2961, November 16, 2012) (claimant had good cause to quit work to avoid being imminent or inevitable discharge); *David J. Schalock* (Employment Appeals Board, 12-AB-2919, November 15, 2012) (remand to determine whether claimant's potential discharge was for misconduct, and whether he had good cause to quit to avoid being discharged, not for misconduct, when his immediate work separation was assured and the only thing left was to negotiate how the separation would be characterized by the employer to prospective employers); *Debra Legato* (Employment Appeals Board, 12-AB-2824, November 6, 2012) (claimant had good cause to quit to avoid being discharged, not for misconduct, and losing her pharmacy technician certification); *Thomas R. Bailey* (Employment Appeals Board, 12-AB-1609, June 27, 2012) (claimant had good cause to quit to avoid being discharged, not for misconduct, when his discharge was assured and he had reason to believe it would look better on his employment record if he quit instead); *Donna Zelinski* (Employment Appeals Board, 12-AB-0436, March 16, 2012) (claimant had good cause to quit to avoid being discharged, not for misconduct, and receive a severance package); *Timothy E. Case* (Employment Appeals Board, 11-AB-3571, February 3, 2012) (claimant had good cause to quit to avoid being discharged, not for misconduct, and receive a monetary settlement); *compare Melody G. Zehner* (Employment Appeals Board, 12-AB-2831, November 16, 2012) (claimant did not have good cause to quit work when her discharge was not assured and did not specify particular concerns about the stigma of a discharge on her future employability).