

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0712

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114529). Claimant filed a timely request for hearing. On May 26, 2015, ALJ R. Frank conducted a hearing, and on June 3, 2015 issued Hearing Decision 15-UI-39503, affirming the Department's decision. On June 11, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Ken Ware Chevrolet, Inc. employed claimant as a service advisor from June 17, 2002 to March 31, 2015.

(2) Claimant was diagnosed with anxiety. Claimant picked at her skin when anxious, causing wounds and lesions on her body. Claimant was prescribed medication to treat the anxiety and picking, but continued to experience both despite medical treatment.

(3) Claimant had a hearing impairment, and used hearing aids. Claimant had difficulty hearing customers and coworkers despite the hearing aids, because she could not hear people when the hearing aids were adjusted to a low volume, and heard so much background noise when the hearing aids were adjusted to a higher volume that she still could not hear people well.

(4) In approximately 2014, the employer transferred claimant to a noisier work area, which aggravated claimant's hearing difficulties. She experienced work performance problems as a result, and increased anxiety.

(5) The employer was aware of claimant's anxiety, picking and hearing problems for at least one and one-half years, and tried to assist her to improve her work performance. However, the employer did not

transfer claimant to a quieter work area or offer her different duties, and none of the employer's efforts to assist claimant improved her work performance, environment or anxiety.

(6) On March 6, 2015, claimant asked a manager what he had discussed with her coworker, who was also claimant's partner, and the manager would not explain. Claimant felt ignored. She later learned that the manager had offered the coworker duties that could be performed in a less noisy area than her work environment, and which she might have found preferable to her service advisor duties. Claimant felt upset that she was not informed of or offered those duties.

(7) On March 9, 2015, claimant resigned, effective March 31, 2015.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant quit 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 had anxiety and a impaired hearing, which may be considered permanent or long-term "physical or mental impairments" 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 15-UI-39503, the ALJ concluded that claimant did not have good cause for quitting work due to her hearing loss, anxiety and picking because she had reasonable alternatives to quitting work, including obtaining additional treatment, requesting a reduction in hours, asking for a transfer to another position, or taking a leave of absence. Hearing Decision 15-UI-39503 at 3. We disagree that those were reasonable alternatives in this case.

The record fails to show that requesting a reduction in hours or taking a leave of absence were reasonable alternatives to quitting. Claimant's anxiety and picking were associated with performance of her duties in a noisy environment, which also worsened her hearing problems and caused poor work performance. Although taking time off work or working fewer hours would reduce claimant's exposure to those conditions, doing so would do nothing to change the work environment that caused or aggravated claimant's problems. An alternative that would not, as a practical matter, have a tendency to improve the conditions that were causing claimant's workplace problems cannot be considered a reasonable alternative to quitting work.

The record also fails to show that a reasonable and prudent person with anxiety, picking and hearing loss would consider obtaining additional treatment for her anxiety or picking as reasonable alternatives to quitting work. The record shows that claimant was under medical care, and participating in treatment, for those conditions, all of which persisted despite treatment. Absent evidence that a more effective treatment was available to claimant, for instance, evidence that claimant was not following a prescribed

course of treatment from her provider, had refused to follow medical advice from her health care provider to obtain additional treatment, or perhaps that a treatment that would cure or improve her health conditions existed, was recommended, but claimant had refused it, we cannot conclude that the record shows that a reasonable and prudent person with claimant's conditions would consider seeking additional medical care an alternative to quitting work.

Finally, the record fails to show that asking for a transfer to another position was a reasonable alternative to quitting work. The employer was aware of claimant's anxiety, picking and hearing problems, and, although the employer worked with claimant over the course of approximately one and one-half years, claimant continued to underperform in her duties and continued to have problems. Despite knowing of claimant's hearing problem and working with her to overcome them, the employer assigned claimant to work in a noisier area than she had been and did not reassign her when work performance problems related to her working conditions persisted. The employer potentially had duties claimant could perform in a quieter area and did not consider assigning them to her. The employer knew of claimant's anxiety, picking, hearing problems, and work performance problems related to her hearing and anxiety for one and one-half years, and, despite working with claimant on those issues, at least on this record, the employer did not consider transferring claimant to another position or another location within its facility. The record does not show whether that was because the employer did not have another location or duties available, or had another location or duties but did not consider them appropriate for claimant's skill set. However, given the length of time the employer was aware of claimant's problems without transferring claimant to another location or duties, we cannot conclude that a transfer was an alternative available to claimant, or, given the circumstances in this case, that a reasonable and prudent person would have considered requesting such a transfer a reasonable alternative to quitting work.

We therefore conclude that claimant quit work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-39503 is set aside, as outlined above.

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

DATE of Service: July 31, 2015

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.