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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-0764

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95702). Claimant filed a timely request for hearing. On June 15, 2015, ALJ Wipperman conducted a hearing, and issued Hearing Decision 150UI-40058 affirming the Department's decision. On June 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments, on July 1, 2015 and on July 10, 2015. The first written argument complied with all requirements for EAB to consider it and EAB did so. *See* OAR 471-041-0080 (October 29, 2006); OAR 471-041-0090(2) (October 29, 2015). In the second written argument, claimant requested that EAB enter into evidence and consider certain documents that the ALJ did not enter into the record as hearing exhibits because claimant had failed to provide them to the other parties in advance of the hearing. The medical progress notes that claimant requested EAB to consider were from 2006, and, although they indicated claimant had a meniscus tear at that time, they did not provide a prognosis or suggest that claimant was likely to have a permanent or long-term impairment resulting from that knee injury that existed at the time of the work separation. The completed Oregon Safety and Health Administration (OSHA) Hazard Report that claimant sought to have EAB consider was not dated, but from the legend on its face it appears to have been printed from OSHA's website on May 15, 2015, which was approximately a month after claimant left work, and could not have been completed by claimant in handwriting earlier than it was printed. As well, there is nothing in the completed report that suggests it was ever submitted to OSHA or that OSHA ever investigated claimant's report. Since claimant apparently offered the OSHA report to support her contention that conditions in the workplace were unsafe when she left work, the report adds nothing to her testimony at hearing about the allegedly unsafe conditions. For these reasons, neither document appears directly relevant to the issues before the

ALJ or EAB, and EAB did not consider them when reaching this decision. *See* OAR 471-041-0090. EAB considered only information received into the hearing record.

FINDINGS OF FACT: (1) Fred Meyer Store employed claimant from April 10, 2015 until April 18, 2005.

(2) In 2005, claimant tore the meniscus in her knee. Claimant recovered from this injury. After claimant's recovery, she was able to work at physical jobs that required lifting without further injuring her meniscus. Claimant attributed her ability to avoid subsequent meniscus injury to the safe lifting procedures she used.

(3) On April 16, 2015, the first day that claimant worked after she attended the employer's orientation for new employees, she was assigned to work in the employer's nutrition department. When claimant lifted a box at work, she filed a "twinge" in her right knee. Audio at ~8:20. Claimant was able to work that day until the end of her shift. Sometime after her shift was over, claimant told the food department manager that the physical demands of working in the nutrition department were too great and she asked to be transferred to the produce department, which she thought would be less physically demanding. Audio at ~31:46. The manager agreed and re-assigned claimant to the produce department to work as a fruit cutter. On approximately that same day, claimant called the employer's human resources manager to ask if she could have a back belt to assist her when lifting. Claimant later called the human resources manager to inform her that she had been reassigned to the produce department. The human resources representative was not in her office that day because she was on a short vacation, and was unable to respond to claimant's calls.

(4) On April 17, 2015, claimant reported to the produce department, where she was assigned to work with another employee as her trainer. Claimant saw that boxes and crates were stacked high in the work area and concluded that she would need to perform the same sort of lifting as she had done in the nutrition department. Claimant asked the trainer if she could have a back belt to assist her in lifting. The trainer told claimant that he did not have any back belts. Claimant began to work and started to perform some lifting. Claimant asked the trainer if would help her when lifting and he told her that she needed to lift the boxes herself. At some point during claimant's shift, a box fell from a stack of piled boxes. As claimant bent over to pick up the box she felt another "twinge" in her right knee. Audio at ~8:40. Claimant was able to work for the remainder of her shift and went home. Before she left that store, claimant did not tell the food manager or her trainer that she thought she had injured herself.

(5) On April 17, 2015, after she arrived at home, claimant concluded that she was unwilling to perform work for the employer under the conditions that existed in the produce department. Claimant called the food department manager, and left at least one message for him stating that she thought she had injured herself at work and she had concerns about safety conditions in the produce department. The food department manager did not receive any message or messages from claimant. Claimant called the human resources manager and left her a message stating that she had concerns about working for the employer and that "I don't think I'll be able to work for [the employer]." Audio at ~43:01. The human resources manager did not respond to claimant's call because she was still out of the office on the short vacation.

(6) By the morning of April 18, 2015, claimant had not heard from the food department manager or the human resources manager. On that day, claimant sent an email to the food department manager informing him she was quitting work. Thereafter, claimant did not return to the workplace. When the human resources manager retuned to work and reviewed her voicemail messages, claimant had already quit work.

(7) When claimant left work, the employer had many available positions in its store that required fewer physical demands than claimant's positions in the nutrition and the produce department. If claimant had not resigned but had requested a transfer to a less physically rigorous position, the employer would have considered reassigning her. Audio at ~36:18.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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). If a claimant has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), she 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.

For purposes of this decision, claimant's testimony that she tore her meniscus in 2005 is accepted. However, claimant did not present sufficient evidence to establish either that she did not fully recover from that injury or that, in 2015, it constituted a permanent or long-term impairment. Audio at ~20:58, ~22:58, ~23:20, ~27:47. For this reason, claimant did not establish that the modified standard for determining good cause when a claimant is impaired applies to her decision to leave work. Even if she had, our decision would remain the same for the reasons that followed.

Claimant contended that she left work on April 18, 2015 because neither the food department manager nor the human resources manager had responded to her phone messages on April 17, 2015, and she thought that, without some assurances from them about the safety of her working conditions, she risked additional injury if she reported for work on April 18, 2015. Audio at ~11: 30, ~13:06, ~15:05, ~17:59, ~20:24. Accepting that claimant had experienced an injury to her knee on April 17, 2014 and that claimant left messages sometime after 3:30 p.m. that day for both the food department manager and the human resources manager to report the injury and her safety concerns, the failure of either to return her calls by the next morning was not good cause for her to conclude that the employer was going to subject her to unsafe working conditions if she returned to work the next day. This was particularly so when the employer had only one day before accommodated her request to transfer her to a less physically demanding position and she had no reason to believe that either manager would be less receptive to a second request. That neither manager responded to claimant's calls by the beginning of the next business day was not, in and of itself, an objectively reasonable basis for claimant to conclude that one or both of them was likely to be indifferent to her expressed concerns or her injury. A failure to return her calls before even half a business day had passed could have just as likely meant that, as was the case

here, one or both managers were not in the workplace or that one or both had other more pressing or exigent duties to attend to before responding to her messages. Further, there was also no apparently grave reason for claimant to quit after giving the employer such short notice of her injury since claimant presumably had the reasonable alternative of calling in to work stating that she was going to absent due to injury and then trying to resolve her safety issues with the employer while she allowed her knee to heal. Finally, claimant surely knew of her option to seek a transfer to a less physically demanding position since she had so recently sought a transfer to the produce department for that reason, and she did not pursue that reasonable alternative in lieu of quitting, although the food service manager testified that such positions were available. Audio at ~36:18.

On these facts, a reasonable and prudent employee, exercising ordinary common sense would not have concluded that she needed to leave work until she exhausted all reasonable alternatives to quitting or reasonably determined that it was futile to pursue those alternatives. Claimant did not show that pursuing the options described above was unlikely to resolve her concerns. Claimant also did not show that the employer was likely to require her to work when she was injured if she reported on April 18, 2015. Claimant did not meet her burden to demonstrate that she took the steps after a reasonable and prudent person before deciding to leave work.

Claimant did not show good cause to leave work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-40058 is affirmed.

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

DATE of Service: <u>August 10, 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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