

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1073

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121735). Claimant filed a timely request for hearing. On August 20, 2015, ALJ R. Davis conducted a hearing, and on August 26, 2015 issued Hearing Decision 15-UI-43559, affirming the Department's decision. On September 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments, one on September 8, 2015 and one on September 18, 2015. In both, claimant argued that Hearing Decision 15-UI-43559 was factually flawed and offered new information in support of her claim. However, claimant did not explain why she did not offer these new facts into evidence during the hearing, or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new facts that claimant proffered. EAB considered claimant's arguments only to the extent they were based on evidence received into the hearing record when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Multnomah County School District employed claimant as a teacher from October 2, 2001 until June 4, 2015, last as a fourth grade teacher at Rigler Elementary School.

(2) In school year 2013-2014, claimant took time off from work as a result of her emotional reactions to a difficult and stressful fifth grade teaching assignment. At that time, claimant was diagnosed with depression and severe anxiety. Claimant was prescribed medication and received psychotherapy to control these conditions. Claimant's symptoms eased sufficiently to enable her take another teaching position in school year 2014-2015. Exhibit 1 at 4.

(3) Before school year 2014-2015 began, claimant had 35 interviews in an attempt to secure a teaching assignment during that school year. Approximately two weeks before the school year began, claimant

received an offer to teach fourth grade at Rigler Elementary School. Claimant accepted that teaching position because she thought, if she did not take it, she would not have a placement for the 2014-2015 school year. Claimant started at Rigler in late August 2014.

(4) After she began at Rigler, claimant discovered that the 30 students in her fourth grade class had a reputation beginning in kindergarten year for intractably unruly, disruptive, defiant, disobedient and unmanageable behaviors. Once in the classroom, claimant experienced serious problems maintaining control over students who acted out while simultaneously instructing the other students who remained on task. The disciplinary difficulties that claimant encountered included students running out of the classroom and away from the school campus, fights and bullying during recess that continued into the classroom, students throwing things at each other and out the classroom windows, students disrupting crafts projects by smashing boxes in other students' faces, and students bringing knives into the classroom. When claimant tried to intervene and maintain order in the classroom, the students told her "fuck off" and "flipped [her] off." Transcript at 14.

(5) Claimant wrote many referrals of students to other staff for behavioral difficulties and to design and implement behavior plans. No action was taken by the school administration other than, on occasion, to remove a student from the classroom for a very short period of time during the school day. Claimant repeatedly asked the administration and the principal for assistance with managing the students and asked for an educational assistant, a teacher on special assignment or a student management specialist to be assigned to help her maintain order in the classroom. No one was assigned to assist claimant. Claimant perceived that the principal at Rigler was not going to help her maintain order in the classroom. As claimant viewed the disciplinary situation in her classroom, she believed that the principal was not following the policies of the Portland Public Schools (PPS) for placing students with identified behavioral difficulties on behavior management plans and monitoring their behavior on an ongoing basis.

(6) By late 2014, claimant was experiencing an exacerbation of her pre-existing depression and anxiety symptoms. Claimant was "overwhelmed," "frustrated" and finding it hard to continue working. Transcript at 21. Claimant experienced sleeplessness, crying and weight loss. The counselor from whom claimant received ongoing psychotherapy treatment became concerned about claimant's ability to continue in the classroom environment at Rigler.

(7) On January 20, 2015, claimant's counselor noted in a letter apparently intended to be given to the employer that claimant was "struggling with a return of her anxiety and depression," that her "coping mechanisms are being tested beyond a reasonable limit" and expressed concern that "if she continues to teach in this difficult environment [at Rigler] she will be unable to tolerate this stress." Exhibit 1 at 5. On February 2, 2015, the employer approved a leave of absence for claimant as a result of the stress she experienced from teaching her fourth grade class at Rigler and the effect that it had on her symptoms of depression and anxiety. Sometime after claimant was on medical leave, claimant filed a worker's compensation claim based on stress and that claim was accepted. Although claimant remained on leave, beginning on March 1, 2015, she did not receive pay for the time she was away from work.

(8) On March 3, 2015, claimant's primary care physician evaluated that, although claimant was being treated for anxiety and depression and undergoing counseling for those conditions, she was "at the peak of her coping mechanisms" and expressed concern that if she returned to her position at Rigler "it will

only add to increasing [the] problems with her general medical and mental wellbeing. As a result, I feel [that] a transfer to a different teaching position that's not . . . in the current school be addressed.” Exhibit 1 at 6-7.

(9) On approximately March 17, 2015, while still on medical leave, claimant requested a transfer to a different school other than Rigler when she was released to work as an accommodation under the Americans with Disabilities Act (ADA). Exhibit 1 at 15. On April 8, 2015, while acknowledging that both of claimant's providers had recommended that she not return to Rigler because that would “negatively impact[] your pre-existing medical conditions,” the employer did not approve the transfer accommodation, stating that it did not have a placement where it could accommodate the providers' recommendations. Exhibit 1 at 15. The employer stated that, as an alternative, it would continue claimant's unpaid medical leave for the duration of school year 2014-2015 as an unprotected leave and claimant could apply for other open teaching positions for school year 2015-2016 when hiring for them commenced. The employer's communication concluded by offering to discuss with claimant any “potential accommodations that would allow you to return to Rigler.” Exhibit 1 at 15.

(10) On April 14, 2015, claimant, along with other union members, filed a grievance under the union's collective bargaining agreement with the employer seeking to remove the principal from her position at Rigler, have their accumulated leaves and lost salaries restored to them as a result of taking medical leaves allegedly necessitated by the working conditions at Rigler, and require that PPS disciplinary policies be enforced at Rigler. Exhibit 1 at 10.

(11) On May 15, 2015, apparently at the request of the employer's risk management department, claimant's counselor sent to claimant's primary care physician a letter evaluating claimant's readiness to return to work. The counselor stated, “I believe [claimant] will function very well in a classroom with a reasonable mix of competent and troubled children with good administrative support. In my opinion, she is clear to return to full work as a teacher of elementary children.” Transcript at 35, 36.

(12) On May 28, 2015, the employer's risk management department received this letter releasing claimant to return to work. On that day or shortly thereafter, a representative of the risk management department called claimant and told her to report for work in her fourth grade classroom at Rigler on the next scheduled school day. Transcript at 35.

(13) On June 3, 2015, claimant submitted a resignation to the employer. Claimant did so because she thought she could not tolerate returning to Rigler and its working environment and she could not afford to remain on an unpaid leave of absence.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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). Although claimant appeared to deny that she had

any long-term impairments when she left work, the submissions from her health providers at that time stated that in their professional opinions she had depression and anxiety, which may both be considered permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). Transcript at 17; Exhibit 1 at 4-5, 6-7. Because claimant might not have fully understood the question she was answering, we accept the diagnoses supplied by the providers as likely more accurate. A claimant with the impairments of depression and anxiety who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for her employer for an additional period of time.

In Hearing Decision 15-UI-43559, the ALJ concluded that claimant voluntarily left work without good cause. The ALJ found that, while claimant’s “stress” might have been a grave situation, “once she was released by her doctor to return to work, she had the reasonable alternative of returning to the classroom for an additional several weeks or remaining on a leave of absence.” Hearing Decision 15-UI-43559 at 3. We disagree.

Although claimant’s counselor had released her to work as of May 15, 2015, from the evaluation that the employer read into the record, the record fails to show that the counselor and the primary care physician unconditionally released claimant to work in all existing elementary school environments, or that of Rigler, in particular. From the very careful language employed in the release about claimant functioning well in a classroom with a “reasonable mix of competent and troubled children with good administrative support,” read in light of the prior evaluations from claimant’s counselor and her primary care physician and claimant’s description of her working conditions at the time she began her medical leave, it is more likely than not that the release was intended to rule out claimant’s classroom at Rigler as an appropriate environment for claimant. Transcript at 35-36. The counselor and the primary care physician had in evaluations previously submitted to the employer expressly mentioned that claimant’s classroom at Rigler did not have such a “reasonable mix” of students and claimant had not had “good administrative support” at Rigler. Exhibit 1 at 4-5, 6-7. Reasonably construed, the evaluations of both health care professionals did not release claimant to work at Rigler if the environment there remained unchanged, and the employer did not contend that it had changed during claimant’s medical leave. Given the medical evaluations of both medical professionals treating claimant and claimant’s undisputed experience at Rigler, it was not a reasonable alternative for claimant to return to Rigler even for “an additional several weeks,” since it likely would jeopardize her health and exacerbate her underlying conditions of anxiety and depression. We therefore conclude that a reasonable and prudent person with claimant’s impairments, and with the evaluations that she received from her treating providers, would have not returned to Rigler for any period of time.

The remaining ground on which the ALJ concluded that claimant failed to show good cause for leaving work was that she could have remained on an unpaid leave for an unspecified period of time. Generally, a protracted unpaid leave of absence is not considered a reasonable alternative to leaving work. *See Taylor v. Employment Division*, 66 Or App 313, 674 P2d 64 (1984); *Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980). The simple reason for determining that an unpaid leave is generally not a reasonable option is the common sense recognition that few people can subsist, without income, for an uncertain or prolonged period of time. Here, claimant had been on unpaid leave for approximately six months when she quit, and she testified that she was desperate for income at that time. Transcript at 5, 22. As well, under claimant’s teaching contract, she was prohibited from looking for other work during the time she was employed, including if she was on a leave of absence. Transcript at

6, 22. While it may be appropriate for an individual to consider taking an unpaid leave a reasonable alternative to leaving work when the leave period would not be indefinite or protracted and when there is some reasonable possibility that taking leave would resolve the issues that would otherwise cause the individual to quit, from the evaluations of her health care professionals, claimant's conditions had not improved sufficiently in the six months she had been on leave to allow her to return to Rigler. A reasonable and prudent person in claimant's position would, more likely than not, conclude that continuing on leave for "an additional several weeks" would not result in her ability to return to teaching at Rigler without jeopardizing her health. Nor is it likely that continuing on an unpaid leave while desperate for income, unable to seek or obtain work elsewhere, with no guarantees of obtaining work at a different school were healthy conditions for an individual with depression and anxiety. On these facts, taking an additional period of unpaid leave was not a reasonable alternative to leaving work.

On this record, claimant met her burden to show that she had good cause to leave work for which there were no reasonable alternatives. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-43559 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 6, 2015

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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