

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1090

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 90753). Claimant filed a timely request for hearing. On August 20 and September 3, 2015, ALJ Wyatt conducted a hearing, and on September 11, 2015 issued Hearing Decision 15-UI-44229, affirming the Department's decision. On September 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written arguments on September 15 and 23, 2015. However, claimant failed to certify that she provided a copy of her arguments to the employer as required by OAR 471-041-0080(2)(a) (October 29, 2006). The arguments also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider claimant's written arguments, and considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) US Postal Service last employed claimant from March 19, 2005 to May 29, 2015.

(2) Claimant suffered from permanent medical condition that caused chronic back pain. In 2007, claimant provided medical documentation regarding her medical condition. Claimant's doctor imposed the following work limitations: standing 2 hours at one time with a 2 hour period before standing a second time during the same day, sitting 6 hours per day in an ergonomic chair with appropriate breaks, walking 15 minutes at a time up to 6 times per day with appropriate breaks between times of walking, using stairs only in emergencies, lifting 10 pounds on an occasional (33%) basis, pushing/pulling 60-70 pounds on an occasional basis, bending and squatting on an occasional basis, and working with arms above shoulder level 5% of her work day, non-repetitively.

(3) Claimant participated in the employer's reasonable accommodation process, during which a committee worked to ensure that an employee's work complied with the employee's work restrictions. The employer then assigned claimant work in its automated flats shouldering machines (AFSM) section that it believed accommodated her work restrictions. Claimant believed the work did not fully accommodate her restrictions, but was able to work, and continued to work, in the AFSM section until March 7, 2015.

(4) Effective March 7, 2015, the employer reassigned claimant to work in its automation section. Claimant had worked for the employer in its automation section from 1999 to 2000. Based on that experience, claimant believed she could not work in the automation section without violating her work restrictions. Claimant reported for work from March 7 through 19, 2015, but refused to work in the automation section. Claimant did not report for work as scheduled on March 20, 2015.

(5) On March 20, 2015, the employer informed claimant in writing that it could not accommodate her work restrictions at that time, and that she needed to provide updated medical documentation for the employer to determine whether there was work available that complied with claimant's restrictions. The employer instructed claimant to provide the updated medical documentation by March 26, 2015. Claimant did not return to work after March 20, 2015, or provide the updated medical documentation.

(6) On April 24, 2015, the employer mailed claimant a letter instructing her to return to work on her next scheduled work day, or, if unable to do so, notify the employer and inform it of her status and intentions regarding her return to work. The employer further instructed claimant to submit medical or other documentation explaining the reason(s) for her absence from work since March 20, 2015 within three days.

(7) On April 27, 2015, submitted a statement explaining that she was absent from her job because the employer was failing to accommodate her work restrictions. Claimant also provided updated medical documentation in which the doctor imposed the following work restrictions: lifting/carrying 0-10 pounds, 4 hours per day; sitting 6 hours per day; standing 4 hours per day; walking 15 minutes, 6 times per day; climbing stairs or ladders only in emergencies; kneeling, bending stooping and twisting on an occasional basis, 4 hours per day; pushing/pulling 60-70 pounds, 4 hours per day; simple grasping and fine manipulation, 6 hours per day; and reaching above her shoulder 30 minutes to 1 hour, or less than 5% of her work day.

(8) Based on claimant's updated work restrictions, the employer believed her work in the automation section would accommodate those restrictions, or could be modified to accommodate them. On May 15, 2015, the employer invited claimant to participate in its reasonable accommodation process so that the reasonable accommodation committee could ensure that claimant's work would accommodate her restrictions. On May 16, 2015, claimant declined to participate in the process, asserting that she had participated in the process in 2007, and the employer nevertheless had failed to accommodate her work restrictions.

(9) On May 26, 2015, the employer instructed claimant in writing to report for work on May 29, 2015 at 1:00 a.m. for an investigative interview regarding claimant's continued failure to report for work, and her failure to submit acceptable medical documentation to support her extended absence from work.

The employer scheduled the meeting for 1:00 a.m. because claimant typically worked the graveyard shift.

(10) Claimant failed to attend the May 29, 2015 investigative interview, which therefore was canceled. On June 2, 2015, the employer mailed claimant a letter notifying her that she would be discharged in no less than 30 days. On June 25, 2015, the employer rescinded that letter, and mailed claimant another letter notifying her that the employer intended to discharge her in no less than 30 days.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause.

The first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(b) (August 3, 2011) states that if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

At hearing, claimant argued that she was discharged, as evidenced by the letters the employer mailed her on June 2 and 25, 2015. Transcript (August 20, 2015) at 5, 18; Exhibit 1 at 26-30. Prior to the employer mailing those letters, however, claimant did not report for work after March 19, 2015 or submit updated medical documentation by March 26, 2015 as instructed, declined to participate in the employer’s reasonable accommodation process on May 26, 2015, and failed to attend the May 29, 2015 investigative interview regarding claimant’s continued failure to report for work, and her failure to submit acceptable medical documentation to support her extended absence from work. Claimant’s conduct demonstrated, more likely than not, that she was unwilling to continue to work for the employer. Because claimant could have attended the May 29, 2015 investigative interview and continued to work for the employer for an additional period of time, the work separation is a quit, and not a discharge.

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 permanent medical condition that caused chronic back pain, a permanent or long-term “physical or mental impairment” 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.

Claimant quit work because she believed working in the employer’s automation section would require her to violate her work restrictions, regardless of whether she participated in the employer’s reasonable accommodation process. However, claimant had not worked in the automation section in fifteen years.

Although claimant was dissatisfied with the reasonable accommodation process when assigned to work in the employer's AFSM section in 2007, she was able to work, and continued to work, in that section for 8 years. At hearing, the employer's witness testified that claimant's work in the automation section was compatible with her work restrictions, or could be modified to accommodate her work restrictions through the reasonable accommodation process. Transcript at 10-15. Although claimant disagreed, the evidence on that issue is, at best, equally balanced. Absent a preponderance of evidence showing that participating in the reasonable accommodation process would have been futile, claimant failed to establish that she had no reasonable alternative but to quit working for the employer.

We therefore conclude that claimant quit work without good cause. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-44229 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 7, 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.

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