

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1307

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 26, 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 # 84413). Claimant filed a timely request for hearing. On October 7, 2015, ALJ Frank conducted a hearing, and on October 14, 2015 issued Hearing Decision 15-UI-45889, affirming the Department's decision. On November 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire record and claimant's written argument. However, claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) K E McKays Market of Coos Bay, Inc. employed claimant from June 16, 2014 to May 23, 2015.

(2) Prior to November 19, 2014, the employer employed claimant as a deli worker. On November 19, 2014, claimant suffered an on-the-job injury. In December 2014, claimant returned to sedentary modified work. Her physical restrictions included no lifting over ten pounds or bending. Her modified job description stated that claimant was allowed to change positions at will for her comfort. Claimant's doctor ordered her to avoid cold working environments.

(3) When claimant returned to work, the employer typically scheduled her to work 5 to 6 hours per day on Sunday, Monday, Wednesday, Thursday and Friday. The employer required claimant to take a 1-hour lunch break if she worked 5 or more hours. The employer's break policy stated that employees were not required to take a 1-hour lunch break unless they worked over 5 hours. Claimant complained, but the employer continued to require her to take a 1-hour lunch break when she worked only 5 hours.

(4) For the first several months after claimant returned to work, the employer assigned her to greet customers entering its front door. Claimant complained that she was cold working at the front door and asked to be assigned other duties. The employer denied the request because the store manager believed that greeting customers was the only work that complied with claimant's physical restrictions. The store manager eventually determined that claimant could perform other duties that complied with her physical restrictions, and allowed her to perform those duties in addition to greeting customers. As the weather improved, claimant was less cold while greeting customers at the front door.

(5) Toward the end of her employment, claimant asked the employer to increase her hours. The employer denied claimant's request. Claimant also noticed that the employer continued to store boxes of chicken overhead in its freezer, which she believed was responsible for her on-the-job-injury in November 2014. Claimant did not complain to the employer's store manager.

(6) On May 22, 2015, the employer scheduled claimant to have Friday, May 29, 2015 off with pay, in addition to her regular days off, to compensate her for working on Labor Day, and to give her two consecutive days off during the holiday weekend. Claimant wanted to work that Friday and began reviewing the employer's policy on holiday leave. When doing so, claimant determined that the employer had violated its policy by not giving her paid days off for the previous Christmas and New Year's Day holidays. Claimant did not complain to the employer.

(7) Claimant quit because the employer violated its holiday leave and break policies, continued to store chicken in what she believed was an unsafe manner, refused to increase her hours, and had required her to greet customers after she had complained that she was cold working at the front door.

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

A claimant who quits work is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for quitting 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 quit work. OAR 471-030-0038(4) (August 3, 2011). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for quitting work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would quit. Both standards are objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Claimant quit work, in part, because the employer violated its holiday pay and break policies. However, the record fails to show that the employer was contractually or otherwise legally required to give claimant paid days off for the Christmas or New Year's Day holidays, or prohibited from requiring her to take a 1-hour lunch break if she worked 5 hours. Claimant did not complain to the employer about not having been given the paid days off, and the record fails to show that doing so likely would have been futile, given that the employer gave her a paid day off for the Labor Day holiday. It was not unreasonable for the employer to require that claimant take a 1-hour lunch break if she worked 5 hours

given her physical restrictions, and claimant did not assert or show that the requirement reduced her hours or pay. Absent such showings, claimant failed to establish that the employer's violations of its holiday pay and break policies were of such gravity that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Claimant also quit work because, toward the end of her employment, the employer refused to increase her hours, and because claimant noticed the employer continued to store boxes of chicken overhead in its freezer, which she believed was responsible for her on-the-job-injury in November 2014. At hearing, however, the employer's store manager testified that claimant was already working the maximum number of hours allowed under her work restrictions. Audio Record at 21:40. Although claimant testified that she was allowed to work more hours,¹ we find the evidence on that issue equally balanced. In a voluntary leaving case where, as here, the evidence on a disputed issue is equally balanced, the uncertainty must be resolved against claimant, who carries the burden of persuasion. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Claimant did not complain to the employer's store manager that the employer continued to store the chicken in an unsafe manner, and the record fails to show that doing so would have been futile. Nor did she assert or show that the employer required her to continue working in the freezer after her injury, or therefore continued to expose her to an unsafe work environment. Claimant therefore failed to establish by a preponderance of evidence that the employer's refusal to increase her hours or change the manner in which it stored the chicken was of such gravity that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Claimant also quit work because, for several months after she returned to work, the employer had required her to work in a cold environment, contrary to her doctor's orders. However, the record fails to show claimant's work restrictions prohibited her from working in a cold environment, or that claimant told the store manager that her doctor had ordered her not to do so. It therefore was not unreasonable for the employer to require claimant to greet customers, given the store manager's belief that that was the only task available for her that complied with claimant's work restrictions. It also is undisputed that the store manager allowed claimant to perform other duties after determining that they complied with claimant's work restrictions, and that, as the weather improved, claimant was less cold while greeting customers. Claimant therefore failed to establish that the employer's initial refusal to allow claimant to perform other duties was of such gravity that claimant had no reasonable alternative but to quit work when she did.

Claimant failed to establish that she quit work with good cause, and therefore is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-45889 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 8, 2015

¹ Audio Record at 16:00.

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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