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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-1418

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision 113148). Claimant filed a timely request for hearing. On November 19, 2015, ALJ L. Lee conducted a hearing, and on November 25, 2015 issued Hearing Decision 15-UI-48416, affirming the Department's decision. On December 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument containing new information that he did not offer during the hearing. In light of the results reached in this decision without recourse to this new information, EAB need not and does not decide whether claimant's new information should be considered under OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Kohl's employed claimant as a part-time merchandising associate from March 7, 2006 until August 1, 2015.

(2) As a merchandising associate, claimant's duties required him to walk throughout the employer's store during the entirety of his shift. The sales floor and the area that claimant was required to traverse comprised approximately 8,000 square feet.

(3) Claimant's shifts generally were four hours in duration. During the entirety of 2013, claimant worked only 11 four hour shifts and during the entirety of 2014, claimant also worked only 11 four hour shifts. From January 1, 2015 through July 31, 2015, claimant worked a total of 9 four hour shifts.

(4) Claimant was sixty-seven years old in 2015. Beginning some years before 2015, claimant began experiencing severe pain in his legs that radiated into his lower back when he was walking the employer's sales floor. Claimant had suffered no injury to his legs, and was not aware of any condition that was causing his pain. Claimant attributed the pain to his history of performing only hard manual labor in employment and his advancing age. Claimant thought that both were "catching up with me"

and his body was "wearing out." Transcript at 10, 11. By 2015, claimant was wearing orthotics in his shoes and they did not diminish his pain.

(5) By summer 2015, claimant's pain had become severe and endured throughout the entirety of his shifts. At some point, claimant had his annual physical with his physician and told the physician about the serious pain he felt in his legs and his lower back when he stood and walked for any extended period. The physician did not prescribe any medicine or any other course of treatment for claimant. Claimant told his physician that there was "no cure for old age." Transcript at 12. Claimant asked his physician if age was disability, apparently to determine if he could request an accommodation from the employer. At some later time, claimant also asked a Department representative the same question. Claimant understood the responses of both to mean that age, alone, was not a recognized disability. Claimant did not inform the employer about the pain he experienced because he was an "older worker" and did not want to express "frailty" because, rather than allowing him to maintain his job, he thought it would jeopardize it. Transcript at 18, 19.

(6) By the end of mid-July 2015, claimant's pain when he was on his feet during his work shifts was severe and constant. Claimant concluded that it was "getting too painful [to work]" and there was "no point in dragging it out further." Transcript at 15. On approximately July 18, 2015, claimant informed the employer that he was going to resign in two weeks. On August 1, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

In Hearing Decision 15-UI-48416, the ALJ found that claimant's testimony about the "pain and discomfort" he experienced when he was required to stand and walk throughout his four hours shift was credible, but nevertheless concluded that he did not show good cause for leaving work. Hearing Decision 15-UI-48416 at 3. The ALJ reasoned that because claimant did not seek professional treatment for his pain, did not request a "medical modification" of his job duties and did not inform the employer of his pain, he failed to show that the pain was a grave situation leaving him no alternative other than to quit. Hearing Decision 15-UI-48416 at 3. We disagree.

At the outset, we agree with the ALJ that claimant's testimony was credible about the severe pain he experienced due to the requirements of his job. However, the ALJ's conclusion that claimant did not explore the reasonable alternative of seeking an evaluation of a medical professional about his condition was erroneous. Claimant testified that he saw his primary care physician, told the physician about his pain and the physician did not prescribe treatment for him and appeared to agree that his pain and

limitations were due to his advancing age rather having a cause that was susceptible of treatment. Transcript at 12. The ALJ's view that claimant reasonably should have sought a "medical modification" of his job duties is belied by claimant's testimony that both his physician and a Department representative indicated that age-related limitations or impairments were not recognized disabilities. Transcript at 30. We are not aware of any medical modifications that do not require a showing of some recognized short-term or long-term disability. We also disagree with the final point on which the ALJ found that claimant did not show good cause, that if he had told the employer that he was experiencing pain, it would have "been willing to *consider* the possibility of transferring claimant to a cashier position requiring less walking." Hearing Decision 15-UI-48416 at 3 (emphasis supplied). While the employer's witness at hearing testified that the employer could have assigned claimant to work as a cashier rather than as merchandising associate as an "accommodation," she appeared to use the term "accommodation" to mean a request based on some recognized disability and in the context of an accommodation request under the Americans With Disabilities Act (ADA). Transcript at 22, 23, 25. Physical limitations due to age rather than caused by some independent physical or mental impairment do not appear to be covered under ADA. *See* 42 USC §12132, 42 USC §12102(2)(B), (C); 28 CFR §35.104(1)(i), (ii). http://www.ada.gov/pcatoolkit/ chap1toolkit.html. Based on the sense of the testimony from the employer's witness, it does not appear likely that the employer would have "accommodated" claimant by transferring him to the position of cashier, or that making such a request of the employer should be considered a reasonable alternative for claimant in lieu of leaving work.

Viewing this record as a whole, it was apparent that the pain claimant experienced when he was working was a grave circumstance. A reasonable and prudent person who, like claimant, experienced this pain due to his age would likely have concluded that no intervention would alleviate the discomfort to the extent needed to allow him to continue working at a job that required him to walk on an interrupted basis for several hours. Given the very limited and very sporadic shifts that claimant worked and the age-related causes for his pain, he reasonably concluded that informing his employer would not provide to him an "accommodation" that would allow him to continue working. On these facts, a reasonable and prudent sixty-seven year old employee, exercising ordinary common sense, would have quit work when claimant did as a result of the pain he was experiencing.

Claimant showed good cause for leaving work. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-48416 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: <u>January 12, 2016</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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