

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1480

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80725). Claimant filed a timely request for hearing. On November 19, 2015, ALJ S. Lee conducted a hearing, and on November 25, 2015 issued Hearing Decision 15-UI-48415, affirming the Department's decision. On December 9, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oak Park Family Dental, LLC employed claimant as a hygiene coordinator from May 19, 2014 to September 19, 2015.

(2) Claimant has type 1 diabetes. Claimant treated her condition with diet and insulin. She used her breaks to check her glucose levels and eat.

(3) Claimant was typically scheduled to work from 6:30 a.m. to 5:00 p.m. She was provided with a morning rest period. Claimant's lunch break was usually scheduled between 1:30 p.m. and 2:30 p.m. The employer might allow claimant to take an afternoon break if she asked for one, but did not schedule any afternoon breaks for claimant, or ensure that claimant was able to take one. The employer believed claimant did not need an afternoon break because her lunch break ended so late in the work day.

(4) Claimant knew the employer's break policy violated state law and complained to her direct supervisor in May 2014, October 2014 and February 2015. The employer did not modify its break policy or claimant's break schedule based on her complaints.

(5) On one occasion, claimant complained to her direct supervisor's supervisor about issues with her direct supervisor. The supervisor's supervisor brought claimant's supervisor into the conversation. Claimant brought a complaint to the owner's wife on another occasion, was reprimanded for complaining outside her chain of command, and was specifically told to follow the chain of command. Claimant had seen others get in trouble for complaining outside their chains of command.

(6) Claimant felt an increasing amount of work-related stress based primarily on her health and inadequate breaks. On August 17, 2015, claimant had an A1C test that showed higher results than claimant had ever had before. Claimant had not changed her diet or exercise regimen, so the increase in claimant's A1C levels was attributed to her work schedule and resultant stress. Claimant's doctor expressed concern about the increase in claimant's A1C levels.

(7) Claimant's health continued to decline until claimant felt she was no longer physically or mentally capable of continuing to work for the employer. On September 19, 2015, claimant sent a text message quitting work, primarily because of the effect her break schedule and work-related stress had on her diabetes.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant quit 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). Claimant had type I diabetes, 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 primarily because her work schedule, which permitted her inadequate and unlawfully scheduled breaks, did not allow her to carefully monitor her serious health condition. Employers in Oregon, with limited exceptions, none of which appear to apply here, are required to provide employees with a 30-minute meal period and 10-minute rest breaks for each segment of four hours worked in a work period. OAR 839-020-0050(2)(a) and (6).¹ Responsibility for providing breaks generally rests with the employer rather than the employee. OAR 839-020-0050(3) and (6)(a)(C). With respect to meal periods, OAR 839-020-0050(2)(d) provides, in pertinent part,

If the work period is more than seven hours, the meal period is to be taken after the conclusion of the third hour worked and completed prior to the commencement of the sixth hour worked.

Claimant's work period was 10 hours long.² She was, typically, permitted to take her meal period between 1:30 and 2:30, and completed it seven or more hours after commencing work, in violation of

¹ ORS 653.261(1) provides for the adoption of rules prescribing minimum conditions of employment, including designating minimum meal periods and rest periods.

² Claimant's shift lasted from 6:30 a.m. to 5:00 p.m., a period of 10.5 hours. However, under OAR 839-020-0050(10)(c), the "work period" does not include any unpaid meal periods. Subtracting claimant's 30-minute unpaid meal period from claimant's total hours, claimant's "work period," for purposes of determining how many meal and rest breaks she was entitled

the laws and regulations governing Oregon working conditions. With respect to rest periods, OAR 839-020-0050(6)(a)(A) provides, in pertinent part,

As the nature of the work allows, the employer shall provide the rest period approximately in the middle of each segment of four hours or a major part thereof worked in a work period.

OAR 839-020-0050 Appendix A illustrates that when the length of the work period is between 6 hours 1 minute and 10 hours long, the employer is required to give the employee 2 rest breaks. In this case, the employer typically scheduled claimant for only one rest period sometime during the first 7 hours of her shift, no rest breaks during the second four-hour segment of her work period, and no third rest break on the occasions claimant's work period exceeded ten hours and one minute, in violation of the laws and regulations governing Oregon working conditions.³

Claimant, who had type I diabetes, used her rest and meal periods to monitor her glucose levels, administer insulin, eat, and rest. She was unable to successfully manage her health condition as a result of inadequate rest periods, which caused her to experience an increase in her stress levels, which, in turn, exacerbated her health condition, causing a grave situation for claimant. In fact, at her most recent exam prior to quitting work, claimant's A1C levels were higher than her doctor had ever seen, her health was deteriorating, and her doctor expressed concern.

Claimant complained about her situation to her direct supervisor, who did not address the problem. In Hearing Decision 15-UI-48415, the ALJ concluded that claimant nevertheless quit work without good cause, reasoning that claimant "could have continued working for the employer, while asking upper management to take action on her legally required breaks," "asking her doctor for medical restrictions providing that she was medically required to take the breaks so the employer would schedule her afternoon breaks," or "working while filing a complaint with the state regarding the employer's violation of state break laws," particularly since the alternative to pursuing those options was "voluntarily leaving work and reducing her income to zero." Hearing Decision 15-UI-48415 at 4. We disagree.

As a preliminary matter, it is immaterial that claimant could have continued work for the employer. As the Court of Appeals has stated, "[t]hat conclusion is as true in this case as it is in any other case, and is beside the point," because it does "not determine the issue . . . whether a reasonable person would have quit work . . ." See *Warkentin v. Employment Dep't.*, 245 Or App 128, 134, 261 P.3d 72 (2011).

Under the circumstances, it was not reasonable to expect claimant to contact upper management about the lack of breaks and expect a resolution. Not only did claimant have a history of experiencing negative repercussions for going outside her chain of command, she knew other employees had been as well. Claimant cannot reasonably have been expected to go outside her chain of command given the

to receive, equals 10 hours. According to OAR 839-020-0050 Appendix A, an individual with a "work period" that ranges between 6 hours 1 minute and 10 hours is entitled to 1 30-minute meal period and 2 10-minute rest periods. We note, however, that on occasions during which claimant was required to work through her meal periods and was paid for the time (see Transcript at 31), claimant's "work period" was 10.5 hours, and, according to OAR 839-020-0050 Appendix A, claimant was entitled to a third 10-minute rest period on those days.

³ See Transcript at 31; OAR 839-020-0050 Appendix A.

likely consequences. Moreover, one member of upper management, who testified at the hearing, demonstrated full knowledge of the employer's break policies. Given that the employer was aware that it was not providing sufficient breaks, it is unlikely that claimant's complaint to upper management would have resolved anything. While that witness also indicated that she would have addressed claimant's concerns had they been raised to her, the witness did not testify that adjusting claimant's break schedule or scheduling claimant to take regular afternoon breaks were among possible resolutions, so the record does not support a finding that providing medical restrictions to the employer would have resulted in claimant receiving scheduled afternoon rest periods. Finally, it was not reasonable to expect claimant to remain employed while waiting for a "complaint with the state" to be processed. At the time claimant quit work, she was experiencing increasingly poor health as a result of her working conditions, including experiencing unprecedented A1C levels that were concerning to her doctor, and no reasonable and prudent type I diabetic would consider it reasonable to continue to work and suffer increasingly poor health while pending a state regulatory agency resolution to her concerns about her break periods.

In sum, claimant's serious health condition worsened due to the employer's unlawful break policies, and her reasonable efforts to change the situation short of quitting work failed. It is more likely than not that a reasonable and prudent person with type I diabetes would consider quitting work the only course of action likely to result in an improvement to her health. We therefore conclude that claimant quit work with good cause. She is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-48415 is set aside, as outlined above.⁴

Susan Rossiter and J. S. Cromwell

DATE of Service: January 7, 2016

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

⁴ 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.