

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1491

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125514). Claimant filed a timely request for hearing. On November 17, 2015, ALJ Monroe conducted a hearing at which the employer failed to appear, and on November 20, 2015 issued Hearing Decision 15-UI-48129, affirming the Department's decision. On December 10, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Consolidated Supply Company employed claimant from July 27, 2014 to September 8, 2015.

(2) In May 2015, claimant was promoted from an administrative position to a sales consultant position. The employer began giving claimant on-the-job training for the position.

(3) Shortly after she began the new position, claimant suffered a head concussion at work. As a result of the concussion, claimant experienced post-concussion syndrome, cervical strain, adjustment disorder with mixed anxiety and depressed mood, and an unspecified neurocognitive disorder. Claimant's injury caused her to have difficulty managing stress and learning new information. Claimant's doctor told her the symptoms from her head injury could last up to two years, or be permanent, and recommended that claimant ask her employer to modify her position to be less stressful while claimant healed from her injury.

(4) On August 31, 2015, after several months of on-the-job training, claimant and her supervisor met to discuss claimant's progress in the sales consultant position. Claimant's supervisor had noted claimant appeared frustrated at work. Claimant agreed she felt frustrated because the symptoms of her head injury prevented claimant from successfully managing the stress of the position or learning the

information necessary to perform the job. Claimant asked her supervisor if the employer could modify her position to reduce the stress of claimant's position to allow claimant time to heal. Claimant's supervisor told claimant there was no way to modify claimant's position, and offered claimant an administrative support position in the sales department. However, claimant and the supervisor agreed the administrative support position was just as stressful as the sales consultant job claimant had performed since May 2015.

(5) Claimant and her supervisor met with a human resources representative who told claimant the employer could not modify claimant's sales consultant position or the administrative support position the supervisor had offered claimant in the sales department. The representative told claimant she believed claimant's job difficulties were due to job dissatisfaction, and not related to claimant's concussion, but told claimant to meet with her anyway on September 4 after she tried to find claimant another position.

(6) On September 4, 2015, claimant met with claimant's supervisor and the human resources representative. The representative told claimant the employer had no other positions available at that time, but that a position might come available in the future. The human resources representative then asked claimant if she wanted her last day to be September 4 or 8, 2015.

(7) The employer had continuing work available for claimant performing the sales consultant position or the administrative support position, without modification.

(8) On September 8, 2015, claimant sent the employer an email stating that she resigned.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude claimant voluntarily left work with good cause.

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) (August 3, 2011). 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. OAR 471-030-0038(2)(b). Claimant could have continued to work as a sales consultant or performing the other administrative support job offered to her in the sales department, without accommodations for her health conditions. She chose not to continue to work for the employer, and resigned instead. The work separation is therefore a voluntary leaving.

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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had post-concussion syndrome, cervical strain, adjustment disorder with mixed anxiety and depressed mood, and an unspecified neurocognitive disorder which may be considered permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments 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-48129, the ALJ concluded that claimant's working conditions did not pose a grave situation for her, and that she did not establish the two job options in the sales department, without accommodations, posed a situation of such gravity for claimant that she had no reasonable alternative but to quit when she did.¹ The ALJ reasoned that, rather than quitting work, claimant had the reasonable alternative of requesting a leave of absence or attempting to perform the administrative support position to determine if she could perform the work with her health conditions, at least until such time as another position became available with the employer or elsewhere, or claimant's physician requested accommodations from the employer for claimant.² We disagree that claimant's working conditions did not pose a grave situation for her or that she had reasonable alternatives to quitting.

Claimant's doctor recommended claimant request less stressful working conditions while she healed from her brain injury. A reasonable and prudent person with claimant's impairments would follow her doctor's advice. When claimant did so, the employer's human resources department told claimant it could not modify her job duties or offer her a position other than the administrative support sales position. The uncontroverted evidence shows claimant and her supervisor agreed that the administrative support position was not less stressful than claimant's sales consultant job. The human resources representative told claimant a different position might become available in the future. However, it was reasonable that claimant did not rely on that mere possibility, especially in light of the statement the human resources representative made to claimant which demonstrated she doubted claimant's veracity. The employer did not offer claimant other options, such as a leave of absence. Rather, after the human resources representative told claimant it had no modifications or other positions available, she asked claimant if she planned to resign that day, or the next business day. Under the circumstances, claimant reasonably believed she had to quit work to follow her doctor's advice and avoid endangering her health. She had no reasonable alternatives to quitting work.

The record shows that no reasonable and prudent person with the characteristics and qualities of an individual with claimant's impairments would have continued to work for her employer for an additional period of time. She therefore quit work with good cause, and is not disqualified from receiving unemployment insurance on the basis of her work separation.

DECISION: Hearing Decision 15-UI-48129 is set aside, as outlined above.³

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 12, 2016

¹ Hearing Decision 15-UI-48129 at 4.

² *Id.*

³ 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.

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.