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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
2016-EAB-0159

Reversed
Disqualification

PROCEDURAL HISTORY: On December 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120141). Claimant filed a timely request for hearing. On January 20, 2016, ALJ Holmes-Swanson conducted a hearing, and on January 28, 2016 issued Hearing Decision 16-UI-51836, reversing the Department's decision. On February 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant as the manager of the floral department in its Dallas, Oregon store from September 2014 until October 21, 2015.

(2) Sometime before September 2015, claimant had surgery and three plates with L-brackets were inserted in her lower right leg along with 18 screws. At some unknown time, claimant's physician told claimant that she "really doesn't want me on my leg more than six hours each day." Audio at ~12:20.

(3) Despite the condition of claimant's right leg, claimant was able to work full-time for the employer without accommodation. As floral manager, claimant completed paperwork and performed customer service and miscellaneous other tasks. In the course of her regular job duties and notwithstanding the condition of her right leg, claimant also discarded the department's trash, smashed boxes, performed service walks and "threw" heavy freight. Audio at ~9:35; Exhibit 1. Before approximately mid-October 2015, claimant did not inform the employer that her right leg limited her or that it impaired her ability to perform her job. Claimant did not ask for any workplace accommodation.

(4) As of October 2015, claimant worked between 32 and 40 hours per week for the employer and earned $16.95 per hour. Claimant's weekly earnings were between $542 and $678. Claimant's weekly benefit amount was $471.

(5) After she was hired, claimant worked very hard to increase the sales of the floral department and was successful. Sometime around approximately October 11, 2015, the management at claimant's store notified claimant that the number of employee-work hours allocated to the floral department was going to be reduced by 25 percent and might be further reduced by another 20 percent. Before the reduction was announced, the floral department was allocated approximately 80 to 100 employee hours per week for its operations. After the reduction was implemented, the weekly employee hours allocated to the floral department would be 60 to 75. The reduced hours were to become effective starting the week of October 25, 2015.

(6) After October 11, 2015, claimant became concerned that the employee hours allocated to the floral department would be insufficient to meet its operational demands. The floral department was open eight hours per day, seven days a week or for 56 hours. Claimant thought the reduction in hours allocated meant that her workload would significantly increase since there would only be 20 to 35 hours allocated for employees other than her to work in the floral department each week, and that she and another employee would be at the same time in the floral department for only four hours per week. Between approximately October 12 and 20, 2015, claimant spoke three times with management at her store, including the store manager, protesting the reduction in allocated hours to the floral department and the impact of that reduction on her workload if she tried to maintain the floral department's current level of operations. Claimant told management that, if the reduction was implemented, it would be impossible for the floral department to maintain operations. From these conversations, claimant understood that the decision to reduce the hours for the floral department had been made by the employer's central office and that the decision "was not going to change." Audio at ~14:09. Claimant told one member of management that the condition of her right leg might not allow her to assume an increased her workload. That member of management told claimant, "I'm sorry about that." Audio at ~14:53. Claimant did not pursue a workplace accommodation in the event her workload increased after the reduction.

(7) By October 20, 2015, claimant decided she needed to leave work as a result of the employer's planned implementation of the reduction in hours for the floral department. Claimant began looking for new work. On October 20, 2015, Heartstrings Florists offered claimant a job as lead floral designer. The owner of Heartstrings told claimant the job she was offering was permanent and claimant could start work immediately after she resigned her job with the employer. The owner told claimant she would work 30 to 40 hours per week at Heartstrings and would begin at a wage of $10 per hour. Claimant expected to earn $300 to $400 per week from Heartstrings. Claimant accepted the job at Heartstrings.

(8) On October 21, 2015, claimant submitted a resignation letter to the employer, stating that she was leaving work immediately. In that letter, claimant stated she was leaving work because the hours allocated for the floral department were "unworkable" and she did not think that she could maintain the quality of the floral department's operations with an allocation of less than 80 employee hours per week. Exhibit 1. Claimant did not mention that she had any physical limitations that prevented her taking on the increased workload she thought would result from the employer's reduction in the number of hours allocated to the floral department. Claimant voluntarily left work on October 21, 2015.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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 testified that she some surgical reconstruction to her lower right leg, presumably to the tibia or fibula bone, which for purposes of this decision is assumed to have resulted in 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.

In Hearing Decision 16-UI-51836, the ALJ concluded that claimant voluntarily left work with good cause. In reaching his conclusion, the ALJ found as fact that claimant had a "limited ability to stand," that the reduction in hours allocated to the floral department would result in a "large increase" to claimant's workload and that this increase would "impact[] her condition." Hearing Decision 16-UI-51836 at 3. The ALJ also concluded that claimant exhausted her reasonable alternatives to quitting work, despite this "potentially grave situation," by "finding new employment prior to resigning." Hearing Decision 16-UI-51836 at 3. We disagree.

At the outset, the new employment that claimant secured at Heartstrings Florists before she left work did not in and of itself constitute good cause for leaving employment. OAR 471-030-0038(5)(a)(A)-(B) provide that leaving work to accept an offer of other work is good cause to leave employment only if, among other things, the new job pays an amount greater than the work left or an amount equal to or in excess of a claimant's weekly benefit amount. The job at Heartstrings did not meet this requirement. That job would pay at most $400 per week, which was less than claimant's weekly benefit amount of $471 and less than $542, the lowest estimate amount of her weekly pay from the employer.

With respect to claimant's concerns about an increased workload after implementation of the employer's reduction in work hours allocated to the floral department, it is not clear on what she based those concerns, and the evidence she presented was insufficient to demonstrate that there would likely be an increase to her workload or the magnitude of any such increase. While claimant contended that the employer's reduction was going to triple her existing workload, her more specific testimony was that 60 hours was going to be allocated to the floral department rather than the 80 previously allocated, or a decrease of 20 overall hours. Audio at ~11:54, ~33:31. If claimant was required to accept the entire workload otherwise performed during the 20 hours at issue when she worked her 40 hours, her workload would appear to increase only by 50 percent, assuming work hours are an appropriate measure of workload. However, claimant did not dispute that she was expected only to work 40 hours per week after the reductions were implemented and did not demonstrate that the floral department was operating at maximum efficiency under its prior allocation, which is the only apparent scenario in which a reduction in allocated hours after implementation would necessarily result in an increase to claimant or other employees' workloads. Claimant did not present sufficient evidence to show that her workload was likely to "drastically" increase, the nature and extent of that increase or, how, if claimant was not expected to work in excess of 40 hours per week, the increased workload would have an impact on her. Audio at ~11:40.

Assuming there would be some unknown increase to claimant's workload after the employer's reduction in hours was implemented, claimant's principal contention about its gravity was that the condition of right leg was likely to prevent her taking on any more work. Although claimant characterized her condition as a "handicap," she described apparently physically strenuous tasks she had historically performed in the floral department, such as "throwing freight," without alluding to any physical limitations. Audio at ~9:35, ~10:29. While claimant testified that her physician did not want her to stand more than six hours per day, she did not state that she was medically restricted from doing so, was unable to comfortably work 40 hours per week in the floral department or was impaired in any way when she doing so. Audio at ~11:15. Claimant also testified that she never requested a physical accommodation in the workplace in the course of her employment, which strongly suggests that despite the surgery to her lower right leg she was physically able to perform the requirements of working in the floral department. Audio at ~15:16, ~27:05. As well, if f claimant had legitimate concerns about physically performing an increased workload, it was not sufficient that she made one off-hand statement to a manager after October 11, 2015 that one of her concerns about the increased workload she anticipated was the condition of her right leg. Viewed in context, claimant's statement to the manager was made while she was apparently voicing various objections to the reduction in allocated hours. It is therefore unlikely that this statement would have notified him that she was genuinely limited, particularly since up to that time she was apparently very able to perform the physical demands of work the floral department. Claimant also did not dispute that she knew the employer's human resources department handled employee requests for workplace accommodation, and testified that she had before spoken to the employer's district manager numerous times about work-related matters. Audio at ~35:18. A reasonable and prudent employee, who wanted to continue working but was concerned about her physical abilities to perform the workload resulting from a reduction in hours, would have clearly notified the employer of any physical limitations and would have unsuccessfully sought a workplace accommodation before concluding she had no alternative other than to quit work. Because claimant did not take this action, she did not show that her situation was likely grave or that it was good cause to leave work.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-51836 is set aside, as outlined above.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating

DATE of Service: <u>March 7, 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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