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BYE: 201635

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-0191

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work with good cause (decision # 105446). The employer filed a timely request for hearing. On January 19, 2016 and January 29, 2016, ALJ S. Lee conducted a hearing. On February 5, 2016, the ALJ issued Hearing Decision 16-UI-52507, concluding claimant quit work without good cause. On February 8, 2016, the ALJ issued Hearing Decision 16-UI-52555, amending Hearing Decision 16-UI-52507 and concluding claimant quit work without good cause. On February 11, 2016 issued Hearing Decision 16-UI-52818, amending Hearing Decision 16-UI-52555 and concluding claimant quit work without good cause. On February 19, 2016, claimant filed an application for review of Hearing Decision 16-UI-52818 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lincoln City Community Center employed claimant as a lifeguard in training from October 3, 2015 to October 12, 2015.

(2) On September 14, 2015, claimant inquired with the employer's director about the availability of a front counter position, and whether the employer would consider hiring her. The director responded that the employer only had lifeguard positions available. Claimant applied for the lifeguard job and, after an interview during which claimant expressed interest in working at the front counter, the employer offered claimant the lifeguard job.

(3) The American Red Cross Lifeguarding Manual set forth standards for professional lifeguards. The manual stated that lifeguards were required to have adequate strength and endurance at a moment's notice to get to a victim, execute a water-based rescue, move drowning victims to safety, and perform resuscitation. The manual stated that lifeguards "have a legal responsibility to act in an emergency." Exhibit 2, Lifeguarding Manual at 6. The employer's mandatory requirements for lifeguards included

being a strong swimmer, obtaining an American Red Cross Basic Lifeguard Training Certification, and being fit enough to perform the physical demands of the job.

(4) Prior to being hired by the employer, claimant had not been swimming since 2013. She had not thought of herself as a swimmer in 30 years and did not think she had been a very good swimmer. She thought she was fit enough to work as a lifeguard, however, and accepted the job.

(5) On September 22, 2015, claimant sent an email to the director stating that she had gone swimming for the first time that day and thought she would need between six and eight weeks of daily swimming before she would be in shape to work as a lifeguard. Claimant asked the director if she thought that would preclude claimant from working for the employer. The director replied that claimant should let the employer evaluate her swimming skills.

(6) On October 9, 2015, claimant began taking an unpaid lifeguarding class with the employer. On October 10, 2015, after approximately three and one-half hours of pool training, claimant felt sudden pain in her hamstring and knee area. Shortly thereafter, claimant's instructor told claimant to stop participating in pool training for the rest of the day. Claimant called her husband, an orthopedics physical therapist with 20 years of experience in that field, described her symptoms over the phone, and he said he thought she had probably strained her medial collateral ligament (MCL). Claimant iced and rested her knee. Claimant did not have money or medical insurance so she did not go to the doctor or have an MRI.

(7) On October 11, 2015, claimant reported to her training class wearing a knee brace on her injured knee. Claimant's instructor had claimant sit out from pool training. Claimant's supervisor saw claimant wearing the knee brace and not participating in pool training, and claimant told him about her knee injury. Claimant was told she needed to take the water skills test, which was a mandatory prerequisite to becoming a lifeguard, by October 16, 2015.

(8) On October 12, 2015, claimant performed paid services for the employer job-shadowing one of the employer's lifeguards from 4:30 a.m. to 8:30 a.m. After completing the job-shadowing, claimant sent an email to her supervisor's personal email account stating that she was still experiencing pain from her knee injury. She asked to delay her water skills test so she could recover and have another week or two of pool training. The supervisor did not respond to claimant's email. He probably did not get the email because he did not regularly monitor that personal email account.

(9) On the evening of October 12, 2015, claimant went to the pool to practice the swimming skills necessary to pass the water skills test, which involved swimming laps and diving into deep water to retrieve a five-pound brick and hold it out of the water while swimming to the shallow end of the pool. Claimant decided to approximate the test by retrieving the brick from 5 feet of water three times and swimming to the edge of the pool. Claimant completed one brick retrieval and began the second but had to stop because she suddenly felt like she could not breath. Claimant decided to do some laps. After swimming one length of the pool, her heart rate was extremely elevated, she could not catch her breath, and felt like she was gasping for air. She completed one more length of the pool, but continued to feel like she could not catch her breath. Her chest felt constricted. She tried to recover her breath and lower her heart rate but could not, and went home. Approximately 15 minutes after leaving the pool, she had to use four doses of an asthma inhaler to help her breathe, her heart rate elevated, her blood pressure was

171/110, and she had a severe headache. Claimant continued to experience an elevated heart rate and abnormal breathing the rest of the night.

(10) Claimant felt scared because of the incident. She concluded that she was not fit enough to work as a lifeguard. The employer did not have other positions available at the time.

(11) On October 12, 2015, claimant sent an email to the employer resigning her position. Claimant stated she was quitting because she was not fit enough in swimming to be a lifeguard.

(12) On October 18, 2015, claimant exchanged emails with the employer's director. Claimant offered to work at the front desk if the employer needed anyone and would consider her for that. The director did not reply one way or the other.

(13) After quitting work, claimant continued to experience knee pain. On October 22, 2015, claimant's husband examined her injured knee and determined that, in his professional opinion as an orthopedic physical therapist, claimant had a partial tear of the MCL and a strain or sprain of the medial hamstring. On December 22, 2015, claimant's chiropractor evaluated her knee and confirmed that, with respect to her knee, she had a chronic MCL sprain and a hamstring strain.

CONCLUSIONS AND REASONS: We disagree with 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.[1] 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 her employer for an additional period of time.

The ALJ concluded that claimant faced a grave situation based on her inability to safely perform work as a lifeguard. We agree. Claimant did not have training or experience working as a lifeguard before the employer hired her, and, while physically fit, she did not think of herself as a very good swimmer. She had not been swimming during the one and one-half years before the employer hired her. The second day of water skills training claimant injured her knee so severely that she still experienced symptoms of her injury more than two months later. Just two days after the knee injury, claimant experienced dangerously high blood pressure, rapid heart rate, and impaired breathing while practicing water skills test. Claimant's lack of fitness to work as a lifeguard was a grave situation.

[1] Although claimant quit work due to physical ailments, she did not establish that any of them constituted permanent or long-term physical or mental impairments as that term is used at 29 CFR §1630.2(h). We therefore analyzed claimant's decision to quit work using the standard of a reasonable and prudent person without impairment.

However, the ALJ also concluded that claimant did not quit work with good cause because she "did not adequately explore what reasonable alternatives were available to her prior to quitting her position." Hearing Decision 16-UI-52818 at 3. The reasonable alternatives the AJ listed included speaking with her supervisor about her knee, delaying the water skills test, speaking with her instructor or the director about delaying the test, seeking medical treatment from a doctor of medicine instead of relying on her husband's long-distance assessment of her injury, obtaining a "formal diagnosis" of her knee injury so she could request accommodation or seek another position, notifying the employer of her injury in a "formal manner," or ask the employer if there were other open positions or alternatives to leaving. Notably, the ALJ's analysis did not address claimant's blood pressure and breathing problems. We disagree that the alternatives the ALJ listed were reasonable or non-futile alternatives to quitting work.

It was not reasonable for claimant to attempt to have the water skills test delayed. She had been told on October 11 that she needed to take the water skills test by October 16th, and she did not receive a reply to the email she sent to the supervisor asking that the test be deferred one or two weeks. Although the supervisor's failure to respond to the email likely occurred because she sent it to the wrong email address, claimant did not know she had misdirected the email at the time. She only knew that she did not receive a response, and reasonably concluded that the non-response constituted a denial of her request. Claimant did not have any reason to believe that asking her instructor or the director about delaying the test would make a difference, given that she knew the supervisor was in charge of that, and given that she had been told to take the test by October 16th. Nor is there any evidence in this record about how long a delay the employer could have authorized given its business needs and training schedule, or whether, as a practical matter, any delay would have been sufficient to allow claimant time to recover her health and become proficient enough at training that she could perform the water skills test without suffering ill health as a result.

It was not reasonable to expect claimant to seek medical treatment, a formal diagnosis of her knee injury or an MRI. Claimant thought she had sprained or strained her knee. It is normal for individuals who experience seemingly minor injuries not to go to a doctor until home remedies like rest, ice and bracing have failed to resolve the injury. Claimant's reliance on her husband's opinions about her injury was not unreasonable given that he had 20 years of experience in orthopedic physical therapy and, therefore, had specialized knowledge and skill advising and rehabilitating people with orthopedic injuries. Claimant lacked the money or medical insurance necessary to seek or obtain a formal opinion about her diagnosis or an MRI, so it was not reasonable to expect her to pursue those alternatives, particularly given that, at the time, she thought she had a sprained knee and, therefore, had no logical reason to suspect she needed to undergo expensive medical imaging. Nor was it reasonable to expect claimant to notify the employer in a "formal manner" that she had injured her knee during the employer's unpaid training class. Not only is it unclear on this record whether an injury sustained during an unpaid training class that may or may not have been part of her employment would be considered work-related, claimant's instructor saw claimant injure herself, and the supervisor discussed claimant's injury with her the following day. The employer was aware of claimant's injury and did not take action with respect to it, from which we infer that the employer did not have resources or options available for claimant at that time. In the absence of evidence suggesting claimant could have improved her situation by notifying the employer in a "formal" manner about an injury the employer already knew she had, formal notification was not a reasonable alternative to quitting work.

It was not reasonable to expect claimant to request accommodations or a transfer. The employer had already accommodated claimant's injury by having her refrain from participating in water skills training on October 10th and October 11th. On October 12th, knowing of claimant's injury, the supervisor told her she needed to do the water skills test by October 16th. If other accommodations were available, it is not apparent on this record. The employer did not have transfer opportunities available for claimant. Claimant had initially inquired with the employer in mid-September 2015 about the availability of front counter work, and was told that the only positions the employer had available were lifeguarding positions. On October 18th, after claimant quit work, she expressed a continued interest in helping the employer with that type of work, and got no response. The employer did not have other positions available at the time.[2]

Given claimant's knee injury, symptoms of which persisted into December 2015, and the implication that she required a lot more training and experience swimming before she could work as a lifeguard based on the symptoms she experienced on the evening of October 12th, it is unlikely that claimant could have recovered and trained sufficiently to quickly return to work as a lifeguard. It was unreasonable to expect claimant to continue working for the employer, unpaid, for an indefinite period of time in the hopes that she would become fit enough to resume the unpaid training that was a prerequisite to working for the employer. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working under those circumstances. We therefore conclude that claimant quit work with good cause, and is not subject to disqualification from unemployment insurance benefits based on her work separation.

DECISION: Hearing Decision 16-UI-52818 is set aside, as outlined above.[3]

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, 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.

[2] The employer's witnesses testified that they were unaware of any available positions at the time of claimant's separation. Although claimant might have contacted the director to confirm that none were available, the supervisor, who was the person to whom she would have been expected to approach with such a question, testified that there were no open positions at the time claimant worked for them, and the employer did not provide any information tending to show that positions were available if only claimant had inquired about them with the right person. Claimant had been told there were no other jobs available when she inquired about working for the employer in mid-September and the director did not respond to her October 18th offer to work for the employer in a different capacity. For all those reasons, we conclude that a reasonable and prudent person would conclude, as claimant did, that the employer did not have other work for her at the time she quit.

[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.

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