

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0434**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92149). Claimant filed a timely request for hearing. On January 21, 2016, ALJ Murdock conducted a hearing, and on January 25, 2016 issued Hearing Decision 16-UI-51601, affirming the Department's decision. On February 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On February 4, 2016, EAB issued Appeals Board Decision 2016-EAB-0120, reversing and remanding this matter for further development of the record. On March 23, 2016, ALJ Murdock conducted a hearing, and on March 31, 2016 issued Hearing Decision 16-UI-56209, again affirming the Department's decision. On April 13, 2016, claimant filed an application for review with EAB.

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

Although the ALJ admitted Exhibits 2, 3 and 4 into the record during the hearing on remand, she did not mark either Exhibit 3 or 4 for entry into the record. Audio at ~3:43, ~4:51. Since those exhibits were readily identifiable, EAB marked them as Exhibit 3 and 4, respectively as a clerical matter.

**FINDINGS OF FACT:** (1) Staples The Office Superstore West employed claimant from August 21, 2000 until October 15, 2015, last as a general manager at one of its stores.

(2) As a general manager, claimant often worked long hours in order to perform tasks that the other employees were not able to accomplish because they were assigned to specific store locations. The employer's district manager thought working long hours was "part of [claimant's] DNA." Audio of February 29, 2016 Hearing (Audio 2) at ~16:38.

(3) By the summer of 2013, claimant was overwhelmed by his heavy workload. At that time, a condition in claimant's shoulder was interfering with his range of motion and his capacity to lift heavy boxes, which was a task he frequently needed to perform. Claimant's workload was also impacting his mood and his job performance. Claimant sought an evaluation from his physician, and was diagnosed with subacromial bursitis, stress disorder and depression. Exhibit 1 at 1. Claimant resisted treatment with prescription medications, and his physician recommended lifestyle changes and relaxation techniques.

(4) During the spring and summer of 2014, the assistant manager of claimant's store was away from work on a medical leave. Claimant regularly worked 80 hours each week due to the lack of an assistant manager, which aggravated claimant's bursitis and deteriorated his emotional state. Claimant thought it was "a real rough patch" and that he could no longer work the long hours that the job required. Audio 2 at ~11:07. During the summer of 2014, claimant discussed with the district manager if he could be demoted to a sales manager position, which would require fewer work hours. The district manager told claimant that it was not likely the employer would allow him to step down to a less responsible position after having been general manager. The day after this discussion, claimant called the district manager and told him he was retracting his request for a demotion and reassignment. The district manager told claimant he thought the retraction was appropriate because "[a voluntary demotion is] something we really don't do in the company." Audio 2 at 10:44. Ultimately the assistant manager returned to work and claimant's work hours decreased to approximately 60 hours per week.

(5) In April 2015, the employer placed claimant on a performance improvement plan that specified three areas in which his performance needed to improve. By the summer of 2015, claimant was still feeling overwhelmed by the 60 hours per week hours he was continuing to work and his need to improve his work performance. During the summer, the pain in claimant's shoulder from bursitis was "unbearable." Audio 2 at ~9:29. When claimant was unable to work due to the pain, his physician administered a cortisone injection in July 2015. During the summer, claimant continued to feel "overwhelmed" by his position and his mental health was significantly affected. Audio 2 at ~10:33. Although claimant continued to tell the district manager he needed to reduce his work hours, he did not notify him of his physical limitations, his bursitis, his depression or his stress disorder.

(6) On August 31, 2015, claimant was examined by his physician. The physician's progress notes stated claimant was experiencing a flare of bursitis, and the physician recommended non-prescription treatment and stretching and exercises. Exhibit 1 at 1. In the notes, the physician also diagnosed an "acute stress disorder" and a history of depression. *Id.* Given claimant's resistance to prescription medication, the physician recommended relaxation and breathing techniques. *Id.*

(7) During September 2015, claimant still was working at least 60 hours per week. Claimant continued to experience significant pain from the bursitis in his shoulder. Claimant's mental health continued to deteriorate, and he experienced an aggravation of his symptoms from depression and the acute stress disorder. Claimant was overwhelmed by his workload and very fatigued from the hours he was working and from trying to meet the goals of the performance improvement plan. Claimant concluded he was not physically able to put in the hours and perform the tasks his workload and the performance improvement plan required.

(8) On October 2, 2015, claimant had achieved two of his three goals under the performance improvement plan. Before the district manager met with claimant on that day to discuss his status under the performance improvement plan, claimant notified the district manager that he was resigning from work effective October 17, 2015. It was claimant's physician's opinion that, at the time claimant quit work, he was experiencing an acute stress reaction and despite his "best efforts, [he] was not able to continue to work anymore" and "could not take it anymore." Exhibit 3 at 1. The physician further stated that his medical opinion was that claimant "had to quit this job for health reasons," "he did the right thing by quitting," and he "appropriately" decided to leave work. Exhibit 3 at 3.

(9) On October 17, 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 P2d 722 (2010). Claimant had chronic bursitis, depression and acute stress disorder, 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 his employer for an additional period of time.

In Hearing Decision 16-UI-56209, the ALJ concluded claimant voluntarily left without good cause. The ALJ based her conclusion on the fact that a medical professional had not advised claimant to quit work, and that "to whatever extent [claimant] needed medical accommodations, he had not pursued any proximate to the time he decided to quit work." Hearing Decision 16-UI-56209 at 3. The ALJ also reasoned claimant "might have been able to demote" to sales manager position in lieu of quitting, and that a reasonable and prudent person with claimant's impairments "would seek alternatives and accommodations before deciding it was futile to continue working for the employer." Hearing Decision 16-UI-56209 at 3. We disagree.

We agree that claimant did not have a recommendation from a medical professional that he needed to leave work before he decided to quit. However, that he did not do so does not establish, in and of itself, that his physical and mental health conditions in combination with the rigors of his job did not give rise to a grave situation at the time he left work. Based on claimant's testimony and the evaluation of his physician as to his physical and mental conditions at the time he decided to leave work in relation to the requirements of his job, the preponderance of the evidence in this record demonstrates that claimant faced a grave situation. Audio of January 21, 2016 Hearing (Audio 1) at ~5:30, ~6:35; Audio 2 at ~6:10, ~9:29; Exhibit 3 at 1-3. Although claimant's physician did not recommend claimant quit, it appears that he did endorse the decision. As such, the issue of claimant's good cause for leaving work narrows to whether there were reasonable alternatives to quitting work that a reasonable and prudent person in claimant's circumstances would have pursued before he decided to quit.

While the ALJ cited that claimant did not pursue the alternatives of seeking medical accommodation for his physical and mental conditions or a demotion to a sales manager position which would have reduced his hours as reasons in support of her conclusion that claimant did not have good cause for leaving work when he did, there is insufficient evidence in this record to show such alternatives were available rather than being merely speculative. With respect to the availability of a medical accommodation, although the employer's witness, the district manager, generally asserted that some help in lifting heavy items could have been arranged for claimant and his hours could have been reduced by arranging for help from staff in his store or from other stores, he provided no specifics that might have verified the availability of those accommodations. Audio 2 at ~16:50, ~17:25. To the extent these actions actually would have been undertaken by the employer, they appear to have been envisioned as only short-term adjustments, and were unsuitable as long-term accommodations for claimant's chronic physical and mental health impairments. With respect to a demotion to a less demanding position, the district manager stated claimant could have asked to step down, but he did not know whether the regional vice-president or the senior vice-president would have approved the demotion. Audio 2 at ~24:28. The district manager did not provide any evidence about the likelihood the demotion would have been approved, the times in the past, if any, when the employer approved such a demotion, or even if any positions were available in the employer's organization into which claimant might have transitioned. Before an alternative to quitting is considered available to a claimant, there must at least by some evidence showing that it is more than a hypothetical option. *See Gonzales v. Employment Department*, 200 Or App 547, 115 P3d 976 (2005) (an alternative is not considered reasonably available absent some evidence that the employer actually considered it or other circumstances show that it was more than merely an unverified hypothetical). There was insufficient evidence in this record showing that alternatives cited by the ALJ were available to claimant when he decided to leave work.

When claimant decided to leave work, his work circumstances were exacerbating the physical conditions of his bursitis and his mental health conditions of depression and acute stress reactions. There is insufficient evidence in this record to show that reasonable alternatives were available to claimant other than quitting work. Claimant had tried for a lengthy period of time to achieve the demands of his job despite the health conditions that he had, but was unsuccessful. Exhibit 3 at 1-3. Under these circumstances a reasonable and prudent person with chronic bursitis, depression and acute stress reactions would have concluded that he needed to leave work when he did, and that continuing to work would have unreasonably jeopardized his health.

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

**DECISION:** Hearing Decision 16-UI-56209 is set aside, as outlined above.

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

**DATE of Service:** May 18, 2016

**NOTE:** 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](http://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.