

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0722

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 113331). Claimant filed a timely request for hearing. On June 1, 2016, ALJ Dorr conducted a hearing, and on June 2, 2016 issued Hearing Decision 16-UI-60935, affirming the Department's decision. On June 15, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Albertson's employed claimant from July 18, 2009 to November 25, 2015. Claimant worked for the employer as a meat and seafood department supervisor. Her duties including leaning, lifting, bending, pushing and pulling.

(2) In approximately November 2014, claimant injured her back at work. She filed a worker's compensation claim. Claimant initially had medical restrictions prohibiting her from engaging in certain activities. Approximately four months later, her physician lifted those restrictions and released her to return to work four hours per day, five days per week. The employer needed its meat and seafood department supervisor to work 40 hours per week. Claimant felt pressured to increase her hours, and increased them to six hours per day four days per week, with an eight hour shift once per week.

(3) The employer needed the meat and seafood department supervisor to work eight hour shifts five days a week, which claimant could not do. The employer offered to transfer claimant to a different position in the store. Claimant refused the transfer because, in her experience, the types of work available in a grocery store involve the type of physical labor that aggravated her back injury.

(4) Claimant continued to have back pain related to her injury while she worked. Her physician did not issue any specific medical restrictions or limitations on what kinds of activities she could perform at work, but in approximately October 2015, recommended that claimant undergo surgery. Claimant declined to have surgery at that time because of financial considerations and the risks involved.

(5) In approximately November 2015, the employer's worker's compensation insurance carrier offered to settle claimant's worker's compensation claim. As a condition of the settlement, the insurance carrier required claimant to resign from her employment by November 25, 2015. Claimant was not certain that she wanted to agree to the settlement of her claim under the terms being offered.

(6) On November 20, 2015, a box at work hit claimant's head. She immediately experienced back pain and spasms so severe that she was in tears. She finished helping her customer then sat down to rest in the back room. The manager saw her sitting and in tears, and, without expressing concern or offering to help her or obtain medical assistance for her, stated, "you can always file another claim." Audio recording at ~19:30.

(7) Claimant had experienced increasing pressure from management to work full time when she felt unable to do so, felt as though her performance was being scrutinized and she was subject to frivolous discipline for the first time in her career with the employer, and felt as though she was in trouble all the time. She did not know how to handle those conditions, did not know where she could go for help, and it did not occur to her to complain to human resources or ask for their assistance. Claimant's quality of life diminished because she felt physical pain every day due to her on-the-job injury and the effect her work had on her body, went to bed right after work, and usually spent her days off in bed. The employer did not have ongoing work for claimant as the meat and seafood department supervisor because it needed someone in that position full time.

(8) Claimant's attorney had explained to her that the insurance carrier's representative said that claimant was a liability and needed to leave her job. After claimant's November 20th injury and the manager's comment and lack of concern for her well-being claimant felt she was out of options. Claimant decided to accept the settlement agreement and notified the employer that she resigned, effective November 25, 2015.

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. 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 a back injury and needed surgery, which may be considered 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-60935, the ALJ concluded claimant voluntarily left work without good cause, suggesting that claimant might have quit work due to "her preference for the monetary settlement [from the worker's compensation insurance carrier] over continuing to work for the employer," but reasoning that even if she had quit because she felt physically incapable of performing the work,

claimant “could have consulted her doctor to determine whether it was medically necessary and appropriate to re-impose any restrictions or limitations,” or considered transferring to another position. Hearing Decision 16-UI-60935 at 3. The ALJ also reasoned that claimant “summarily concluded that any position the employer would have offered would nonetheless still require her to perform tasks that aggravated her back symptoms,” but “did not show the employer had no open positions that she could physically tolerate, or that the employer was unwilling to transfer her into any such position,” and she could have brought her concerns to the human resources department or requested a reduction in work hours. *Id.* We disagree.

The preponderance of the evidence shows that claimant did not decide to quit work when offered a financial settlement, but instead that she did so because she could no longer handle the pain she experienced at work and felt she did not have any options that would allow her to work without experiencing pain. Although claimant did not have any orders from her physician restricting her from performing specific physical requirements of her job, claimant credibly testified, unrefuted, that she experienced physical pain every day she worked, and continued to feel pain after work and on her days off, all because of her on-the-job injury and the physical activities she had to do to perform her work. The employer made it clear that it could not continue to employ her as the meat and seafood department manager unless she could work 40 hours per week, and claimant testified that she was physically incapable of doing so. The record does not show that claimant summarily concluded that she could not perform other jobs to which the employer might have transferred her, but rather that she arrived at that conclusion based on her own experiences and observations working for the employer for over six years.

Given the conditions claimant described, and the effect those conditions had on claimant’s physical well-being, we conclude that a reasonable and prudent person with the qualities and characteristics of an individual with a long-term back injury that required surgery, exercising ordinary common sense, would reasonably conclude, as did claimant, that she had no reasonable alternatives to leaving work. We therefore conclude that claimant showed good cause for quitting work, and she is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-60935 is set aside, as outlined above.

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

DATE of Service: July 19, 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.

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