

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0857

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82404). Claimant filed a timely request for hearing. On July 5, 2016, ALJ Frank conducted a hearing, and on July 13, 2016 issued Hearing Decision 16-UI-63669, affirming the Department's decision. On July 21, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from October 15, 2012 until April 22, 2016.

(2) Claimant had long term medical conditions including tendonitis in her left shoulder and bursitis. Claimant initially worked as a cashier. Claimant was injured at work on June 5, 2014, resulting in a slap tear to her left labrum. After her injury, claimant's doctor imposed work restrictions on claimant, including no overhead work or repetitive use of her left shoulder. The work restrictions became permanent in December 2015. From June 2014 until April 22, 2016, the employer assigned claimant to perform light duty work as a greeter. Claimant was a member of a bona fide labor organization, and the cashier and light duty greeter positions were union positions.

(3) On April 19, 2016, the employer's human resources manager met with claimant, reviewed her worker's compensation claim information with her, and asked her if she was interested in a childcare attendant position. The employer had continuing work available for claimant as a childcare attendant. The childcare position met claimant's medical restrictions, and the employer had no other work that met claimant's restrictions. Exhibit 1. The childcare position was not a union position, and claimant told the manager she was not interested in the position for that reason.

(4) On April 22, 2016, the assistant store director told claimant the employer had no positions available within claimant's restrictions and that she was "done." Audio Record at 16:47 to 16:58.

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

The first issue is to determine whether claimant voluntarily left work or if the employer discharged her. 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 testified that she was not given a “formal offer” for the childcare attendant position, and did not realize the manager’s question on April 19, 2016 about claimant’s interest in the position was a job offer. Audio Record at 12:18 to 12:29. However, it is undisputed that claimant could have continued to work for the employer in the childcare position and told the manager she would not do so. Thus, because claimant could have continued to work for an additional period of time as a childcare attendant, we agree with the ALJ that the work separation is 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 tendonitis, bursitis, and a hip labral tear, 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 16-UI-63669, the ALJ concluded that claimant quit work without good cause because she had the reasonable alternative of accepting the childcare attendant position because the position would have complied with claimant’s medical restrictions, and its status as a non-union position did not create a grave situation for claimant.¹ Although the record shows that the childcare position met claimant’s medical restrictions, we conclude that the non-union nature of the childcare attendant job made the work unsuitable for claimant, thereby establishing that a grave situation existed that left claimant no reasonable alternative but to quit.

ORS 657.195(1)(c) provides that no work is suitable and benefits shall not be denied under Employment Department law if an individual refuses to accept new work, “[i]f as a condition of being employed the individual would be required to . . . resign from . . . any bona fide labor organization.” The only position available to claimant when she quit was the non-union childcare attendant position. Claimant was not willing to, and not legally required to, resign from her union to accept a non-union job to remain eligible for unemployment insurance benefits. Because the only work available to claimant when she quit was not suitable for her because it was a non-union job, claimant had good cause to leave work.

¹ Hearing Decision 16-UI-63669 at 3.

Claimant showed she quit work with good cause. She is, therefore, not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-63669 is set aside, as outlined above.

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

DATE of Service: August 16, 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. 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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