

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1245

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133100). Claimant filed a timely request for hearing. On October 11, 2016, ALJ Kangas conducted a hearing, and on October 17, 2016 issued Hearing Decision 16-UI-69309, affirming the Department's decision. On November 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Providence Health employed claimant from January 26, 2015 until July 15, 2016.

(2) Sometime before January 2016, claimant began to experience severe migraine headaches. Claimant thought those headaches were attributable to a traumatic brain injury she sustained from a concussion while deployed in the armed services. Claimant contacted the Department of Veteran's Affairs (VA), to seek a service-connected disability rating due to the migraines she experienced.

(3) Sometime before February 1, 2016, claimant began to think that the employer's office manager was harassing her.

(4) On February 1, 2016, the employer authorized intermittent leave for claimant under the federal Family Medical Leave Act (FMLA) due to her migraine headaches. Based on her medical provider's certification, the leave authorized claimant to take one day off per month for migraine episodes and one day per month for treatment.

(5) In April, May and June 2016, claimant was absent from work as a result of migraine headaches many more days than were authorized under the intermittent FMLA leave. On June 24, 2016, the employer approved an updated FMLA leave for claimant based her medical provider's updated certification. The updated leave allowed claimant to take, as needed, entire work weeks off due to her migraines. Claimant was away from work continuously beginning on June 20, 2016 and was expected to return to work on July 5, 2016. On July 5, 2016, claimant notified the employer that she was unable to return to work on that day and her continuous leave was extended through July 17, 2016. At around this time, claimant notified the employer that she was actively pursuing a service related disability through the VA due to her migraine headaches and she had an appointment with the VA on July 12, 2015.

(6) Sometime before July 6, 2016, claimant's supervisor, who was the office manager, and the employer's human resources representative discussed claimant's leave with each other. Because the office manager did not know when claimant planned to return to work, the human resources representative advised the office manager to contact claimant to learn the status of her condition and when claimant anticipated she might return to work. The representative also advised the office manager to keep in regular contact with claimant throughout the time she was continuously away from work on leave.

(7) On July 6, 2016, the office manager called claimant twice and they discussed claimant's condition and when she might return to work. On July 7, 2016, the office manager called claimant twice and left voicemail messages. Claimant did not return the office manager's calls because she was having a migraine headache that day. On July 12, 2016, the office manager sent three text messages to claimant inquiring about her appointment with the VA and if she was going to be able to return to work on July 18, 2016. Claimant called and spoke to the office manager. When claimant stated she did not know if she would return to work on July 18, 2016, the office manager told her it would be "more convenient" if she took off the entire remaining FMLA leave to which she was entitled on a continuous basis so the manager could obtain coverage during claimant's absences. Transcript at 12. The office manager also asked claimant details about her appointment with the VA, which claimant did not feel comfortable discussing with her. On July 12, 2016, after talking with the office manager, claimant contacted the employer's benefit administrator to complain about what she perceived as the office manager's excessive and harassing phone calls and intrusive questioning. The benefits administrator advised claimant to contact the employer's human resources department about those complaints. Claimant asked the benefits administrator to send her the paperwork she needed to complete to extend her FMLA leave beyond July 17, 2016.

(8) On July 13, 2016, claimant left a message on the employer's recorded integrity line, stating her concerns about the employer's human resources department. In response, a human resources representative contacted claimant the next day and arranged a phone meeting with claimant for July 15, 2016. When they spoke, claimant told the representative that she felt harassed by the office manager's recent calls to her while on leave, as well as by other of the manager's behaviors. Claimant told the representative she did not want to return to the clinic and continue working under the office manager when she was well enough to resume working. Claimant also told the representative that she had requested paperwork from the benefits administrator to take the remaining FMLA leave time available to her on a continuous basis to determine if during that extended leave time her condition would improve sufficiently to allow her to return to work. At that time, the FMLA leave available to claimant would have allowed her to be off from work continuously until late August or early September 2016.

The representative asked claimant if she thought she could return to work when her extended FMLA leave was exhausted, and claimant said, "I hope so." Transcript at 15. The representative explained to claimant that, rather than the office manager intending to harass her by her calls, the human resources department had advised the office manager to maintain contact with claimant and the manager's calls likely were a result of that advice. Transcript at 15. The human resources representative told claimant she would speak with the office manager about claimant's concerns and her perception that she had been harassed. Transcript at 19. Claimant then expressed uncertainty about whether she would pursue extending her FMLA leave and stated she might resign very shortly. The representative told claimant she had the option of remaining employed and extending her FMLA leave to see if her condition improved and if it did not, and she was not able to return to work when it was exhausted, to resign at that time rather than doing so immediately. Transcript at 20, 22, 24.

(9) On July 15, 2016, after their call, claimant notified the human resources representative that she was resigning, citing the state of her health, her uncertainty about when her health would be sufficiently improved to allow her to return to work and her perception that she was not "supported by [the] leadership" at the clinic. Exhibit 1 at 24. In her resignation, claimant expressed her appreciation to the employer for "following up on the concerns that I have expressed in regards to leadership at [the clinic]." Exhibit 1 at 24.

(10) By the end of July or beginning of August 2016, the frequency and severity of claimant's migraine episodes had substantially subsided and she would have been medically able to return to work if she had extended her FMLA leave and had not resigned. Transcript at 27.

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 P3d 722 (2010). Claimant had chronic migraine headaches, 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.

While claimant discussed her migraines headaches and the allegedly harassing behavior of the office manager as contributing to her decision to leave work, she contended that she principally decided to resign when she did because the human resources representative recommended that she take a "medical resignation" to ensure she received unemployment benefits and told her that there were no open positions into which she could transfer to avoid the office manager. Transcript at 15, 16, 17, 18. However, the human resources representative denied making such recommendations and statements to claimant, and credibly contended that she did not refer to a "medical resignation" and did not know what exactly that phrase meant, would not have told claimant that there were no positions into which she could transfer because she was not involved with hiring and recruitment, those tasks were handled by

the talent acquisition team and, with respect to unemployment benefits, it was her practice only to state that the employer contested all claims and that was all she told claimant. Transcript at 22, 25. The representative further testified that she only discussed the various options available to claimant, including that she could extend her FMLA leave, without making any recommendations as to which would be more beneficial for claimant to pursue. Transcript at 25. Claimant agreed that the representative made clear to her that she had several alternative courses she could take, which undercuts claimant's contention that the representative advocated for one option in particular rather than discussing all options in general. Transcript at 18, 20. As well, if the representative had actually been so strongly in favor of a "medical resignation," it would be expected that claimant would have mentioned in her resignation letter that she was quitting in accord with the recommendation of the human resources representative, which she did not. See Exhibit 1 at 24. Viewed in sum, the evidence on whether the human resources representative advised to resign immediately is evenly balanced. As such, claimant did not meet her burden to show that such advice was given to her or that she quit based on that advice. See *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

With respect to claimant's health and the headaches she experienced, her circumstances appear to have been grave at the time she resigned. However, when she resigned in lieu of extending her FMLA leave, it was not reasonably certain that her medical condition would not resolve sufficiently before the extended leave was exhausted. Indeed, claimant told the human resources representative immediately before she resigned that, although she was not certain if her condition would improve enough to allow her to return to work during the extended leave, she was "hopeful." Transcript at 15. While claimant would not have been paid during the approximately one and one-half months remaining of her FMLA leave, her health condition was such that she would not have been able to work at any job until it improved and she would not have been able to earn any income. Since claimant did not attribute the occurrence of her migraine headaches to conditions in the employer's workplace, it is difficult to see how claimant improved her circumstances by resigning rather than extending her leave to see if her medical condition improved sufficiently during that time to allow her to return to work. Transcript at 27. Because claimant did not show that taking the extension of the FMLA leave would have been reasonably futile in rectifying the gravity of her situation and she also did not show that resigning when she did caused her to avoid some cognizable harm or somehow to improve her situation beyond what it otherwise would have been, claimant did not show that taking the extended leave was not a reasonable alternative to quitting work when she did due to her headaches.

With respect to the allegedly harassing behavior of the office manager, claimant did not show that it constituted a grave circumstance or was good cause for her to leave work when she did. While the office manager contacted claimant on July 6, 2016, left two voicemail messages on July 7, 2016 (which claimant did not return) and sent her three text messages on July 12, 2016 asking claimant to call her, claimant did not show that these contacts were so frequent or of such a nature that they created a situation of gravity. As well, from claimant's testimony, it appeared that after claimant informed the human resources representative that she felt the office manager was harassing her, the representative intended to address claimant's concerns with the office manager. Transcript at 19. The human resources representative also testified that if claimant had remained employed and expressed other concerns about the office manager's behavior she would have addressed those concerns with the office manager as well. Transcript at 25. Claimant presented no evidence suggesting or tending to suggest that the intervention of the human resources representative on her behalf with the office manager would not be in good faith or was unlikely to ameliorate the behavior of the office manager that claimant

perceived to be harassing or discriminatory. Moreover, in her resignation letter, claimant thanked the employer for its responsiveness in following up on the concerns she had expressed about the clinic “leadership,” which presumably referred to the office manager. Exhibit 1 at 24. Based on this evidence, it appears that the employer had already taken some steps and was willing to take additional steps to address the office manager’s behavior. On this record and for these reasons, claimant did not show that the office manager’s behavior was a grave reason to leave work, and did not show that she had no alternative other than leaving work to avoid the behaviors that she considered harassing.

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-69309 is affirmed.

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

DATE of Service: December 14, 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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