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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1440

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, but was eligible to receive benefits up to September 17, 2016 (decision # 112419). Claimant filed a timely request for hearing. On December 6, 2016, ALJ Frank conducted a hearing, and on Decmber8, 2016 issued Hearing Decision 16-UI-72579, reversing the Department's decision and concluding claimant was discharged but not for misconduct. On December 27, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not offered into evidence during the hearing. The employer did not explain why it did not offer this information at hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Jubitz Corporation employed claimant as a transportation manager from September 1, 2015 until September 6, 2016.

(2) Before March 2016, claimant usually worked around fifty hours per week. In March 2016, the employer's fleet maintenance manager took a medical leave of absence and claimant was assigned a significant portion of the fleet maintenance manager's responsibilities in addition to those he already had as transportation manager. As a result of the new responsibilities claimant was assigned, he began working between seventy and eighty hours per week, fifty in the employer's office and twenty to thirty outside of the office. The combination of the longer hours claimant was working and the stress of assuming job responsibilities with which he was neither experienced nor trained caused claimant to experience anxiety and depression. In approximately mid-June 2016, claimant was notified that the employer had decided to eliminate the separate position of fleet maintenance manager, and for the foreseeable future claimant would be expected to perform the duties of transportation manager as well as the duties of the fleet maintenance manager that had been assigned to him.

(3) Sometime after June 2016, claimant's anxiety and depression progressively worsened due to his efforts to cover the duties of the two positions. Claimant began to experience significant chest pains and heart palpitations from work. Sometime in July 2016, claimant told the employer's director of people services that he was having significant difficulties working the hours was expected to work, and that he was "stressed out." Audio at ~22:49. Around Monday, August 15, 2016, claimant again spoke with the director of people services, described the hours he had worked over the preceding weekend and the number of phone calls he had been required to take to respond to drivers' and customers' needs, and stated that he was working at a "pace that [he] couldn't keep [up]." Audio at ~12:26, ~33:50.

(4) Around August 16 or 17, 2016, claimant began experiencing serious heart palpitations, irregular heartbeats and chest pains that he attributed to the hours he was working and stress and anxiety associated with work. On August 18, 2016, claimant went to a hospital emergency department for treatment of his heart symptoms. Claimant's physician examined him and told him his symptoms were caused by work-related stress, and that he needed to take at least the next two weeks off from work. The physician prescribed anti-anxiety and anti-depressant medications to claimant. Claimant contacted the employer, and told it about his health conditions, that he had gone to a hospital, and that his physician had told him he was not able to work and had instructed him to take two weeks away from work.

(5) From August 19, 2016 to September 5, 2016, claimant took a leave of absence from work pursuant to his physician's instructions. During the time claimant was off work, his physical symptoms due to anxiety and depression largely abated, including the heart palpitations, irregular heartbeats and chest pains. While he was off from work, claimant decided he could not return to work at the same job with the same stresses without jeopardizing his health.

(6) On September 6, 2016, claimant reported for work and told the employer he was quitting work in two weeks. Because the employer had begun implementing some work-related changes during the time claimant was away on leave, the employer decided it did not want to train claimant in those changes if he was going to leave on September 20, 2016. On September 6, 2016, the employer discharged claimant and did not allow him to work through the two week notice period.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The employer's witness contended at hearing that the employer did not discharge claimant on September 6, 2016, but merely "accepted his resignation and paid him for the week [notice] period." Audio at ~21:31. However, the employer's witness did not contend that the employer gave claimant a choice about whether or not he could work out the notice period, there was no evidence that the employer was willing to allow claimant to work during the notice period, and the employer did not dispute claimant's testimony that the employer's director of people services told claimant on September 6, 2016 that the employer was "terminat[ing] my employment on the sixth [September 6, 2016]." Audio at ~15:53. The evidence in this record shows that after claimant had tendered his resignation indicating he would quit as of September 20, 2016, the employer was unwilling to allow him to work during the notice period and thus discharged him on that day.

When an employer has intervened to discharge a claimant after claimant has notified it he plans to leave work on a specific date, there are limited circumstances in which the discharge may be disregarded and

the work separation will be adjudicated as if the discharge had not occurred and the voluntary leaving had occurred as planned. ORS 657.176(8) is one such statutory provision, and it allows an intervening discharge to be ignored if it occurred no more than 15 days prior to the planned voluntary leaving date, the discharge would not be for misconduct, and the planned leaving would be for reasons that do not constitute good cause. Here, the employer discharged claimant 14 days before his planned leaving date of September 20, 2016, and the first prong of ORS 657.176(8) is therefore satisfied. ORS 657.176(8)(c). It is next considered whether claimant's planned leaving would or would not have been for good cause to determine whether the employer's intervening discharge of claimant may be disregarded under ORS 657.176(8)(a).

"Good cause" for leaving work 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). Based on claimant's testimony at hearing about his depression, anxiety and associated heart palpitations and chest pains, his treatment at an emergency department on August 18, 2016, his physician's instruction that he take a leave of absence and the medications the physician prescribed for him, it appears that claimant was subject to permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h) at the time he left work. A claimant with such 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 his employer for an additional period of time.

At hearing, the employer's witness did not dispute that claimant was suffering from anxiety and depression at the time he left work or that he had heart palpitations and chest pains that were triggered by stress he perceived in the workplace. While the employer's witness testified he would be "surprised" if claimant was working seventy hours each week and "very surprised" if claimant was working eighty hours per week, he did not deny outright the accuracy of claimant's testimony or contend that it was fabricated. Audio at ~26:17. It further appeared that the employer's witness did not have first-hand knowledge of the hours that claimant worked per week in the months before he quit, and the basis for his opinion was not clear. In contrast, claimant's testimony was measured, based on first-hand information, and there was no reason to question its credibility. On balance, the evidence shows that claimant was working seventy to eighty hours per week in the months leading up to his resignation. From claimant's description of his physical reactions to the stress he experienced from working and the severity of those reactions, it was not unreasonable for claimant to conclude that continuing to work under conditions as they then existed would jeopardize his health. A reasonable and prudent person with the level of depression and anxiety that claimant experienced would have considered his circumstances at work grave, particularly when those conditions acting in combination with perceived workplace stressors provoked serious heart palpitations, irregularities in heart rhythm and chest pain that culminated in hospital treatment, and a medically recommended leave of absence from work.

On this record, it also appears that a reasonable and prudent person with anxiety, depression and the associated physical symptoms that claimant experienced would not have concluded that there were reasonable alternatives to leaving work when he did. First, claimant testified he brought up his problems coping with workplace stressors with the employer's director of people services and asked the employer to relieve him of some of the fleet maintenance manager's duties, and he did not receive any assurances that this would be done. Audio at ~13:25. While that director testified at hearing that he had "vague

memory" of claimant complaining about being "busy" at work one or two days before claimant's physician placed him on a medical leave, the director testified that he had not understood that claimant was asking him for help. Audio at ~33:50. What the director did or did not think based on a "vague memory" of a conversation with claimant is less important for purposes of determining whether claimant had reasonable alternatives to leaving work when he did than whether claimant likely sought some intervention from the employer to alleviate the stress that was giving rise to his physical symptoms, and it was not forthcoming. It appears that claimant did, and none was forthcoming.

In addition, while the employer's witness testified generally that that some less stress-provoking positions with the employer were "potentially" available for claimant to take as an option to leaving work, he testified he could not identify the "specific positions" that might have been open when claimant quit. Audio at ~26:46. Such vague testimony is insufficient to establish that claimant's transfer into another position was a reasonable alternative since it was based only on a unverified hypothetical and there was no concrete evidence that such alternative work was actually available or that claimant would have been suitable for that work. *See Gonzales v. Employment Department*, 200 Or App 547, 115 P3d 976 (2005) (transferring to another position was not a reasonable option when no evidence that the employer investigated and determined that alternative work was actually available when claimant left work or that claimant was qualified and interested in performing such work).

Finally, while claimant might have sought an additional leave of absence and extended the length of time he was away from work in lieu of quitting when he did, a leave of absence is not considered a reasonable alternative if it would not remedy the underlying working conditions that were causing claimant to experience gravity. *See Early v. Employment Department*, 247 Or App 321, __P3d__ (2015) (leave of absence not a reasonable alternative because time away from work would not resolve the workplace conditions that were making claimant ill and suicidal but would only postpone claimant's experience of illness). Here, there was no indication that a leave would result in the employer reducing the hours that claimant was required to work or lessen the additional duties that claimant had assumed, which were the workplace conditions that caused claimant to experience depression, anxiety and the physical symptoms associated with them. On this record, it does not appear there were any reasonable options to claimant quitting work when he did. Since claimant's situation was grave, he therefore had good cause for leaving work.

Since claimant left work for good cause, ORS 657.176(8) does not apply to claimant's situation. As such, the employer's discharge of claimant, which intervened between when claimant notified the employer that he planned to leave work and the effective date of his leaving, cannot be disregarded under that statutory authority. Because no other statutes or regulations authorize us to ignore the employer's discharge of claimant on September 6, 2016 as effectuating the work separation, there is no basis to do so. The next issue therefore is whether the circumstances under which claimant was discharged disqualify him from benefits.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to

show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because the employer did not want to train claimant in newly implemented procedures when, based on his notice of resignation, he would be leaving work in two weeks. It was not misconduct for claimant to notify the employer that he was resigning in two weeks. There was no evidence in the record suggesting or tending to suggest that the employer discharged claimant for any other behavior that constituted misconduct. The employer therefore failed to meet its burden to show that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-72579 is affirmed.

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

DATE of Service: February 1, 2017

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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