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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0353

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145253). Claimant filed a timely request for hearing. On March 1, 2017, ALJ Snyder conducted a hearing, and on March 9, 2017 issued Hearing Decision 17-UI-78522, affirming the Department's decision. On March 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision to the extent it was relevant and based upon the hearing record. ORS 657.275(2); OAR 471-041-0080; OAR 471-041-0090.

FINDINGS OF FACT: (1) The Department of State Police employed claimant as an office specialist from July 16, 2007 to September 11, 2016.

(2) Claimant had a medical condition that caused her to experience major discomfort while sitting. Claimant experienced pain and bleeding due to the condition. Claimant noticed that a couple of coworkers had sit/stand desks. Claimant asked them what they did to receive the desks. Neither reported that they had been subject to questioning about their medical conditions.

(3) The employer planned to move its offices to a new building in June 2016. Prior to moving, claimant asked her supervisor if she could, after the move, be given use of a former employee's sit/stand desk, which had been sitting unused for several months. The supervisor said claimant could not use the desk because the supervisor was going to use that desk herself.

(4) On June 22, 2016, after the employer moved its offices to a new building, claimant submitted a doctor's note to her supervisor stating that claimant needed to be able to sit or stand at her desk to accommodate a medical condition. Claimant's supervisor did not acknowledge receiving the doctor's note or respond to it.

(5) Approximately one week later, a human resources staff person called claimant to ask her for details about the physical problems that necessitated the sit/stand desk. Exhibit 1. The human resources person suggested that claimant use a freestanding lift that sat on top of her desk instead of a sit/stand desk. Claimant said she had tried that option but found that the lift was too heavy for her to use because of pain and neuropathy in her hands and a permanent neck injury. The human resources person offered to have an ergonomic assessment done for the purposes of determining the placement and position of claimant's chair. Claimant agreed and waited for her turn as the employer regularly issued emails listing whose work stations were being assessed or repaired, but no one ever came to do the assessment.

(6) Claimant's supervisor subsequently arranged to have claimant's keyboard tray installed at her work station. Claimant declined, and told her supervisor that she was still waiting for a resolution about the sit/stand desk her doctor had recommended. She did not hear again from her supervisor or human resources about the sit/stand desk.

(7) On September 9, 2016, claimant again experienced pain and bleeding from having to sit at work. Claimant believed it would be useless to do additional follow up with the employer about the sit/stand desk request. Although coworkers with sit/stand desks had not had to undergo questioning about their medical conditions or health, claimant was required to do so but was still not allowed to get a sit/stand desk even though she had provided the employer with a medical note justifying her request. She had repeatedly asked for a sit/stand desk. Her supervisor refused one request outright and ignored a second. Human resources subjected her to medical inquiries, required she have an ergonomic assessment she did not feel she needed before considering her request for a sit/stand desk, and, eventually, abandoned her request without ever having offered her a sit/stand desk or other accommodations.

(8) Claimant had additional reasons to believe that following up on her request with either the union or the employer was useless. Claimant complained to the union about previous incidents, and while the representative commiserated the only response she provided was that she "said she wished I [claimant] could find employment elsewhere" and there was nothing the union could do for her. Exhibit 1. She had been yelled at and spoken to in anger by her supervisor about other complaints. Claimant tried to go above her manager to complain about harassment, but was told that she was not permitted to complain to them and had spent too much time on the issue. She experienced ageist incidents, was ignored or subjected to disparate treatment by another manager, and experienced what she felt were unjustified criticisms of her work. Claimant had once sought counsel from a former manager, who told her that "if I wanted to get along with this administration and management team, I was to only say what I knew they wanted to hear, keep my mouth shut otherwise, and to keep my head low"; claimant's subsequent experiences with managers, human resources and her coworkers reinforced to claimant that complaining about her circumstances was futile. *Id.*

(9) Claimant had a number of ongoing concerns about her employment; based in part on the pain and bleeding claimant experienced on her final day of work, and her belief based upon other experiences that further efforts to obtain a sit/stand desk would be futile, she quit work effective September 11, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant voluntarily left 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.[1] OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

The ALJ concluded that claimant quit work without good cause because although "the work environment had become toxic for her," "seeking other suitable work while maintaining her current employment and health benefits" so she could "secure suitable employment before leaving work" was a reasonable alternative to quitting work. Hearing Decision 17-UI-78522 at 3. We disagree. The Oregon Court of Appeals has repeatedly held that continuing to work while seeking another job is not considered a reasonable alternative to quitting work. *See e.g. Campbell v. Employment Dep't.*, 256 Or. App. 682, 303 P.3d 957 (2013); *Strutz v. Employment Dep't.*, 247 Or. App. 439, 270 P.3d 357 (2011); *Campbell v. Employment Dep't.*, 245 Or. App. 573, 263 P.3d 1122 (2011); *Warkentin v. Employment Dep't.*, 245 Or. App. 128, 261 P.3d 72 (2011); and *Hill v. Employment Dep't.*, 238 Or. App. 330, 243 P.3d 78 (2010). Not only is it true in every case that an individual could have kept working, as the availability of continued work is the hallmark of a "voluntary leaving," it is beside the point, because it does not answer the question of whether a reasonable and prudent person would quit under the conditions at issue. *See accord Warkentin v. Employment Dep't.*, 245 Or. App. 128, 261 P.3d 72 (2011).

Claimant quit work, in part, because the employer ignored over a period of almost three months her request for and doctor's note justifying a sit/stand desk as an accommodation for a medical condition. Claimant's initial request to her supervisor was denied. Claimant's supervisor did not acknowledge or respond to claimant's submission of a doctor's note, and ignored claimant when she said three months after submitting her doctor's note that she was still waiting for human resources to respond to her request and doctor's note. Although human resources had a doctor's note stating that claimant needed a sit/stand work station and understood from claimant that other accommodations such as an ergonomic chair adjustment or a lift on her desk would not work, other than a phone call and promise of an ergonomic assessment that was not responsive to claimant's actual request, human resources did not undertake any actions to respond to claimant's request or provide her with a sit/stand desk. As a result, claimant was required to use a desk that did not accommodate her need to stand at work, and suffered pain and bleeding for almost three months, which any reasonable and prudent person would consider a grave situation.

The employer's witness implied during the hearing that claimant had the reasonable alternative of engaging in the employer's interactive process rather than quitting work over the lack of a sit/stand desk,

[1] Claimant alluded during the hearing to having a variety of medical conditions, but the record was not developed to include sufficient information establishing whether or not she had long term or permanent physical or mental impairments as that term is defined at 29 CFR 1630.2(h); we therefore analyzed claimant's voluntary leaving using the standard of a reasonable and prudent person without impairment. Even if we had found claimant had impairments, the outcome of this decision would remain the same for the reasons explained.

arguing that, although the employer ultimately "dropped the ball" with respect to claimant's request for a sit/stand desk, it was because things were "chaotic" and "swamped" after the employer moved its offices and not because the employer was non-responsive to claimant's request. Audio recording at ~ 37:00. We disagree. The employer's witness testified, with respect to claimant's request for a sit/stand desk, "I wanted to get an ergonomic assessment, to see if there was something that we could do with her work station to make it more comfortable for her to work. And this is how I routinely respond to requests like this. And then – and then if that didn't work, then I would've engaged in the interactive process and we would've gone through that process." Audio recording at 35:15. She described the "interactive process" as "We are required to have conversations with the employee and it may go back and forth interactively to determine what solution would best meet the employee's needs." Audio recording at 36:15. At the time the witness was recommending claimant have an ergonomic assessment of her chair, however, claimant had already ruled out the possibility of a desk lift working for her, and claimant's doctor had already notified the employer that she was required to have a sit/stand desk. Ergonomically assessing claimant's seat was non-responsive to her medical need as noted by her doctor, and rather than even doing that, the employer decided to assess claimant's chair instead of taking some action that would allow her to stand while working, and later "dropped the ball," allowing almost three months to pass without effectively responding to claimant's request for a medical accommodation.

Finally, the employer's witness said at the hearing that claimant had a lot people to which she could complain if she felt she needed to do so. Audio recording at ~ 31:00. However, a prior manager had counseled her against complaining, and claimant's later experiences were consistent with the advice she received from him. Claimant had seen her previous complaints to her managers result in a negative backlash against her, which discouraged her from complaining about anything else and receiving additional negative treatment in response. Claimant's supervisor had both refused and repeatedly ignored requests for a sit/stand desk. Her union was repeatedly non-responsive to her requests for help and counseled her that she "wished" claimant could work elsewhere. Claimant had spoken with coworkers who had not had to undergo any sort of process or medical inquiry prior to being allowed sit/stand desks, and therefore knew she was being treated differently than others who had made similar requests. Given those factors, claimant reasonably believed complaining further was not a reasonable alternative to quitting work.

No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working for an employer whose lack of response to her request for a medical accommodation caused her to work for almost three months while in pain and bleeding. Claimant had good cause for quitting work when she did, and she may not be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-78522 is set aside, as outlined above.[2]

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

DATE of Service: <u>April 7, 2017</u>

[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if 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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