EO: 990
BYE: 201736

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

042
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0672

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 74917). Claimant filed a timely request for hearing. On January 28, 2017, ALJ Murdock conducted a hearing, at which both parties appeared, and on February 6, 2017, issued Hearing Decision 17-UI-76301, affirming the administrative decision. On February 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On March 15, 2017, EAB issued Employment Appeals Board Decision 2017-EAB-0226, reversing Hearing Decision 17-UI-76301 and remanding the matter for additional proceedings. On May 18, 2017, ALJ Murdock conducted a hearing, at which the employer did not appear, and on May 24, 2017 issued Hearing Decision 17-UI-84095, re-affirming the Department's decision. On May 31, 2017, claimant filed an application for review of Hearing Decision 17-UI-84095 with EAB.

EAB considered claimant's written arguments to the extent they were relevant and based on evidence in the record.

FINDINGS OF FACT: (1) Vectrus Systems employed claimant as a network security information assurance engineer 2 from July 20, 2015 until July 27, 2016.

(2) Although the employer told claimant in July 2015 that it was hiring an associate to assist him in the performance of his duties, and attempted to do so, the hiring did not occur. Despite ongoing efforts the employer was unable to find a qualified candidate to hire. A significant amount of staff and managers left their jobs. Because claimant had no one to assist him, he performed the work of at least two people.

(3) Claimant worked on and managed up to seven major security projects at one time. The work and work was very intense, and claimant was the only person qualified to perform it. Although claimant, as a salaried employee, chose not to accurately report t hours, he regularly worked more than 40 hours per week and sometimes worked seven days a week.

(4) Claimant asked the employer for fewer projects but the employer could not reduce his workload. It did not occur to claimant to ask the employer to reduce his hours. It was common knowledge that claimant and others worked long hours. One former director of claimant's department took early retirement because of the demands of the work. Another former director of claimant's department reported to human resources that the engineering "department is really understaffed" but nothing changed because of his report. May 18, 2017 hearing, Audio recording at 16:15. People continued to leave their jobs, which caused claimant's workload and stress to worsen.

(5) Throughout his employment claimant had prostate cancer and squamous cell carcinoma. Claimant had undergone treatment and is cancers were essentially dormant, so to speak, but claimant had to be careful to maintain his health and pay close attention to his health in case he became symptomatic again. In approximately April 2016, symptoms of his cancers returned. Claimant lost sleep due to the symptoms, felt unwell, contracted an upper respiratory infection. Claimant felt deeply afraid at the prospect of his cancers returning. Claimant attributed the return of his symptoms to work-related stress.

(6) Claimant's doctor recommended he take a medical leave of absence, and the employer allowed claimant's leave from May 2, 2016 to June 1, 2016. At the time claimant left work for his medical leave, he had five complex projects outstanding at work. He knew there were no other employees with the clearances necessary to do his work, and anticipated that when he returned to work after his leave of absence he would return to the same workload he had been handling before he left.

(7) While on leave, claimant's health improved and he began to feel normal again. Claimant's doctor noted that his condition had markedly improved, told him that the connection between his job stress and health were obvious, and said that although it was ultimately claimant's decision whether or not to keep his job he risked worsening health if he returned to it. The doctor extended claimant's medical leave to July 25, 2016, and recommended that claimant find another job.

(8) On July 25, 2016, the doctor released claimant to return to work without restrictions. That day, claimant spoke with the employer's human relations representative. The representative told claimant that because he had been released by his doctor to return to work, he was expected either to return to work on July 26, 2016 or to provide a doctor's note to authorize additional time off for medical reasons. Claimant told the representative that he would not return to his job, but was interested in working for the employer in a different position. The representative told claimant the employer would not allow him to remain on a leave of absence when he had been cleared to work, but put him in touch with a recruiter who began assisting claimant in looking for other positions with the employer.

(9) The employer had continuing work for claimant in the position he had held prior to his medical leaves. Claimant chose not return to that position after July 26, 2016. Claimant immediately began working with the employer's recruiter to find another, less stressful position with the employer. As of January 2017, no such positions had become available.

(10) Claimant's former coworkers told claimant that during or after his medical leave the employer had lost one or more of its government contracts for lack of performance because the employer lacked sufficient staff to complete the work.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 prostate cancer and squamous cell carcinoma, which were permanent or long-term "physical or mental impairments" 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 his employer for an additional period of time.

The ALJ concluded that claimant quit work without good cause "based upon the unconfirmed assumption that it was not possible for the employer to implement reasonable accommodations that might alleviate or reduce his work stress," and that a reasonable and prudent person, as a reasonable alternative to quitting, "would seek such options before determining that it was futile to continue working for the employer in the position he was hired to perform." Hearing Decision 17-UI-84095 at 3. We disagree.

Claimant did not quit based on unconfirmed assumptions about his workload or the employer's ability to implement measures to reduce his work stress. At the time claimant quit work, he well knew what his typical workload was like and what the employer was capable of doing to alleviate it. For example, claimant knew that he was the only person qualified to do the work he was assigned, he had been handling a very intense workload unaided for more than a year, his request to reduce his workload had been denied, he had observed the employer's ongoing efforts to find a qualified associate to assist with the performance of claimant's work fail, and observed at least two engineering department managers quit work either because of the workload or citing to the workload as a problem in claimant's department without any forthcoming resolution. When claimant began his leave he had five very intense projects on his desk, and he reasonably believed based on his personal observations and experiences that not only would those five projects still be on his desk if he returned from his medical leave, but also that the employer had probably not hired anyone to assist him with that work, no existing employees had the right clearances to do the work, and the employer would not be able to reassign any of those projects away from claimant's desk. While the ALJ is correct that the employer's witness testified in the first hearing that the employer would have been willing to explore accommodations for claimant, as a practical matter the record developed at both hearings fails to demonstrate that the employer had the ability to reduce claimant's workload or that other accommodations short of a reduced workload would have been responsive to claimant's concerns. Notably, information claimant received from coworkers during his medical leave or after he quit that the employer's staff shortages cost the employer one or more government contracts suggests the likelihood that the employer did not have the ability to reassign some of claimant's work to other staff or otherwise reduce his workload around the period of time relevant to claimant's decision to quit work.

At the time claimant quit work, he had a very intense workload over a protracted period that caused him undue stress, affected his tenuous health and caused him symptoms that made him fear for his life. Claimant's doctor confirmed that claimant's symptoms and ill-health were connected to his work-related stress and he risked further health problems if he chose to return to his job after his medical leave. Claimant knew it was unlikely his working conditions or work-related stress would change if he continued working in the job he held.[1] Claimant's improved health while away from his job supported the doctor's belief and recommendation that claimant would improve his health by leaving his job. Claimant testified, with regard to his decision to quit when he did, "I don't want to die over a job." May 18, 2017 hearing, Audio recording at ~ 43:30. A reasonable and prudent person in claimant's situation, with the qualities and characteristics of an individual with prostate cancer and squamous cell carcinoma, whose doctor recommended he quit work for the sake of his health, would, more likely than not, take that advice. Claimant therefore quit work with good cause. He is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-84095 is set aside, as outlined above.[2]

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

DATE of Service: <u>June 22, 2017</u>

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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[1] We note that seeking a transfer or going through recruitment for a different job with the employer was not a reasonable alternative to quitting work in this case. Claimant sought a different position at the time he was communicating with the employer about his unwillingness to continue in the position he held and there were none available. At the time of the January 2017 hearing, claimant had been working with the employer's recruiter about getting a different position with the employer for almost six months without success. It is not reasonable to expect an individual in claimant's situation to continue working for a protracted period of time while waiting for a transfer or recruitment opportunity to become available.

[2] 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.