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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0753

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 104444). Claimant filed a timely request for hearing. On June 5, 2017, ALJ Janzen conducted a hearing, and on June 6, 2017 issued Hearing Decision 17-UI-84946, affirming the Department's decision. On June 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Robert Half International, Inc. employed claimant as a staffing manager from November 14, 2014 to March 31, 2017.

(2) In early February 2017 claimant was injured in a car accident. She subsequently had a lot of absences related to her injuries and recovery, and missed between five and seven and one-half hours per week for medical appointments. The employer did not offer accrued sick leave to its employees. Claimant's supervisors authorized her to make up her missed time by coming to work early or working late.

(3) Approximately a month after claimant's injury, on March 7, 2017, the employer placed claimant on a work plan, set to expire on March 31st, because she was underperforming in her job and needed to improve or be subject to discipline or discharge. Claimant was surprised to have been placed on a work plan. She had access to information ranking all the employer's staff and considered her performance to be adequate as compared to others with her position and experience. She considered the performance goals in her work plan unattainable.

(4) By March 31, 2017, claimant had not satisfied the terms of the work plan despite her efforts. Claimant's supervisor suggested that claimant would not be able to meet the expectations set forth in the March 7th memo, was being forced out, and was likely going to be discharged if she did not quit. She suggested that claimant needed to spend her time recovering from her injuries and recommended claimant resign. Claimant resigned on the advice of her supervisor to avoid being discharged, effective immediately.

(5) At the time she quit work, claimant was not aware if a medical leave of absence was available. The individual who handled human resources matters for the employer did not speak with her about a leave of absence or offer one to her, and claimant did not know how to contact anyone else about human resources matters. The employer did not have other positions available for claimant, and did not offer claimant a transfer.

(6) As of June 5, 2017, claimant was still attending medical appointments every day of the week, and sometimes two appointments a day, in an effort to recover from her February 2017 injuries.

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. 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's inability "to meet the employer's expectations because she was attending a variety of medical appointments as a result of injuries she sustained in a car accident" amounted to "a grave situation."[1] However, the ALJ also found that "she had some reasonable alternatives to explore before quitting" because "she could have asked if the employer had any leave of absence options available for her."[2] The ALJ concluded that because claimant did not ask if the employer had a leave of absence options she did not have good cause to quit work.[3]

We agree with the ALJ that it appears more likely than not that claimant faced a grave situation at the time she quit her job. She had suffered injuries in a car accident almost two months earlier that resulted in her need for a significant amount of ongoing medical care that necessitated she miss up to seven and one-half hours of work every week. Her attendance and work performance suffered to the point that the employer placed her on a work plan and ultimately recommended she quit work because she was facing what was likely an imminent discharge and was concerned about the effects having a discharge on her employment record would have on her search for a new job.

[1] Hearing Decision 17-UI-84946 at 2.

[2] *Id.*

[3] *Id.*

We disagree with the ALJ, however, that asking the employer if there were any leave of absence options was a reasonable alternative for claimant to quitting work. Claimant testified that she was not aware that any leave of absence options existed. In fact, the only evidence in this record about the existence of such an option was provided by claimant, and consisted of her statement that she did not know that the employer offered leaves of absence, making the existence of a leave purely hypothetical.[4] It is not reasonable to expect claimant to pursue an alternative of which she was unaware.[5] It is also notable that the employer was aware of the likely correlation between claimant's frequent absences from work and her unsatisfactory performance, as suggested by the supervisor's recommendation to claimant to quit work so she would have the time she needed to attend to her recovery. Rather than suggest that claimant take a leave of absence from work to recover, however, the supervisor instead suggested that she quit work. The employer's failure to offer claimant a leave of absence under the circumstances implicitly suggests that a leave of absence was not an option, making an inquiry by claimant into the existence of a leave a futile exercise.[6] For those reasons, we conclude that asking about a leave of absence, which might not have existed, was not a reasonable alternative for claimant to quitting work, and that claimant's failure to ask about that hypothetical option should not disqualify her from receiving benefits.

Even if the employer had a leave of absence policy and was willing to allow claimant to take a leave of absence in this case, we would still conclude that it was not a reasonable alternative for claimant. As of the date of the hearing, over two months after claimant quit her job, claimant continued to require frequent medical treatment for the injuries she sustained in the accident, attending up to seven medical appointments every week. The record fails to show when or if claimant's appointments were due to cease. We also note that claimant testified the employer did not offer employees paid sick leave. We infer from that evidence that, had the employer allowed claimant to take a leave of absence, the leave of absence would have to have lasted well over two months, and the entire leave period would, most likely, have been unpaid. While taking an indefinite unpaid leave of absence from work could be considered an alternative to leaving work, it cannot be considered a reasonable alternative.

In sum, claimant faced a grave situation and, likely, impending discharge, and the only alternative available to her was to quit work or be discharged.[7] Under the circumstances, no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have continued working for the

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[4] The record does not include enough information about the size of the employer's company from which to infer that the employer was subject to state and federal protected leave laws. Even if the employer was, such a leave would still not have been a reasonable alternative for claimant for the reasons we explain herein.

[5] *See accord Krahn v. Employment Dep't.*, 244 Or. App. 643, 260 P.3d 778 (2011).

[6] *See accord Early v. Employment Dep't.*, 247 Or. App. 321, 360 P.3d 725 (2015).

[7] It appears on this record that any discharge would not have been for misconduct, because claimant's failure to satisfy the employer's performance requirements despite her efforts to do so was not the result of willful or wantonly negligent behavior attributable to her as misconduct. *See* OAR 471-030-0038(3)(a) (defining misconduct, in part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee). As such, OAR 471-030-0038(5)(b)(F), which provides that individuals who leave work to avoid a discharge or potential discharge for misconduct do not have good cause for quitting work, does not apply, and claimant's voluntary leaving to avoid a discharge or potential discharge that was *not* for misconduct must be analyzed under the good cause standard set forth in OAR 471-030-0038(4).

employer for an additional period of time. Claimant therefore established that she quit work with good cause, and she may not be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-84946 is set aside, as outlined above.[8]

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

DATE of Service: July 18, 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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[8] 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.