

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0821

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161028). Claimant filed a timely request for hearing. On June 28, 2017, ALJ Amesbury conducted a hearing, and on June 29, 2017 issued Hearing Decision 17-UI-86983, affirming the Department's decision. On July 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Visiting Angels employed claimant as a caregiver from March 30, 2017 until April 17, 2017. The employer assigned claimant to provide in-home care for particular clients by matching the client's needs and claimant's skill level. Claimant was expected to perform light housekeeping, prepare meals and assist clients in activities of daily living, as needed.

(2) In 2015, claimant was involved in two automobile accidents. The first accident injured claimant's lower back and the second aggravated the injury from the first. As a result of the injuries, claimant experienced back pain, stiffness and leg numbness. Claimant received physical therapy to treat the injuries. Claimant lost her medical insurance coverage sometime after she sustained the injuries in 2015. Claimant again obtained medical insurance coverage in mid-2016. In 2016 up to April 17, 2017, claimant did not receive medical treatment for any lingering effects from the 2015 injuries.

(3) When the employer interviewed her, claimant stated that she was able to perform meal preparation and light housekeeping for any client with whom she was matched. At the time she was hired, claimant believed she had the physical capacity to perform the duties of a caregiver.

(4) In the initial days of her employment, claimant attended an orientation and completed an online training course. On April 12, 2017, claimant began working with clients. That day, claimant worked for one client for two hours. On April 13, 2017, claimant was not scheduled for work and did not work.

(5) On Friday, April 14, 2017, claimant was again assigned to work for one client for two hours. On that day, claimant performed some light housekeeping and assisted the client with bathing. After claimant finished her work for the client, claimant's back became very painful, was "killing" her, and her leg

went numb. Transcript at 7. Claimant thought some involvement of her sciatic nerve was causing the pain. The next day, claimant was unable to get out of bed as result of pain and stiffness. Claimant's condition did not improve over the weekend.

(6) On Monday, April 17, 2017, claimant sent an email to the employer's human resources representative. The email stated, "I am so sorry, but I cannot do the job I was hired for. My body won't allow it. So therefore I am turning in my resignation." Transcript at 31. Claimant voluntarily left work on April 17, 2017.

(7) Before sending the resignation email on April 17, 2017, claimant did not discuss the condition of her back with the employer, did not seek time off to see if her condition would remit sufficiently to allow her to resume working as a caregiver, and did not ask the employer if it had any available positions that were less physically demanding than the caregiver position to which she was assigned. Claimant thought that her back would not allow her to perform the duties of a caregiver regardless of any time she took off to convalesce and she was not aware that the employer had any positions that did not involve caregiver duties similar to those she had been performing. In fact, the employer would have allowed claimant to take time off due to her back condition. The employer also had a position classified as "companion care," which principally provided companionship to clients and did not involve the housekeeping, bathing assistance or the other sorts of physical duties that had caused claimant's pain.

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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

While OAR 471-030-0038(4) allows the use of a modified standard to show good cause if claimant had a permanent or long term "physical or mental impairment" as defined at 29 CFR §1630.2(h), the evidence in this record is insufficient to show that claimant's back condition was permanent or long term. The record is unclear as to the cause of claimant's back problems immediately before she quit work, if the problems resulted from some chronic back condition or sciatic nerve involvement or whether they simply occurred approximately two years after she sustained unrelated back injuries in 2015. For this reason, we have not used the modified standard in evaluating whether claimant showed good cause for leaving work when she did. However, our decision would be the same even if we had used the modified standard, as detailed below.

While we accept that claimant experienced severe back pain that led her to quit work, it is unclear why she concluded that back pain would recur if, after some time convalescing, she attempted to return to work for the employer, or if that conclusion was reasonable. However, even if a reasonable and prudent person, with or without a permanent or long term impairment, would have drawn the same conclusion as

claimant, that person, before she quit, would at a minimum have inquired of the employer if it had any positions that involved duties she was physically able to perform without aggravating her back condition and without pain. Claimant did not dispute that the employer's "companion care" position was such a position, and from the employer's description, it appeared to be so and was a reasonable alternative to quitting. Because claimant did not make such an inquiry before quitting, she did not meet her burden to show that there were no reasonable alternatives to leaving work when she did.

On this record, claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-86983 is affirmed.

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

DATE of Service: August 7, 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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