

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1019

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 105227). Claimant filed a timely request for hearing. On August 22, 2017, ALJ M. Davis conducted a hearing, and on August 23, 2017 issued Hearing Decision 17-UI-90970, affirming the Department's decision. On August 28, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beaverton School District employed claimant from October 15, 2001 until June 22, 2017, last as a testing systems coordinator at a high school.

(2) Sometime in or before 2017, claimant experienced physical impairments that prevented her from performing the job duties of a testing systems coordinator. A physician medically restricted the work that claimant could perform. The employer approved workplace accommodations under the Americans with Disabilities Act (ADA) that allowed claimant to continue working as a testing systems coordinator despite her physical limitations.

(3) On May 1, 2017, the employer notified claimant that due to budgetary constraints she would be laid off from her job effective June 22, 2017 unless within five days she exercised "bumping" rights that were available to her under the collective bargaining agreement between the employer and her union. Audio at ~7:33. These "bumping rights" allowed claimant to take the position of any less senior employee who held a job in the next lower rank in the same classification group as testing systems coordinator. If claimant chose not to exercise bumping rights, she would be laid off and placed on a recall list for rehire as a testing service coordinator if and when such a position again became available.

(4) As of May 1, 2017, the positions to which claimant could be bumped that had the same hours and pay as a testing systems coordinator were SPED program assistant, transition program assistant and technology program assistant. Several other lower paying positions were also available for claimant to bump into, including, for example, early childhood care provider, health assistant, supervisory aide and

crossing guard. Claimant's physical limitations would prevent her from performing the duties of SPED program assistant and transition program assistant. Claimant did not know if her physical limitations would prevent her from performing any of the other jobs into which she had bumping rights. Claimant was not familiar with the duties of a technology program assistant and did not believe she had the skills or training to perform a position in the technology program. Claimant chose not to exercise her bumping rights, and to allow the employer to lay her off on June 22, 2017.

(5) Between May 1, 2017 and June 22, 2017, claimant pursued medical treatment for the physical condition that limited her ability to perform work for the employer. As of June 22, 2017, claimant was not medically released to work without restrictions.

(6) On June 22, 2017, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

While the ALJ found in Hearing Decision 17-UI-90970 that the employer discharged claimant, we do not agree. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining the nature of a work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time, but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a).

Here, while the employer notified claimant that her position was to be eliminated effective June 22, 2017, it also notified claimant that, if she chose to exercise bumping rights, the work relationship would continue after that date, albeit with claimant assuming a different position from that of testing systems coordinator. Because the employer was willing to continue to employ claimant after June 22, 2017, it was claimant who chose to sever the work relationship by not exercising her right to bump into a different position. Claimant's work separation therefore was a voluntary leaving as of June 22, 2017.

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). Claimant had physical impairments sufficiently serious that ADA accommodations were required to enable her to continue to work. The physical limitations that claimant experienced presumably constituted permanent or long-term "physical or mental impairments" as defined at 29 CFR § 1630.2(h). A claimant with such impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

The employer did not dispute at hearing that claimant had significant physical impairments that precluded her performance of many job duties, and it also did not dispute that claimant was not

physically able to work as a SPED program assistant or a transition program assistant. The employer also did not contend that any of the other jobs into which claimant could have been bumped was within her physical abilities or her existing medical restrictions. In addition, while claimant did not know with certainty the duties of a technology program assistant, she did not think she had the technology background to perform that job. A reasonable and prudent person with the significant physical limitations that claimant had would not have chosen to be bumped into a new position that she knew she was physically unable to perform, or into any position in which she did not have reasonable assurance was within her physical capacities and existing medical restrictions. A reasonable and prudent person in claimant's circumstance also would not have chosen to be bumped into a position that she lacked the skills to perform, or for which she did not know the relevant duties or if she possessed the required skills. In either scenario, claimant would risk being discharged from the position into which she had chosen to be bumped due to an inability to perform the work. Under these circumstances, the only realistic option available to claimant was to select the layoff, as opposed to exercising bumping rights into an unsuitable or potentially unsuitable position, to secure her recall rights, which claimant did.

Claimant had good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-90970 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 26, 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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