

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1193

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114917). Claimant filed a timely request for hearing. On September 28, 2017, ALJ L. Lee conducted a hearing, and on October 6, 2017 issued Hearing Decision 17-UI-94064, affirming the Department’s decision. On October 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Macy’s West Stores, Inc. employed claimant as a merchandiser from sometime around September 2012 until May 22, 2017.

(2) Claimant has experienced mental illness since he was 17 years old. Beginning after he was diagnosed, claimant was hospitalized “many times,” both voluntarily and involuntarily, due to mental illness. Transcript at 28. Claimant’s last hospitalization was in 2009, after which his condition appeared to stabilize. As of mid-April 2017, claimant was in treatment with a psychiatrist and taking many prescription medications to control the symptoms of his mental illness, including an anti-psychotic drug. Claimant received Social Security Disability benefits during the period in which he worked for the employer. Claimant considered himself “disabled” due to a mental impairment. Transcript at 15.

(3) In 2015, claimant’s mental condition deteriorated and claimant informed the employer that he sometimes experienced symptoms of mental illness. After 2015, claimant’s mental condition improved and again appeared to stabilize.

(4) Sometime before April 2017, claimant learned that the employer’s store at which he worked in downtown Portland, Oregon was closing and he was offered a merchandiser position at the employer’s store at a mall in Clackamas, Oregon. Claimant accepted the transfer to the Clackamas store because he understood his job there would be similar to what it had been at the downtown store.

(5) April 3, 2017 was claimant's first day working at the Clackamas store. From what he learned that day, claimant concluded that his position at the Clackamas store was an on-call position, and he would have no guarantee of a particular number of weekly work hours. Claimant was displeased by this perceived discovery. Claimant generally had a difficult time adjusting to working at the Clackamas store.

(6) On April 20, 2017, claimant reported to work an overnight shift at the Clackamas store, from approximately 9:00 p.m. until 6:00 a.m. During those hours, the lighting in the public areas of the store was dimmed to half-light illumination. To claimant's perception, there were no lights illuminating the men's restroom, the employees' coatroom, the employees' lunchroom and the employees' entrance to the store. When claimant was in the darkened employee entrance area, several mice had gathered at his feet. The darkness in the store and the presence of the mice greatly distressed claimant. That night, claimant became "scared and paranoid" and "just felt like I had to run [away]." Transcript at 16. The conditions on the overnight shift revolted claimant, made him feel very ill, caused him feel as if he was "in a coma" and rendered him unable to function effectively. Transcript at 18. Within claimant's "crazy mind," he was certain that he could not continue to work under those conditions, that his mental status was worsening and that working at the Clackamas store had "really messed up my head." Transcript at 16, 34. Claimant called a friend to pick him up from the store at 5:00 a.m., and he left the workplace before the scheduled end of his shift.

(7) On approximately April 21, 2017, claimant spoke with his psychiatrist about his reaction to the workplace the night before. A few days later, claimant met in person with the psychiatrist. The psychiatrist told claimant he should not be working at that time and also told claimant that she would authorize a leave from employment for him for "as long as you need." Transcript at 25. To address claimant's deteriorating mental condition, the psychiatrist also arranged weekly talk therapy sessions with claimant and increased the dosage of the antipsychotic medication that she had prescribed for him. Shortly after, the psychiatrist submitted to the employer a physician's authorization for claimant to have a leave of absence.

(8) Around or shortly after April 21, 2017, claimant spoke with his current manager, the current manager's manager and his former manager at the downtown store about the working conditions he experienced on April 20, 2017. After speaking with them, claimant perceived that none of them cared about the working conditions that had incapacitated him and they were not going to take any steps to rectify them. They provided claimant with the toll-free number and email address for the centralized location of the employer's human resources department that processed leave of absence requests and requests for accommodation, which was in Florida. Afterward, claimant and his psychiatrist used that contact information to pursue obtaining information about how claimant could avoid a future recurrence of conditions like those he experienced on April 20, 2017. Claimant interpreted the responses of the employer's human resources department that he and his psychiatrist received as a "runaround" and not helpful. Transcript at 60. As of May 18, 2017, claimant had exhausted all of his paid sick leave and other paid time off, and no longer received pay while on leave. As of that date, claimant's leave of absence from the employer was scheduled to end June 11, 2017.

(9) On May 22, 2017, claimant sent an email to the employer notifying it he was quitting work effective immediately. Claimant quit work principally because of the effect of the working conditions at the Clackamas store on his mental health.

(10) After quitting, claimant informed his psychiatrist that he wanted to be medically released for work so he could seek other work than with the employer. The psychiatrist released claimant to work as of June 1, 2017. On June 4, 2017, claimant filed a claim for unemployment insurance benefits.

CONCLUSIONS AND REASONS: 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 a chronic, serious mental illness, which was a permanent or long-term “physical or mental impairment” 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.

In Hearing Decision 17-UI-94064, although the ALJ found that claimant’s mental illness was a permanent or long mental impairment, the ALJ nonetheless concluded that claimant did not have good cause to leave work despite his incapacitating reaction to the workplace on April 20, 2017. Hearing Decision 17-UI-94064 at 3. The ALJ reasoned that since claimant’s psychiatrist had not recommended that he quit work, and the psychiatrist had told claimant that she would extend his leave as long as he needed, claimant quit work “prematurely.” Hearing Decision 17-UI-94064 at 3. The ALJ further reasoned that because claimant did not face a grave situation while he was on leave at his home, a reasonable and prudent person would have remained employed until at least June 11, 2017, the scheduled end of claimant’s leave, to determine if, at that time, his mental state was sufficiently improved to allow him to return to work at the Clackamas store. Hearing Decision 17-UI-94064 at 3.

At the outset, we agree with the ALJ that the mental illness from which claimant suffered was a permanent or long-term impairment, if only because of its long history and its severity. Claimant’s mental illness was likely was a seriously disabling impairment in light of his many previous psychiatric hospitalizations, his receipt of SSD benefits, his continuing to receive treatment and antipsychotic medications from a psychiatrist and the magnitude of his negative reaction to the conditions of the workplace on April 20, 2017. However, the ALJ appeared to use as the standard of a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, as the basis for her determination that claimant did not have good cause to leave work. The standard that should have been applied was that of a reasonable and prudent person with a serious mental illness of the type from which claimant suffered, including its manifestations of paranoia and generalized fear on and after April 20, 2017.

From claimant’s hearing testimony, it appears that he did not think he could withstand another overnight shift at the Clackamas store after April 20, 2017 given the then-prevailing symptoms of the mental illness from which he suffered. In view of the acuteness of his reactions on April 20, 2017, claimant’s conclusion was not unreasonable. Nor was it unreasonable, given the longevity of claimant’s mental

illness and the magnitude of his adverse reaction to the overnight conditions at the Clackamas store, that claimant would think that his symptoms would not remit relatively quickly, or by June 11, 2017, the scheduled end of his leave of absence, should he attempt to return to work at the Clackamas store. Although the ALJ asserted that claimant's psychiatrist did not advise claimant to leave work, claimant's actual testimony was only that the psychiatrist told him he "should not be working at that time," and that he and the psychiatrist had not discussed how he would support himself financially if he quit work. Transcript at 25, 29. From this record, particularly the psychiatrist's willingness to extend claimant's leave for as long as claimant needed, what may be most reliably inferred is that the psychiatrist had, as of the time claimant quit, not recommended that claimant would be able to return to work for the employer under the conditions as they existed at the Clackamas store, and would make any recommendations about that matter only after additional evaluation of, or consultation with claimant. We do not interpret claimant's testimony on what the psychiatrist stated to him as suggesting that the psychiatrist thought claimant's mental state allowed him to return to the Clackamas store at any time before he quit, or that his condition would likely be sufficiently improved by June 11, 2017, the end of his current leave, to allow his return to that store at that time.

As well, while the ALJ relied on claimant's leave of absence as a reasonable alternative to leaving work before the scheduled end of claimant's then-current leave, the Court of Appeals has held that a leave of absence to obtain medical or psychological treatment is not a reasonable alternative to quitting work due to working conditions if during the leave period the conditions that led to claimant's illness likely would not be remedied. *See Early v. Employment Department*, 274 Or App 321, 328-329, 360 P3d 725 (2015) (when claimant quit work because her underlying depression was exacerbated and she became suicidal as a result of workplace conflict with a particular individual, a leave of absence was not a reasonable alternative since a reasonable and prudent person with depression would have concluded that a leave would be futile in remedying the underlying conflict that caused the exacerbation of claimant's depression); *Warkentin v. Employment Department*, 245 Or App 128, 261 P3d 72 (2011) (when claimant quit work because her onerous workload caused her to become depressed and suicidal, a leave of absence during which claimant could obtain psychological treatment was not a reasonable alternative to quitting because it would not remedy the working conditions that caused claimant to become ill). There is no evidence in this record either that the employer intended to remedy its practice of dimming the store lights during hours it was not open for business by June 11, 2017 or at any time, or that it was likely claimant's mental condition would be sufficiently improved by June 11, 2017 that he would not again react negatively to the physical conditions in the workplace. On this record, there is insufficient evidence in the record to support the conclusion that a leave of absence was a reasonable alternative to quitting work when he did.

In addition, given that claimant apparently had paranoid features to his mental impairment at the time he quit work, it was not unreasonable for him to think, as likely would other reasonable people who had an impairment of a similar nature, that the difficulty he and his physician had experienced in contacting and communicating with the employer's human resources department, and getting the "runaround," meant that the employer was not likely to rectify the workplace conditions that caused claimant to leave his shift early on April 20, 2017, whether or not a reasonable and prudent person who was not similarly impaired would have reached that same conclusion. On this record, it was not unreasonable for claimant to have concluded that continuing to try to work through the employer to change the working conditions that led to an incapacitating aggravation of his symptoms on April 20, 2017, or to arrange work that avoided those conditions, likely also would be futile.

As of the time claimant quit work, the preponderance of the evidence shows that claimant's circumstances were grave. The preponderance of the evidence also shows that claimant had no reasonable alternatives to quitting work when he did. Because claimant had good cause for leaving work when he did, he is not disqualified from unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-94064 is set aside, as outlined above.

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

DATE of Service: November 20, 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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