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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1416

Hearing Decision 17-UI-98314 Reversed ~ No Disqualification
Hearing Decision 17-UI-98317 Affirmed ~ Ineligible Week 41/17

PROCEDURAL HISTORY: On October 26, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant voluntarily left work without good cause (decision # 85900) , and the other concluding claimant did not actively seek work during the week including October 8 through October 14, 2017 (decision # 84554). Claimant filed a timely request for hearing on each decision. On December 5, 2017, ALJ Janzen conducted a hearing on decision # 85900, and on December 6, 2017 issued Hearing Decision 17-UI-98314, affirming the Department's decision. On December 5, 2017, ALJ Janzen conducted a separate hearing on decision # 84554, and on December 6, 2017 issued Hearing Decision 17-UI-98317, also affirming the Department's decision. On December 11, 2017, claimant filed a timely application for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-98314 and 17-UI-98317. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1415 and 2017-EAB-1416).

With respect to our review of Hearing Decision 17-UI-98317 (whether claimant was eligible for benefits from October 8, 2017 through October 14, 2017), EAB reviewed the entire hearing record. On de novo review and pursuant to ORS 657.275(2), Hearing Decision 17-UI-98317 is **adopted**.

FINDINGS OF FACT: (1) Turtle Island Foods, Inc. employed claimant as a packager from January 9, 2017 until October 10, 2017.

(2) During claimant's employment, claimant suffered from diagnosed degenerative arthritis of her right thumb and osteoarthritis of both hands. Exhibit 1. Her hand conditions were known to the employer and made it difficult for her to keep up with her duties as a packager when the employer's conveyor belt speed was set to a speed greater than the normal three to five.

(3) On October 10, 2017, during claimant's shift, the employer sped up the conveyor belt speed at claimant's work station to a six without any explanation. Claimant could not keep up due to the

difficulties caused by her hand conditions and product ended up on the floor, causing a safety hazard. When claimant asked a person who had worked along the same belt during the prior shift if the belt speed had been set to six, she was told that the belt had been operated at a speed of no greater than four. When claimant asked her supervisor to slow the belt speed down due to her difficulty, physical condition and the safety hazard that belt speed was causing, he responded, without slowing down the belt speed, "I've been trying to save your job for quite some time" and "they've [the employer] been wanting to fire you." Audio Record at 9:45 to 11:05. At that point, claimant believed the employer was intent on firing her. Due to that belief and the physical difficulty her working conditions was causing her, claimant quit.

CONCLUSIONS AND REASONS: We disagree with the ALJ regarding claimant's work separation and conclude claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)), good cause for voluntarily leaving work is such that a reasonable and prudent person, with the characteristics and qualities of an individual with such impairment, would have no reasonable alternative but to leave work.[1] Both standards are objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Under each standard, a claimant who quits work must show that no reasonable and prudent person in claimant's circumstances would have continued to work for the employer for an additional period of time.

In Hearing Decision 17-UI-98314, after finding that "claimant's supervisor sped up the production line to an unusual degree", that claimant was unable to keep pace because "her hands were cramping due to arthritis", and that when claimant asked the supervisor to slow down the belt speed he only responded that "he had been trying to save her job" and that "the employer wanted to fire her", the ALJ concluded that claimant quit work without good cause, reasoning that her situation was not grave and that "claimant could have reported the issue . . . to someone with the employer besides her supervisor" to correct her working conditions before quitting. Hearing Decision 17-UI-98314 at 1, 2 and 3. We disagree.

Claimant quit work because her supervisor refused to slow down the conveyor belt speed knowing that it was causing her physical distress due to her hand conditions and backing up the conveyor belt such that

[1] 29 C.F.R. §1630.2(h) defines "physical or mental impairment" as the following:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

it was creating a safety hazard. Moreover, when claimant asked him to slow down the belt, her supervisor failed to do so and only responded that "they've [the employer] been wanting to fire you." Based on his statement and knowing she was unable to work under those conditions given her medical conditions, claimant quit. At hearing, when asked by the ALJ why the employer sped up the belt speed to a six, the employer's safety manager, the employer's only witness, first gave conflicting answers and then responded that she was "not prepared to respond . . . at this time and can't respond to any questions. . . . We are declining to add to testimony." Audio Record at 25:00 to 27:00. Based on that testimony, we give no weight to the employer's evidence.

Based on the totality of the record, we infer that either the employer deliberately created unreasonable working conditions for claimant in the hope that claimant would quit or at least was unwilling to correct known working conditions that she was unable to comply with. Claimant took a reasonable step to address the working conditions by speaking directly to the supervisor who controlled the belt speed before being told by that individual that he employer wanted to "fire" her without modifying the speed. At hearing, the employer did not dispute claimant's testimony. Accordingly, regardless of the employer's intent, we conclude that claimant quit work due to a situation of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense in her circumstances and with her impairments, would conclude she had no reasonable alternative but to leave work when she did. Claimant voluntarily left work with good cause and is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-98314 is set aside, as outlined above.[2] Hearing Decision 17-UI-98317 is affirmed.

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

DATE of Service: <u>January 17, 2018</u>

NOTE: 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.

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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