

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0515**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 23, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #95416). Claimant filed a timely request for hearing. On March 14, 2014, ALJ Wiperman conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13168, affirming the Department's decision. On April 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wildhorse Resort & Casino employed claimant from April 8, 2012 to November 16, 2013 as a lead bartender.

(2) Claimant had training as a veterinary technician, but her primary occupation was as a bartender.

(3) Claimant earned \$12 per hour. She also shared tips earned in the employer's bar with the other bartenders who worked there. The executive sous chef also received a portion of those tips. Claimant complained to the bar manager that the sous chef should not receive tips from the bar because the employer's policy prohibited managers from taking a share of tips. The bar manager agreed with claimant about the employer's policy, but told claimant the employer allowed the sous chef to receive tips from the bar because the sous chef often performed bartending duties when the bar was busy. The bar manager began to alternate who received tips from the bar to make the tip distribution more equitable.

(4) Claimant was dissatisfied with the bar manager's response to her complaint. She did not complain about the sous chef receiving tips to anyone other than the bar manager.

(5) Claimant had a job interview on November 17, 2013 for an accounting firm in Texas. Claimant asked the bar manager for time off from work to attend the interview in Texas. The manager refused to allow claimant to take time off to attend the interview.

(6) On November 16, 2013, claimant voluntarily left work with the employer to attend an interview in Texas, and because she was dissatisfied that the sous chef received a portion of the tips from the bar.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant quit work without good cause.

A claimant who quits work is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for quitting 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 quit work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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. Leaving work without good cause includes leaving suitable work to seek other work. OAR 471-030-0038(5)(b)(A). In determining whether any work is suitable for an individual, ORS 657.190 states that the Department shall consider, in relevant part, the degree of risk involved to the health, safety and morals of the individual, prior training, experience and prior earnings of the individual.

Claimant quit work, in part, because she disagreed with the employer’s practice of allowing the executive sous chef to share tips from the bar. Claimant testified that the practice violated the employer’s policy that managers were not to receive tips. Transcript at 5. Claimant conceded she knew she could complain to the bar manager’s supervisor about the practice, but asserted that she did not do so because she feared retaliation. Transcript at 6-8. However, claimant showed only that the bar manager changed her shift one weekend after she complained to him about the tips. Transcript at 7. Claimant failed to show that the manager changed her shift to retaliate against her for complaining, or that his supervisor would have retaliated against her if she complained.

Assuming, *arguendo*, that complaining to the bar manager’s supervisor would have been futile, claimant nevertheless failed to establish that she quit work with good cause. Claimant failed to show that the employer was prohibited from making exceptions to its tip sharing policy, or that making an exception for the sous chef was unreasonable given that he also worked as a bartender. We presume claimant would have earned more had the sous chef not received a portion of the tips. However, claimant still earned a base wage of \$12 per hour, which did not change throughout her employment and was above minimum wage. The record does not show claimant’s cost of working for the employer exceeded the remuneration she received. Thus, claimant failed to establish that the employer’s practice of allowing the sous chef to receive a portion of the bar tips was of such gravity that no reasonable and prudent person would have continued working for the employer for an additional period of time.

Claimant also quit work, in part, to attend a job interview in Texas for the purpose of obtaining work there.<sup>1</sup> To the extent claimant left her position with the employer to seek another line of work in Texas,

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<sup>1</sup> The ALJ determined that claimant left work, in part, because she accepted a job offer in Texas as a veterinary technician. Hearing Decision 14-UI-13168 at 3. We disagree that a proximate cause of claimant’s leaving work on November 16, 2013 was to accept the offer of work as a veterinary technician. Claimant testified at hearing that she would have continued to work for an additional period of time had the employer allowed her to miss work to attend the interview on November 17, 2013 and had the employer stopped allowing the sous chef to receive tips. Transcript at 24, 11.

claimant left work without good cause under OAR 471-030-0038(5)(b)(A). Claimant's primary occupation was as a bartender. She did not assert or show that her work for the employer posed an undue risk to her health or safety. Because claimant failed to show her work for the employer was not "suitable" as defined under ORS 657.190, she failed to establish good cause for leaving work with the employer to seek other work.

In sum, claimant failed to show she had good cause to quit work due to the employer's tip practices, or to seek other work. Claimant is disqualified from the receipt of unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-13168 is affirmed.

Susan Rossiter and Tony Corcoran;  
D. E. Larson, not participating.

**DATE of Service:** April 29, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.