

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0747

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80027). Claimant filed a timely request for hearing. On April 3, 2014, ALJ Clink conducted a hearing, and on April 14, 2014 issued Hearing Decision 14-UI-15097, affirming the Department's decision. On May 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he sought to introduce new evidence that he did not offer at hearing. The employer submitted a written argument objecting to claimant's new evidence. Much of claimant's new evidence, particularly including the new evidence about claimant's union seniority, addressed the reasons the employer reassigned claimant to a new position but not whether claimant had good cause to leave work rather accept the reassignment. Because this new evidence is not relevant and material to the issues now before EAB, it was not considered. *See* OAR 471-041-0090(2)(a) (October 29, 2006). Claimant also sought to introduce new evidence in the form of several emails addressing the requirements of the new job to which he had been assigned, apparently to demonstrate that he was not suited for the job. However, a claimant who quit a job because he thought that he lacked the professional background for the job should have been reasonably aware in advance of the hearing that the duties and requirements of the job would be disputed issue. In light of claimant's reasonable awareness, claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering this new evidence at the hearing as required under OAR 471-041-0090(2). Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Lane County Human Resources employed claimant as a mental health specialist 2 from November 7, 2011 until January 13, 2014.

(2) After he was hired, claimant worked in the behavioral services program. Claimant provided counseling services to clients with primary diagnoses that included depression, anxiety, bipolar illness and schizophrenia. If a client had a primary diagnosis of substance abuse or addiction disorder, claimant was expected to refer that client to a specialized program for continued treatment. At some point in his employment, claimant obtained a licensed professional counselor (LPC) credential issued by the Oregon Board of Licensed Professional Counselor and Therapists. Claimant's work hours for the employer in this initial assignment were 8:00 a.m. until 5:00 p.m. on weekdays

(3) In December 2013, Claimant was married and had a six-month old daughter. In mid-December 2013, claimant's wife obtained full-time work as an attorney. The wife's work hours started at 6:30 a.m. during the workweek, although she might be able to arrange to start at 7:00 a.m. Claimant's daughter was in daycare on weekdays starting at 7:30 a.m., except on Wednesdays when claimant's parents cared for the daughter. Claimant's parents were the only family members who lived in area and the only family who were available to care for claimant's daughter.

(4) In approximately mid-December, claimant received a letter from the employer notifying him that his mental health specialist position 2 in the adult mental health treatment program was being eliminated effective December 31, 2013. The letter informed claimant that he was reassigned to a mental health specialist 2 position in the methadone treatment program, also a part of the behavioral services program. The letter referred claimant to the supervisor of the methadone treatment program to learn his work hours in the new assignment. Sometime after claimant received the reassignment letter, he contacted the supervisor and learned that the hours in the reassigned position were from 6:00 a.m until 3:00 p.m.

(5) The position in the methadone treatment program to which claimant was reassigned required an LPC or LCSW credential and also required that claimant obtain a chemical and alcohol dependency counselor (CADC) certificate within two years of the reassignment. Although claimant had the technical credentials to begin in the position, he was extremely concerned that he did not have the educational background and training to perform adequately in it. In his career, claimant had no experience treating clients with a primary diagnosis of substance abuse and had limited or no education in the field of substance abuse. *See* Exhibit 1 at 1, 10, 11. After he was notified that he was being reassigned, claimant contacted the clinical supervisor of the methadone treatment program about his duties in the new assignment. Claimant learned that after the reassignment, he would immediately assume responsibility for a caseload of approximately forty people with primary diagnoses of substance abuse disorders. Claimant learned that beginning on his first day of work in his new assignment he was expected to conduct group therapy sessions for substance abuse clients. From the clinical supervisor's description of the specific tasks claimant would be expected to perform on a day-to-day basis, claimant concluded that there would be little supervision of his actual, hands-on work with clients and that any training he received would be ad-hoc and occur only after he had already provided treatment services to the clients.

(6) Sometime after mid-December 2013, claimant contacted the Board of Professional Counselors and Therapists to determine whether his LPC license would be jeopardized if he took a position, like that in the methadone treatment program, for which he did not have any prior specialized training or experience and in which he believed he would not receive supervision when he provided actual treatment services to clients. The Board representative with whom claimant spoke expressed serious concerns that, without an educational or professional background in substance abuse, claimant would violate OAR 833-100-

0061(11) (January 5, 2010) if he was not adequately supervised when dealing with clients. OAR 833-100-0061(11) states that a person who holds an LPC license must not "perform or pretend to be able to perform, professional services beyond the licensee's field or fields of competence based on their education, training, supervision, consultation, study or professional experience." After claimant received this information, claimant contacted his union and asked it to challenge his reassignment and request that claimant be reassigned to a different position. The union did not file a grievance about claimant's reassignment. After mid-December 2013, claimant contacted at different times four of the employer's supervisors and told them that he thought he lacked the background and specialized knowledge to perform the job to which he had been reassigned and that he thought if he took the job he might jeopardize his LPC credential due to the type of supervision he would receive in the job. Claimant was told that the new job was similar to the job that he had before, and that if he obtained the CADC certificate that the new job required within two years "that was sufficient." Transcript at 33. The employer did not accept claimant's objections to the reassignment.

(7) After the middle of December 2013, claimant and his wife contacted several daycare providers to determine if care could be arranged for claimant's infant daughter if claimant decided to accept the reassignment to the methadone treatment program. Because claimant's wife had so recently started her job, she was unable to rearrange her work schedule to begin work later than 7:00 a.m. The daycare providers that claimant and his wife contacted did not take children any earlier than 7:30 a.m., when claimant's daughter would need to have care starting at 5:30 a.m. if claimant was to arrive at work on time at 6:00 a.m. Most of the day care providers that they contacted did not have openings for any new children. Claimant's parents were able to take care of claimant's daughter only on Wednesdays. Claimant and his wife did not have any other family in the area to take care of claimant's daughter. Claimant and his wife could not afford to hire a nanny or babysitter to take care of the daughter in their home. Although the employer tried to accommodate alternate work schedules for employees, the employer was unable to permanently schedule claimant to begin work at 8:00 a.m.

(8) Beginning on January 1, 2014, claimant took time off from work to provide care for his daughter and to decide whether he was going to accept the reassignment to the position in the methadone treatment program.

(9) On January 13, 2014, claimant submitted a letter of resignation to the employer effective immediately. Claimant stated that his reasons for quitting were his inability to find childcare for his daughter that accommodated his work schedule at the methadone treatment program and his lack of experience and training in the field of substance abuse. Exhibit 2 at 2.

**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). 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.

In Hearing Decision 14-UI-15097, the ALJ concluded that claimant did not show good cause for leaving work based either on his inability to make child care arrangements or his concerns about jeopardizing his LPC license. Hearing Decision 14-UI-15097 at 3. In support of her conclusion, the ALJ reasoned in part that, because claimant could have requested more time off from work to resolve the problem of locating child care that was open at the early hour he needed it, claimant did not show that child care was a grave reason to leave work. Hearing Decision 14-UI-15097 at 3. To support her conclusion that claimant failed to demonstrate good cause based on jeopardizing his LPC license, the ALJ reasoned that the evidence of the employer and claimant on this issue was equally balanced and that, as a result, claimant did not meet his burden to show that this concern was a grave reason to leave work. Hearing Decision 14-UI-15097 at 3. We disagree.

With respect to the issue of locating childcare that accommodated the hours that claimant was scheduled to work in the methadone treatment program, the record does not support the conclusion that additional time spent looking for a day care might reasonably have yielded an acceptable result. Claimant's testimony was not disputed that that he exhaustively looked for a daycare facility that was open at 5:30 a.m., and he was not able to locate one. Transcript at 35, 42, 43. Although one of the employer's witnesses testified that the employer attempted to be flexible in accommodating alternate work schedules, the witness candidly stated that the employer was not able to permanently adjust claimant's schedule to begin at 8:00 a.m., as it had before, and that it could not allow claimant to begin every workday in the methadone treatment later than 6:00 a.m. Transcript at 16-17. Based on this testimony, it is more likely than not that the employer was unwilling to or could not adjust claimant's work schedule in a way that obviated his difficulties in finding childcare that opened at an appropriate hour to accommodate his new work schedule. Claimant's testimony that his wife, who had just started a new job, was not in a position to demand that her employer change her work schedule to accommodate the scheduling requirements of claimant's reassigned position was plausible and likely. Moreover, it would be unreasonable to condition a finding of claimant's good cause on a requirement that his wife change her work schedule or stop working entirely to accommodate claimant's new work schedule. In addition, claimant's testimony that he did not have family that was available to provide care for his daughter as an alternative to a daycare facility was not disputed, and we infer from the record that claimant also did not have friends who were willing to provide care for his daughter on any stable basis beginning at the early hour of 5:30 a.m. Finally, claimant's testimony that he and his wife could not afford to hire a nanny or a babysitter to provide in-home daycare for claimant's daughter was reasonable and plausible. Given these facts, a reasonable and prudent employee, exercising ordinary common sense, would have quit work when, after an exhaustive search, he was unable to locate care for his infant daughter that allowed him to work the schedule that the employer required and the employer was unable to change that work schedule in a way that obviated his need to arrange for that childcare.

With respect to claimant's concerns about jeopardizing his LPC license, we disagree that he failed to present sufficient evidence to demonstrate, more likely than not, that the concern was a grave reason to leave work. Although the employer's witnesses testified that the title for the position to which claimant was reassigned was the same as the title of claimant's prior position, the duties of the two positions were the same and that the "major difference" between the two assignment was a different client "population," the witness did not specifically address claimant's stated concerns that adequately treating clients with

substance abuse disorders required specialized training and experience, of which claimant had none. Transcript at 14, 15, 19. While the employer's witness generally asserted that claimant would receive "sufficient on the job training" to allow him to adequately provide services in the methadone treatment program, the witness did not specifically rebut claimant's detailed testimony that the clinical supervisor of the methadone treatment program told claimant that he was expected to immediately assume treatment responsibilities for a forty-client caseload and immediately facilitate group therapy sessions, and that he was not going to receive any active supervision during the time that he performed these treatment services. Transcript at 17, 32. At a minimum, in light of the employer's failure to provide specific evidence to rebut claimant's specific testimony, claimant's concerns that he would not be able to provide a reasonable level of treatment services to the particular client population in the methadone treatment program were, more likely than not, objectively reasonable. The testimony of the employer's witness that, in her opinion, claimant would not jeopardize his LPC license if he started providing the type services expected of him in the methadone treatment program was not particularly persuasive. Transcript at 45. She admitted she based her opinion on her reading of OAR 833-100-0061(11), and had not consulted with the licensing authority about whether the type of services that claimant was expected to immediately provide without active supervision in the methadone treatment program would violate the terms of his LPC license. Transcript at 45, 46. The opinion of the employer's witness is outweighed by claimant's specific evidence that, when he spoke with a representative of the licensing authority, he was told that he would jeopardize his LPC license if he did not receive adequate supervision when he provided services in the methadone treatment program. Transcript at 33-34. Also more likely than not, claimant's concerns about maintaining his LPC license if accepted the reassigned position in the methadone treatment were objectively reasonable. On these facts, a reasonable and prudent counselor, exercising ordinary common sense, would have quit work rather than accept reassignment to a position in a program in which he reasonably could not provide an adequate level of treatment services to clients and in which he reasonably might jeopardize his LPC license, a professional credential which allowed him to provide independent counseling services.

Claimant had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-15097 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** June 26, 2014

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

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