

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0802

Hearing Decision 14-UI-16025 Affirmed - Disqualification
Hearing Decision 14-UI-15949 Reversed and Remanded

PROCEDURAL HISTORY: On March 12, 2014, the Oregon Employment Department (the Department) served notices of two administrative decisions concluding claimant voluntarily left work without good cause (decision #114553) and was not available for work from January 26, 2014 through March 8, 2014 (decision #121335). Claimant filed a timely request for hearing on both decisions. On April 18, 2014, ALJ Wyatt conducted a consolidated hearing, and on April 24, 2014, issued Hearing Decision 14-UI-16025, affirming decision #114553, and Hearing Decision 14-UI-15949, concluding claimant was not available for work from January 26, 2014 through February 8, 2014. On May 8, 2014, claimant filed applications for review of Hearing Decisions 14-UI-16025 and 14-UI-15949 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-16025 and 14-UI-15949. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 14-AB-0802 and 14-AB-0803).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Oregon Employment Department employed claimant as a seasonal business and employment specialist from September 30, 2008 to January 27, 2014.

(2) On October 14, 2013, claimant began an approved extended medical leave of absence from work. Claimant understood her medical leave would end on February 14, 2014, and that she was scheduled to return to work to perform her duties on February 19, 2014.

(3) Claimant had four children who required care while claimant worked. On January 15, 2014, the nanny who cared for claimant's children quit. Claimant's other babysitter was unable to care for claimant's children because the babysitter began attending school. Claimant's husband was not able to care for the children during the hours claimant normally worked for the employer. He returned home from work at 3:30 p.m. Claimant's parents were able to babysit occasionally, but not on a regular basis.

(4) From January 15, 2014 to January 27, 2014, claimant sought a childcare provider for when she returned to work, but was unable to find daycare that was amenable to her schedule, which varied on a weekly basis.

(5) On January 27, 2014, claimant quit work because she did not have childcare for when she returned to work.

CONCLUSIONS AND REASONS: We agree with the ALJ in Hearing Decision 14-UI-16025, and conclude that claimant voluntarily left work without good cause. However, Hearing Decision 14-UI-15949 is reversed and remanded to the Office of Administrative Hearings (OAH) to obtain additional evidence about claimant's availability for work.

Voluntary Leaving. 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). 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.

In the present case, claimant's childcare provider quit on January 15, 2014, and claimant was unable to find a replacement care provider during the next 12 days. Claimant believed she was scheduled to return to work on February 19, 2014. Rather than resign when she did, claimant could have continued to look for a daycare provider for an additional 23 days until she was required to report back to work. Claimant testified at hearing that she quit on January 27, 2014, because she believed she had to give the employer two weeks' notice of her final day of work, "because that's what the requirement was years ago." Transcript at 24. The record does not show that failing to provide two weeks' notice would have created a situation of such gravity for claimant that no reasonable and prudent person would have continued to work for her employer for an additional period of time. Even had claimant made such a showing, the record does not show that it would have been futile for her to continue seeking childcare until two weeks before her scheduled return to work. Claimant could have sought childcare for nine additional days, until February 5, 2014, and still have given two weeks' notice. We therefore conclude that claimant quit working for the employer without good cause, and is disqualified from the receipt of unemployment insurance benefits based on this work separation.

Availability. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-

0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work during all of the usual hours and days customary for the work being sought. *Id.* However, an individual who is the parent of a child under 13 years of age, who is not willing to work a particular shift because of a lack of care for that child acceptable to the individual, shall be considered available for work if the work the individual is seeking is customarily performed during other shifts, and the individual is willing to work during such shift(s). OAR 471-030-0036(4).

The record shows claimant worked for the employer as a business and employment specialist. However, claimant also testified that she had work experience as a police officer, and had recently been hired to a security position. Transcript at 52. The ALJ did not inquire with either party about the type of work claimant sought during the weeks at issue. Nor did the ALJ inquire about claimant's labor market area, or the days and hours that security work and other work claimant sought is customarily performed in her labor market. Although claimant limited her availability for work because she lacked childcare for a time after her nanny quit, claimant's husband was able to provide childcare during some hours and days. Thus, we are unable to determine if claimant was available for work during the weeks at issue without knowing what work claimant sought, what shifts that work is customarily performed, and what hours pertain to each shift.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether the security work and other work claimant sought during the weeks claimed was "customarily performed" in shifts when claimant's husband could provide childcare, Hearing Decision 14-UI-15949 must be reversed, and this matter remanded for development of the record.

DECISION: Hearing Decision 14-UI-16025 is affirmed. Hearing Decision 14-UI-15949 is reversed, and remanded for additional proceedings consistent with this order.

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

DATE of Service: June 19, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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